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FROM MORTGAGE TO INSURANCE IN QUEST FOR  
SECURITY:  
A TALE OF TWO CITIES  
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**Introduction**

The one and only reason that prompts a lender of capital to demand or accept a mortgage from the borrower is so as to put himself in a position where he can realise the mortgage security to recover the debt in the event of default by the borrower. By the fact of mortgage, the lender acquires a right over the mortgaged property. This gives him priority over other possible competing lenders of the borrower as regards the property set aside. The mortgage security thus prevents the lender's debt from being subordinated to unsecured debts of the same borrower and ensures that the lender is paid his money in full, provided of course that his security is sufficiently valuable.<sup>1</sup>

In both Nigeria and England, it often turns out that the mortgage security does not afford the lender the expected security; the borrower defaults in repayment and the lender discovers that for some reason (not including the extinction of the mortgaged property) he cannot recover his debt by simply realising the security. As will be shown shortly, the reasons for the problem are not the same in both countries. However, like England, Nigeria is a common law country and, indeed, most of her property statutes are either pre-1900 English statutes of general application<sup>2</sup> or statutes which are based on identical post-1900 English property statutes.<sup>3</sup> This paper argues that on close scrutiny, the problems confronting the lender/mortgagee in England and Nigeria are not dissimilar in their effect. It shall be argued further that the solution which the English have devised

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<sup>1</sup> Nolan, R. C.: "Less equal than others-Maxwell and subordinated unsecured obligation", *The Journal of Business Law*, September 1995 at p. 495

<sup>2</sup> E.g., Conveyancing Act 1881, the Statute of Frauds 1677, Real Property Act 1845, Statute of Limitation 1623, Trustees and Mortgagees ("Lord Cranworth's") Act 1860.

<sup>3</sup> E.g., the Property and Conveyancing Law 1959 of Western Nigeria which is modelled on the English Law of Property Act 1925.

for the problem, despite the inherent imperfections, may well be the panacea for the Nigerian mortgagee.

### Definition

In *Santley v. Wilde*,<sup>4</sup> Lindley MR defined a mortgage as a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given". This definition, once described as "classic",<sup>5</sup> has been widely accepted<sup>6</sup> both by judges and jurists. The definition may however be inappropriate, or, misleading, in the Nigerian situation where, from the commencement of the Land Use Act in 1978, land right or interest in land (not amounting to title) may only be encumbered by way of mortgage; it cannot be "conveyed", because conveyance signifies a transfer of title.

Title to land in all the States in Nigeria is vested in the Governor of each State, who holds the same in trust for all Nigerians. All that the individual has today is a right of occupation and use of the land, and that is all he may only encumber by way of a mortgage. For this reason, it may be thought more fitting to adopt the definition of a mortgage as simply "a transfer of an interest in (real) property as security for a loan"<sup>7</sup>. This definition meets the requirement that the mortgagor's "interest" in the land need not amount to title. It however still suffers from the defect that it talks about a "transfer" of the interest, rather than merely encumbering the interest.

It is noteworthy that both in England and Nigeria, a mortgage is purely a security transaction and so the mortgagee has no immediate interest in the (landed) property which is used as security until there is default by the mortgagor/debtor. What the mortgagee requires, which is indeed all he gets- or should get, is only the securing of an obligation. A total transfer to the mortgagee of the mortgagor's interest in the land thus means giving him more than he really requires for security purposes. What

<sup>4</sup> [1899] 2 Ch. 474 (C.A.) (emphasis mine).

<sup>5</sup> Waldock, C.H.M.: *The Law of Mortgages*, London: Stevens and Sons Ltd. and Sweet and Maxwell Ltd, 1950, at p.1.

<sup>6</sup> See, e.g. Cousins, E. F. and Ross, S.: *The Law of Mortgages*, London: Sweet and Maxwell, 1989, at p.3.

<sup>7</sup> Fairst, P. B.: *Mortgages*, London: Sweet and Maxwell, 1980 at p.1.

the lender/mortgagor really wants is not the use of the house which is given as security, but some means of being able to resort to the house if the borrower/mortgagor fails to repay the loan. In the meantime, the mortgagee is quite happy for the mortgagor to live in it. Proprietary securities allow this. The mortgagee does not therefore require a "transfer" of the whole of the mortgagor's interest in the house. One cannot agree more with Weisman<sup>8</sup> that it is characteristic only of the less developed form of security to go beyond what is needed for the securing of an obligation.

In any case, by virtue of the Law of Property Act 1925<sup>9</sup> in England and the Property and Conveyancing Law<sup>10</sup> of Western Nigeria, the common law form of mortgage by transfer of title (or interest) to the mortgagee was prohibited: It is no longer possible to create a mortgage by means of an outright transfer of the whole of the borrower's interest in the landed property with a provision for redemption upon repayment of the loan. What is done now is a charge by way of legal mortgage, which can for convenience be called a mortgage even though a pedant could argue that a charge is not strictly speaking a mortgage because it merely creates rights in security without a conveyance of title. It is therefore only the classical (or traditional) common law form of mortgage, i.e., a "mortgage *stricto sensu*"<sup>11</sup> which entailed a transfer, rather than just the encumbering, of the mortgagor's interest in the land. Certainly, all securities, a mortgage inclusive, presupposes some proprietary right in the security holder. This, however, does not mean that the mortgagor has transferred, and therefore is bereft of all his interest in the property. In fact, it does appear that a mortgage does not necessarily convey title anymore in many legal systems. In Ghana, for instance, a mortgage is only an encumbrance on the property and does not change ownership.<sup>12</sup> And in Germany, the law governing a

<sup>8</sup> Weisman, J.: "Floating charges: recent developments under Israeli law" *Current Legal problems* (1988) vol. 41 pp. 197-211.

<sup>9</sup> Section 85 and 86

<sup>10</sup> Sections 108 and 109. See also; Sheridan, L. A.: *Rights in Security*, London and Glasgow: Collins, 1974 at p. 17

<sup>11</sup> Sykes, E. I. and Walker, S.: *The Law of Securities*, 5th edn., Sydney: The Law Book Company Ltd., 1993 at p. 14. Sykes and Walker also note that the mortgage *stricto sensu* no longer represents an existing concept.

<sup>12</sup> S. 1(2) of the Mortgages Decree 1972 (NRCD.,96) as amended by the Mortgages (Amendment) Decree 1979 (AFRCD., 37), and further amended by the Mortgages (Amendment) Decree 1989.

mortgage transaction (referred to as Hypotheken) is that the borrower retains ownership of the land so mortgaged.<sup>13</sup>

The relevant statutes in Nigeria and England do not say what a mortgage is; they merely say what it includes. The Conveyancing Act (CA) 1881,<sup>14</sup> the English Law of Property Act (LPA) 1925<sup>15</sup> and the Property and Conveyancing Law (PCL) 1959<sup>16</sup> all state that a mortgage "includes any charge or lien on any property for securing money of money's worth"<sup>17</sup> The statutes thus refrain from defining a mortgage, probably in order not to exclude a security transaction which might otherwise be considered to be a mortgage.<sup>18</sup> For the purpose of the present discourse however, one may adopt a functional definition of a mortgage as a security transaction by which land right is encumbered for the repayment of a debt or the discharge of some obligation. It is simply a charge on the landed interest.<sup>19</sup>

### **Mortgage in England**

It is a common practice in England that an occupier of a dwelling home who wishes to buy the same approaches a mortgage institution to borrow the money (or much of it) to pay for the house. The advantage of this practice is that the borrower no longer pays rent to the landlord of the

<sup>13</sup> Foster, N.G: *German Law and Legal System*. London: Blackstone Press Ltd., 1993 at p. 254.

<sup>14</sup> S. 2(vi). The Conveyancing Act 1881 still applies in States of the former Northern and Southern Nigeria as a statute of general application, being a pre-1900 statute in England

<sup>15</sup> S. 205(xvi).

<sup>16</sup> S 2(1). This replaced the CA 1881 in the Western region of Nigeria and is today applicable in the States of the former Western Nigeria.

<sup>17</sup> Emphasis mine.

<sup>18</sup> For instance, the inclusion of a "lien" among mortgage transactions is thought to be a reaction to or, indeed, a confirmation of, the decision in *Everitt v. Automatic Weighing Machine Co.* [1892] 3 Ch. 506. 62 LJ Ch. 241, where it was held that a lien on shares was an equitable charge thereon. See also: Halsbury's Statutes of England and Wales, 4th edn., vol. 37 London: Butterworths, 1987 at pp. 335-336.

<sup>19</sup> The terms "land", "landed property" or "property on the land", "house" or "home" will be used interchangeably throughout this work and shall have the same meaning unless the context suggests otherwise or unless a different meaning is clearly meant. This is on the principle that whatever is affixed to the land, e.g., a house, is part of the land and therefore becomes land, technically. Also, a land right is a *res*, i.e., a "thing" capable of being owned, assigned, sold or mortgaged.

property; instead, he now repays the mortgage by certain agreed instalments until the loan sum is fully liquidated. Thus, by the mortgage-purchase of the home, the tenant/borrower moves away from being a tenant towards being a homeowner. Mortgage business thus promotes home ownership.

The fact of lending carries with it the risk of the borrower's default in repayment. One practical solution which has been devised in the English property market to minimize this risk is the requirement that the mortgage (or the loan sum) should be protected by an insurance. This had been variously referred to as Mortgage Protection Insurance (MPI)<sup>20</sup>, Mortgage Payment Protection (or Mortgage Repayment Protection Insurance),<sup>21</sup> or Mortgage Indemnity Guarantee (MIG).<sup>22</sup> By this, the borrower is required to take on an insurance indemnity policy which protects the lender in the event of the borrower's default in repayment of the loan sum. The default by the borrower may be due to accident, sickness or unemployment,<sup>23</sup> which makes him out of funds to keep up with the agreed repayment schedule. In such case, the mortgage/lender turns to the insurance company for repayment of the loan sum.

Where the mortgagee repossesses and sells the property he may discover that due probably to a fall in the property market he cannot fully realise his debt because the property now sells for less than its original value. Again, in such instance, the mortgagee/lender can then make a claim on the insurance. In that case, the insurance policy is best seen as a hazard insurance on the real property, protecting the lending institution's interest against negative equity.

There are two major criticisms against the practice of mortgage indemnity insurance. One is that though the insurance is for the benefit of

<sup>20</sup> By the Great American Lender Services and by Bradford & Bingley.

<sup>21</sup> By the General Accident Direct (GA).

<sup>22</sup> See, e.g., *Property News (Birmingham Metronews)* Thursday 19 March 1998, at p 28 and of Thursday April 23rd, 1998 at p. 22. There are indeed numerous names for the practice. Abbey National calls it Paymentcare, Alliance & Leicester calls it Mortgage payment Cover, and for Birmingham Midshires it is Mortgage Repayment Cover. For Britannia and Chelsea, it is simply payment protection. Nat west, Nationwide and Portman call theirs Mortgage Repayment Protector, Payment guard and Mortgage Care, respectively.

<sup>23</sup> These three causes of default are usually abbreviated as AUS, and there are indeed the three main mortgage protection plans.

the lender, it is the borrower who pays the premiums. As between the lender and the borrow, it is the borrower who is more in need of money. It can thus be said that mortgage indemnity guarantee payments penalise those home buyers who are most strapped for money by adding hundreds of pounds to the cost of borrowing. Although the borrower pays the indemnity charge (a kind of insurance premium), it is the lender who benefits by being able to pass the risk of losing money on to an insurance company. The borrower still remains liable, however, and may be chased for arrears by an unsympathetic insurer whose premiums he paid.<sup>24</sup>

Mortgage lenders levy these charges for high "loan-to-value" mortgages when the sum borrowed is a relatively high percentage of the total value of the property. Typically, mortgage indemnity payments start when loan-to-value reaches 75 per cent, i.e., when the sum of money lent to the borrower is up to 75 per cent of the value of the mortgaged property. In many cases the borrowers choose to have the premiums added to their loan, which further increases borrowing costs. Mortgage insurance premiums payable soared at the beginning of the Nineties because of the high level of defaults and consequent repossession. Insurers such as Eagle Star suffered huge losses, which they could only recoup by increasing prices.<sup>25</sup>

The second criticism is that the charges for the mortgage (in other words, the borrowing cost) is too high, thus making it too onerous on the borrower. For instance in one case the cost of borrowing \$3,000 turned out to be an enormous indemnity charge of #1,158.<sup>26</sup> In response to this criticism, moves have been made by some mortgage institution, including Halifax - the UK's biggest lender, to scrap the mortgage indemnity fee for most of their new borrower. The lenders will now pay the premiums.<sup>27</sup>

<sup>24</sup> See further: "lenders tinker with troubled indemnity", *The Observer*, 15 February 1998, at p. 12 ("Money Matters") Minnow makes a splash with cheaper mortgage protection", *Financial Mail* on Sunday, January 4, 1998 at pp. 14 - 15; *The Times*, Friday February 6, 1998, front page and at p. 31 ("Commentary"); "Angry critics shoot down Migs", *Property News (Birmingham Metronews)* Thursday 19<sup>th</sup> March, 1998 at p. 28; "MIG problem for loan seekers", *Birmingham Metronews*, Thursday April 23<sup>rd</sup>, 1998 at 22; "Farewell to the endowment mortgage", *The Sunday Telegraph*, March 29, 1998 at. 16B ("Family Finance").

<sup>25</sup> *The Times*, *op. cit.*

<sup>26</sup> *The Observer*, *op. cit.*

<sup>27</sup> Apart from C & G (i.e., Cheltenham and Gloucester), other mortgage lenders that do

Some lenders, like C & G, now part of Lloyds TSB, now do not charge mortgage indemnity. Instead they require that the borrower pays a large deposit, thus making the insurance unnecessary.

The practice of super-adding an insurance on the mortgage shows the growing inadequacy of the mortgage as security. If the lender was sure that upon default by the borrower the mortgaged property, when realised, would sufficiently repay his indebtedness, probably there would be no need for a super-added security. However, the movement from mortgage to insurance in search for security raises a basic legal question: Can one still talk about a "mortgage security" in the circumstance? In other words, is it mortgage or the insurance that constitutes the security for the loan; or, put differently, would the mortgage constitute security in the absence of a super added insurance? The answer is probably that the mortgage alone is not (enough) security, which is why the lender is further assured by the insurance. On the other hand, the insurance alone would not provide security for the loan since no real property would in that case be earmarked to satisfy the lender's debt in the event of default.<sup>28</sup>

It is our view that so long as the rough edges of the MIG practice in England are smoothed, the practice is a commendable one because it enables the lender to better recover his debt; it also enables him to stay in business and offer his lending services to even more borrowers, thus facilitating the emergence of more homebuyers/homeowners. This is ultimately good for the economy and for the society at large.

### Mortgage in Nigeria

It has been shown above that in England a mortgage is mostly entered into for the purpose of buying a home. In other words, the mortgage transaction is mostly contracted by the tenant or prospective homebuyer. In Nigeria, mortgage is mostly (though not exclusively) by the homeowner: a house already owned or to be owned by the borrower is

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not impose mortgage indemnity payments include: Direct Line, Mortgage Express and Hinckley & Rugby building society.

<sup>28</sup> It is of the essence of real security that it creates a right which is against some real property of the borrower. It creates a right *in rem* against third parties including successors in title to the borrower. As Professor Goode put it, it "creates real rights in an asset as opposed to personal rights to an asset": *Bristol Airport plc v. Powdrill* [1990] 2 All ER 493 at 502; Goode, R. M.: *Legal Problems of Credit and Security*, 2nd edn., London: Sweet and Maxwell, 1988 at p.3.

offered to the lender as security.<sup>29</sup> In other words, in most cases the mortgage loan is obtained not by the tenant who wishes to buy a home but by a homeowner who wishes to use the money for some other business and merely uses the house as security.

In Nigeria, mortgage business<sup>30</sup> by mortgage institutions (other than banks) is governed by the Mortgage Institutions Act,<sup>31</sup> s. 7(a) of which stipulates that "adequate security" be extracted for mortgage loans.<sup>32</sup> By the section:

*A mortgage institution shall not-*  
*(a) grant a loan or advance for the building, improvement or extension of a dwelling house unless adequate security has been taken on an existing property or the property in respect of which the loan or advance is being granted.*

<sup>29</sup> For convenience, it is assumed that in every case where a mortgage is granted, it is the borrower's landed property which is used as security. This will usually be the case, although it is possible for a mortgage to be granted by someone other than the borrower, for instance where a parent mortgages his or her landed property to support a loan made to a son or daughter.

<sup>30</sup> S. 26 of the Mortgage Institutions Act defines "mortgage business" as "the business of accepting deposits from members of the public for the purpose of granting mortgage loans and advances for the purchase, construction, improvement and extension of houses.

<sup>31</sup> Cap 231 Laws of the Federation of Nigeria, 1990.

<sup>32</sup> There is a similar provision in respect of loans generally, particularly those granted by banks, in s. 20 of the Banks and other Financial Institutions Decree, (BOFID) 1991, Decree No. 25 of 1991, as amended by the Banks and other Financial Institutions (Amendment) Decree 1997 (Decree No. 4 of 1997). The section frowns on "unsecured advances and loans" or "unsecured credit facilities", meaning "advances, loans or credit facilities made without security, or, in respect of any advances, loans or credit facilities made with security, any part thereof which at any time exceeds the market value of the assets constituting the security, or where the bank is satisfied that there is no established market value, the value of the assets as determined on the basis of a valuation approved by the bank". See also s. 19(1) of the Failed Banks (recovery of Debts) and Financial Malpractices in Banks Decree 1994, which makes it an offence to give a loan "without adequate security or collateral", or "with no security or collateral" where the same is required", or "with a defective security or collateral, or "without perfecting the security given".

Landed property is generally considered to be the most acceptable of real securities. Once it has been offered as security the only other issue that falls for consideration is that of "adequacy". This refers to the monetary value or worth of the property in comparison with the loan sum sought. In all cases, the value of the property given as security has to be much higher than the loan sum so as to make allowance for any future fall in the property market at the time of realisation of the security.

Like in England, there is in Nigeria the problem of secured debt recovery. Where the security is a house mortgage, there is the intractable problem of realising the security when it is due. The reasons for this problem are in some respects different from those faced by the mortgagee in England. To appreciate the problem, it may be necessary to touch on the nature of land right and house ownership in Nigeria.

As from March 29, 1978, land right in Nigeria became governed by the Land Use Act 1978.<sup>33</sup> Under the Act, no individual or group owns land. The Act, by s. 1, vests "all land comprised in the territory of each State in the federation" in the Governor of that State,<sup>34</sup> who holds the land in trust and administers it "for the use and common benefit of all Nigerians". By this provision, the Act divests allodial or radical title to land from its erstwhile owners and vests the same in the State Governor. In the context of secured credit transactions law, what this means is that no person can "convey" any "title" to land by way of a mortgage, on the principle that

<sup>33</sup> Cap 202 vol. xi of the Laws of the Federation of Nigeria 1990. The Act was originally promulgated as a Decree by the military regime (Decree No. 6 of 1978) but was, upon the exit of the military regime and the taking over of government by civilians re-designated Act, vide s. 1 of the Adaptation of Laws (Re-designation of Decrees Etc.) Order No. 13 of 1980.

<sup>34</sup> The vesting of land within the State territory in the State Governor has an express exception: by s. 29(1) of the Act, all lands which were held by the Federal Government or by any agency of the Federal Government at the commencement of the Act continue to be vested in the Federal Government or the Federal Agency. The Act does not state in whom vests the land comprised in the Federal Capital Territory. However, since this is a separate territory and does not form part of any State, it would not vest in the State Governor, it probably vests in the Federal Government, particularly in view of s. 276(2) of the 1979 Federal Constitution which provides that "any property, right ... which immediately before the date when this section comes into force was vested in ... the former authority of the Federation ... shall" without further assurance vest in the President and Government of the Federation.

*nemo dat quod non habet*. What the individual (or group) now has is merely a right to occupy and use the land, a kind of usufructuary right.

As a consequence of the occupation and use of the land, the user or occupier may erect buildings and other structures thereon. Significantly, he may not mortgage the property (or his right thereto) without the prior written consent of the Governor.<sup>35</sup>

There is however no corresponding duty on the Governor to give his consent when sought, or requirement that he should give reasons where he refuses to give consent, or that he should give (or signify his refusal of) consent within a reasonable time, or that he should not unreasonably withhold his consent.<sup>36</sup> The legal effect of the consent provision is quite profound. Where a mortgage is created over a landed property without the consent of the Governor being sought and obtained, the lender may realise that in the event of default, he cannot realise his security by sale of the mortgaged property. As the Court of Appeal emphasized in *Jacobson Engineering Co. Ltd. & Anor v. United Bank for Africa*.<sup>37</sup>

*After the commencement of the Land Use Decree, whatever was created... whether equitable or legal mortgage, the law is the same and that is to the effect that the bank cannot sell nor an order be made that the bank should sell without the consent of the [Governor] first had and obtained.*<sup>38</sup>

This is so even in the case of an out-of-court sale of the mortgaged property, where the power of sale is derived from an express<sup>39</sup> or statutory

<sup>35</sup> ss. 21, 22, 23, and 26 of the Land Use Act 1978

<sup>36</sup> In *Queen v. Minister of Land and Survey, ex-parte The Bank of the North Ltd.* (1963) NNLR 58, interpreting s. 11 of the Land and Native Rights Ordinance 1916 (which is similar to the consent provisions in the Land Use Act 1978) under which it was unlawful for an occupier to alienate his right of occupancy or any part thereof by sale, mortgage, etc. without the consent of the Minister first had and obtained, Reed, Ag. S. P. J. held that the section conferred a discretion on the Minister to grant or withhold consent and that it did not impose a duty on him. See also: *Qudus v. Military Governor of Lagos State* (1973) CCHCJ/6/73 at 61.

<sup>37</sup> (1993) 2 NWLR (Pt. 283) 586.

<sup>38</sup> *Ibid.*, at p. 601

<sup>39</sup> Such express conferment of the power of sale was initially rare because it was feared that it would be a clog on the equity of redemption. The practice became common in the early years of the nineteenth century: Waldock, C. H. M: *The Law*

power. The mortgage wherein the express power is contained must have obtained the consent of the Governor. The same with an equitable mortgage under seal, which thus attracts a statutory power of sale. It appears that even an equitable mortgage created by mere deposit of title documents has to receive the Governor's consent before it can be enforceable.<sup>40</sup>

Thus a lender who has obtained a mortgage of landed property as security for his debt often discovers that he cannot realise the security by sale, because the Governor's consent was not obtained to the mortgage. This places him in the position of an unsecured creditor.

There are other circumstances when the mortgage security in the hands of the lender is rendered valueless. The most notable instance is where the borrower's right to the piece of land on which the house stands (i.e., his right of occupancy) is revoked. Under the Land Use Act, the Governor has a right to revoke the right of occupancy at any time for any one of a myriad of reasons. For instance, he may revoke the right in order to use the land for public purpose<sup>41</sup> or for the extraction of building materials or for overriding public interest,<sup>42</sup> for mining purposes or oil pipelines or for any purpose connected therewith.<sup>43</sup> Upon such revocation,

*of Mortgages*, London: Stevens & Sons, Sweet and Maxwell, 1950, pp 253-254; Tyler, E. L. G. *Fisher and Lightwood's Law of Mortgage*. London: Butterworths, 1988 at p. 379 (footnote no. h).

<sup>40</sup> See: *Jacobson Engineering Co. Ltd., op.cit.* However, in the subsequent case of *Okuneye v. First Bank of Nigeria Plc.* (1996)6 NWLR Pt. 475) 749, the Court of Appeal held that an equitable mortgage by deposit of title documents relating to a statutory right of occupancy does not require the consent of the Governor. It is submitted, with respect, that this decision cannot be right. The court appeared to have forgotten or ignored the statutory definition of a mortgage by the Land Use Act itself (i.e., s.50) which includes an equitable mortgage. For a criticism of this decision, see: Ezejiakor, G., "The Consent Requirement of the Nigerian Land Use Act" *Journal of African Law*, vol.42 No. 1 (1998) at pp. 101-209. Equitable mortgage by mere deposit of title documents can no longer be created in England in view of s. 2 of the law of Property (Miscellaneous Provisions) Act 1989. See Enefiok Essien, "United Bank of Kuwait v. Sahib: The rise and fall of security by deposit of title documents" [1998] *Journal of International Banking Law*, vol. 13, Issue 2, p.80; P. Rosedale, "Abolition of security by deposit of title deed" (1996) vol. 140 *Solicitor Journal*, p. 1223;; G Hill, "Law of Property (Miscellaneous Provisions) Act 1989, Section 2" (1990) LQR396 at 400.

<sup>41</sup> Under s. 28(2)(b) and s. 28(3) of the Land Use Act.

<sup>42</sup> S. 28(3)(a) or (c) of the Land Use Act.

<sup>43</sup> S. 28(2)(c) of the Land Use Act.

the "holder" or "occupier" may either be paid financial compensation for the "unexhausted improvements" on the land or he may be resettled somewhere else. It is remarkable that any compensation payable for the unexhausted improvements (such as buildings on the land) is paid to "the holder" of the right occupancy and "the occupier" of the land,<sup>44</sup> i.e. to the borrower/mortgagor. The Act expressly defines a "holder" and "occupier" to exclude a mortgagee with regard to entitlement to compensation payable upon a revocation.<sup>45</sup> This effectively dismisses any hope of the lender to be paid the compensation money into which his security has suddenly be transformed.<sup>46</sup> In such case, the lender's secured debt is rendered unsecured, thus making the recovery of the debt more uncertain.

It may be well to think that when the compensation money is paid to the holder/borrower he would in turn pay the same over to the lender/mortgagee so as to liquidate the debt. This would be pure wishful thinking as there is nothing to suggest that the borrower would do so. In any case, even if one is to assume that he would do so, it is noteworthy that the compensation money is only for the value of the land on which the "improvement", e.g. a house, stands. This necessarily means that the amount of compensation payable will be negligible compared to the loan sum for which the house (which includes the land itself) was security. Sadly, the holder/borrower cannot resort to any court of law to contest the amount or adequacy of the compensation payable to him.<sup>47</sup>

It can scarcely be doubted that factors like the expanse of the land and its appurtenances and its strategic location, aside from the house itself, may have weighed on the minds of the lender to accept the "improvement" (i.e., the house) as security. A situation thus arises where the compensation money is less than the sum due to the lender. The lender is thus turned into an unsecured creditor at least for the balance.

Even where the holder/borrower is resettled (or relocated)<sup>48</sup> upon a recognition of his right of occupancy, the relocated site cannot be said to

automatically become the security for the lender's debt<sup>49</sup> unless the borrower agrees to transfer the mortgage security to this new property. It is doubtful that the borrower would be prepared to transfer the mortgage to the new property, it being a notorious fact that a borrower would, if he can, like to borrow without giving security.<sup>50</sup> The secured lender/mortgagee therefore loses his security and his risk of recovering the debt gets magnified.

There is also the fact that the certificate of occupancy,<sup>51</sup> which is issued by the Governor to the holder of a right of occupancy, is merely evidence, rather than a conclusive proof, of the holder's right to the landed property. The certificate does not create a right in land,<sup>52</sup> rather, it evidences that holder's right,<sup>53</sup> with the consequence that the certificate of occupancy may be (and indeed is often) set aside in favour of a person who proves a better right.<sup>54</sup> When it is set aside, a lender/mortgagee who accepted the certificate of occupancy (which encompasses the land and the property on it) as security discovers that he has no security for his money. Again, this minimises his prospects of recovering his debt.

## Conclusion

While there may be some peculiarly English problems which confront the lender/mortgagee in England, such as a reduction of State

<sup>49</sup> It is probable that the doctrine of transmutation may not apply in this situation. See further on this: Enefiok Essien: "lending on land mortgage or pledge security in Nigeria ...", *op cit.* at pp. 504-505.

<sup>50</sup> It has been said that "borrowers typically have a strong preference for the unsecured loan". Mann, R. J.: "Explaining the pattern of secured credit" (1977) vol. 110 *Harvard Law Review*, p 625 at 658.

<sup>51</sup> A certificate of occupancy is a document issued by the State Governor in evidence of a person's customary or statutory right of occupancy. See s 9(1) and (2) of the Land Use Act.

<sup>52</sup> This is unlike a conveyance of land title, which creates such land right.

<sup>53</sup> S 9(1) (c) of the Land Use Act. See also: *The Registered Trustees of the Apostolic Church v. Olowoleni* (1990) 6 NWLR (Pt. 158), held no. 4; *Ogunleye v. Oni* (1990) 2 NWLR (Pt. 135) 745, (1990) All NLR 341

<sup>54</sup> *Adedeji v. Williams* (1989) 1 NWLR (Pt. ) 611; *Sir Adetokunbo Ademola v. Amo & Ors.*, Suit No. AB/8/81 of 2/8/82; *Sh ... O. O.* in [1992] JAL vol. 36 No 1 at p. 86

<sup>44</sup> S. 29 of the Land Use Act

<sup>45</sup> S. 50(1) of the Act.

<sup>46</sup> See: Enefiok Essien, "Lending on land mortgage or pledge security in Nigeria: A minefield for secured lenders" *The African Journal of International and Comparative Law*, vol.10,pt.3 (1998) pp. 496-506 at 504.

<sup>47</sup> S.47(2) of the Land use Act.

<sup>48</sup> Under s. 33 of the Land Use Act.

benefits to help the jobless to meet mortgage repayment,<sup>55</sup> some of the problems are shared in Nigeria. For instance, there exist in Nigeria the spectre of unemployment, which makes scheduled mortgage repayment difficult. There is also the risk of negative equity due to a fall in the property market, i.e. the value of the property is rendered less than the loan sum for which it was secured. The Nigerian lender/mortgagee runs the additional, fundamental risk of the absence of the Governor's consent, which may avoid and nullify the security, or the ever-present danger of the Governor revoking the borrower's right of occupancy over the mortgaged property.

It is the suggestion of this paper that Nigeria adopts the English approach to finding a solution to the problem. We recommend the mortgage indemnity approach. To avoid the criticism which have been levelled against the indemnity insurance practice in England, it is suggested that when the approach is adopted in Nigeria there should be no indemnity charges (or premium), or if there is any, then the lender/mortgagee should be made to pay for it, being that the insurance is for his benefit. He should not be allowed to have his cake and eat it. He should not be allowed to pocket the accrued interest on the land yet avoid any risk to himself by passing the risk to the insurer whose premium is paid by the borrower.

It is submitted that if the English indemnity approach is adopted in Nigeria, the secured lender/mortgagee will rest assured that he will recover his debt whether there is a revocation of the right of occupancy covering the mortgaged property, or whether the right of occupancy is judicially set aside in favour of a better right, or whether the borrower/mortgagor is unemployed or is for some other reason unable to repay as scheduled or at all. The English-type mortgage indemnity insurance is probably the panacea that the Nigerian mortgagee needs.

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<sup>55</sup> There was such reduction in April 1995 and again in October 1995. However, it is worth mention that 70% of homeowners would not be eligible for income support following unemployment, because of savings, capital or a working spouse. This indeed is why, as a "safety net" for mortgage-holders, some insurance companies offer policies to cover repayment in case of unemployment. In Nigeria there is no such thing as unemployment benefit or job seekers allowance.