



POLAC ECONOMIC REVIEW (PER)
DEPARTMENT OF ECONOMICS AND MANAGEMENT SCIENCE
NIGERIA POLICE ACADEMY, WUDIL-KANO

CHARGE OF LAND AS A SECURITY IN A SECURED CREDIT TRANSACTION

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Abstract

Loan transactions have become part of human being. Law and equity has developed concepts to secure monies advanced to the debtor due to rampant default of payment or fulfillment of obligation by the debtor to guarantee creditors of realizing their advanced Loans. This paper focused on the validity of charge of Land as a security in Loan transactions, using the black letter process, the paper realized the advantages of charge agreement for its simplicity in creation and giving the parties a security needed depending on the part of the charge and the chargor based on the covenant therein. At the conclusion stage, it is recommended that where the Loan transaction involves huge amount of money the creditor is advised to go for mortgage agreement than charge which does not create any right over the charged land but only creates evidence of loan.

Keywords: Land, Mortgages, Chargee, Security, Chargor.

Introduction

Generally charge is an equitable security created as a advice through which property is specifically appropriated as security for the advancement of loan by natural or an artificial persons. Charge as a written agreement between the Chargee and the Chargor committing a particular Asset or Chattel own by the chargor creating an equitable right to the charge which gives him a right to have his loan advancement paid by applying the property charged in the event of bankruptcy insolvency. A charge has a lot of similarities with equitable mortgage; it also has dissimilarities that made it a different concept.

The doctrine of charge, though easier to create, but unsuitable for the charge, because it creates only an evidence of contractual obligation which gives the charge a right to initiate an action for the recovery of his debt, though easier than recovery of an unsecured loans.

This kind of transaction has its own advantages and the disadvantages to both the charger and the chargor

which is intended to be discussed in one of the section of this paper, against the general rule, a charge by deed expressed to be by way of legal mortgage, Sections 108(1) and 109 (1) of Property and Conveyancing Law said to create legal charge. An equitable charge as would be discussed under a particular section of this paper can be created by way of an agreement by the parties or by operation law. Equitable charge can be created on a tangible and intangible asset or right, it may be a fixed or floating e.g. land, building, wristwatch, shares and debentures.

This paper discussed the principle of charge of land as a security for the payment of debt or the discharge of some other obligation for which it is charged. In the concluding chapter, the paper suggested more congenial secured credit agreement to the creditor where it involve a huge amount and further recommend charge for both parties in simple credits.

This article is a legal research that employs doctrinal method of analysis to examine the validity of charge of Land as a security in Loan transactions, using the black letter process, the paper realized the advantages

of charge agreement for its simplicity in creation and giving the parties a security needed depending on the part of the chargee and the chargor based on the covenant therein.

Conceptualization

Though many definitions were attempted by scholars and through Courts pronouncement, to date, there is no general consensus as to the definition of the word equitable charge as a concept of security for securing a loan. The term is used interchangeably with mortgage in so many cases but the contrast is only made by determining the ingredients of the deed, the mode, the mode of creating the transaction, the type of interest created and most largely the consequences of the agreement.

In a simple term and for the purpose of differentiating mortgage and charge in substance, a mortgage of land as well as mortgage of other properties is, a right of property vested in the mortgagee which entitle him by virtue of transfer of an interest of the property to have the rents and profits applied to satisfy his debt, and upon default by the mortgagor to liquidate the loan to enforce the security by sale or foreclosure. (Waldock, ND)

Thus the essential nature of mortgage is that is a conveyance of a legal or equitable interest in property, with a provision for redemption upon repayment of a loan or the performance of some other obligation.

A charge is usually an agreement between a lender and a borrower i.e. charge and chargor (hereinafter called) creating in equity a right to have the actual property applied to the satisfaction of the debt so that a charge is a secured creditor in the event of bankruptcy, *Matheews v. Godday* (1961).

Denman J. in defining the concept “equitable of charge” in *Tancred v. Delagoa Bay* (1978) had this to say:

“A document given ‘by way of charge’ is not one which absolutely transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property without transferring that fund or property.”

The above quote clearly enunciates that, a charge is a written agreement between the charge and the chargor that only creates a right to pay back a debt out of a particular fund or particular property (charge property) without transferring that property to the charge in any way.

This principle was further expatiated by **Idigbe JSC** in the case of *Ogundiani v. Araba* (1978).

“Where the mortgage is by way of charge and not by conveyance, the mortgagee takes no estate whatsoever in the land or in the property but he has generally only an equitable interest to be enforced by sale upon an order of Court. The equitable charge simpliciter only gives a right to payment out of the property; it does not amount to an agreement to give a legal mortgage at all. The strict mode of enforcing the charge is however by sale (or appointment of a receiver under an order of Court) but never by foreclosure.”

It is worthy to note that, the words ‘Mortgages’ used by his Lordship in the aforementioned quotation meant ‘charge’ and ‘chargee’ for clarity purpose.

There is no doubt that the above definitions of charge provides clear differences with mortgages in the sense that in charges, neither title nor possession of the property charged as security is transferred to the charge at any time and in the event of chargor’s failure to fulfill his obligation, the charge has no right whatsoever to enter into possession or retain title in place of his money as may be exercised by a mortgagee, but only has an equitable estate over the property which is only realizable through application in the Court to sale and have his money paid through the proceed or by appointment of a receiver who will continue managing the property in order to use the proceed in settling the charge.

Land as a Security in Charge Transaction

Section 18(1) Interpretation Act, 1990 define land to mean not only vacant land but also buildings and other things attached to the earth or permanently fastened to anything so attached, but does not include minerals.

Thus, the general society realized that Land provides efficacious and congenial security for loans in the contemporary world, with an acceptable or recognized

title deed, the creditor is protected either as registered encumbrancer, holder of an overriding interest on the charged Land. Land always appreciates in value to compensate a charge who decides to enforce the security upon chargor's default through Court action, either by sale or appointment of a receiver only.

It is pertinent to understand the word 'security' for better appreciation of the topic. The term generated much controversy because it has no general definition which is accepted, because of misconception about the scope, type and characteristics of or frustration about its creation.

However, it was put to mean an expression meaning a security for payment of debt or claim either by a right to resort to some form of property, tangible or intangible for payment or by a guarantee of some person to satisfy the debt or claim for which another person is primarily liable, **Broad v. Commissioner of Stamp Duties (1980)**.

The word security received a secondary meaning as a document or instrument which creates or acknowledges an obligation to pay a sum of money, even though it is the original source of obligation and is not collateral or ancillary to some other obligation (Omotola, 2006).

The above attempted definitions have definitely came up with some criteria which qualify an agreement to be a security, the expression of the parties must be intended to be a security for payment of a debt, either by a right on a particular property or by guarantee, and further to be a written document in most cases.

To conclude on the issue of security that generated a lot of controversies as regard its definition, Allan finally said:

"The question 'what is security' is an irrelevant one once the form of transaction identified and its legal incidents determined, it should not matter whether it is called security or not. If the function of security is the reduction or elimination of risk." (Allan, 1989)

It is also understood that security can be real or personal, tangible or intangible like shares and debentures.

In other words, any security that attaches to an item of property and confers either ownership or some proprietary interest such as possession of tiled deed is described as security. A personal security is said to be by way of guarantee which confers only chose in action in the event of insolvency or bankruptcy.

Personal security was clearly defined to mean a promise by third party (grantor) to pay the debtor's debt in the event of his failure to fulfill his obligation. This type of agreement should normally be in writing and a consideration must have been provided by the creditor i.e. to advance the loan or promise to make the funds available to the debtor.

A grantor (surety) became released from liability where the debtor carried out performance or where the creditor and debtor breach the term or condition of their contract. He is also released if the debt becomes statute-barred from action and where there is more than one surety, where the surety is altered between the creditor and other co-sureties. (Omotola, 2006)

Type of Charges of Land

Equitable Charge

Section 178 of Company and Allied Matters Act, 1996 defined charge as a security by which the creditor obtains neither possession nor ownership of the property, but a simple appropriation of a specific property to the satisfaction of his debt. This kind of security (charge) is only enforceable in equity.

Thus an agreement whereby ascertained or ascertainable property is specifically made responsible for the discharge of an obligation without any transfer of title or possession to the charge is termed as equitable charge.

Some scholars like Gough, (1993) opined that, considering the ingredient of a charge as not a security in the primarily sense, because a charge confers no property on charge, it does not give any real right of ownership and does not confer an immediate right. He therefore considered charge agreement as a piece of evidence of a right that matures in the future, that is to say the charge has a contractual right over the property charged towards the satisfaction of his debt.

Under a charge, if the property passes to a third party, the charge cannot follow it both at law and in equity. It

is best described as a mere acknowledgement of debt with a covenant that the chargee will sell the property in the event of default from the side of the chargor. A chargee only realizes his security by obtaining the appointment of a receiver of rents and profits and where necessary by judicial sale of the property charged.

Legal Charge

As we have seen in the general discussion that the most popular concept of charge is equitable charge, the Property and Conveyancing Law under Section 110 (2) following the English Law of Property Act, 1925 and the case of *Regent Oil Co. v. Gregory (hateh End) Ltd. (1966)* introduced a legal charge where a charge, although taking no conveyance has all remedies of a mortgagee i.e. right of sale, appointment of receiver and that of foreclosure.

Creating a Charge

After being informed of a charge and its types, it is pertinent to now know how it is created to take the effect of the law.

An equitable charge is a consensual agreement between the parties for a credit. In other words, a charge may be created by the consensus of parties to a credit arrangement or may be involved by operation of law. (Smith, 2006)

By Consensual Agreement

This is where a written agreement given 'by way of charge' is given to the creditor by the debtor or where the lender has been deposited with the land title deeds of the borrower as security for loan.

In the former case, a simple contract is said to have been created whereby the described land is specifically made responsible for the discharge of the debtor's financial obligation in case any default.

The written agreement shall among other covenants include the particulars of the parties, the particulars of the property charged, the amount of loan to be advanced and the mode of payment, then the signature of the parties and a witness is also important.

Where an equitable charge is created by mere deposition of title deeds by the borrower after a parole agreement, the law recognizes it as an equitable charge and enforceable under equity, because the deed is

regarded as part performance provided that the deposit of the title deed was constructed by the Court to create an equitable charge. This is only possible where the agreement between the parties was the type that implicated the property and made it specifically responsible for the discharge of the borrower's financial obligation where he defaulted.

The above statement or definition made it clear that, it is a question of evidence whether an agreement between the parties creates an equitable charge outside the purview of the title deed deposited. It follows therefore that a parole agreement that made a property responsible for the discharge of an obligation is a charge and a deposit of title deeds in this case is inconsequential. (Smith, 2006)

Equitable Charge by Operation of Law

This is created where a mortgagor's financial obligation is paid off by party who then takes custody of the title deeds of the debtor's property, *Khaury v. Azar (1982)*.

Even though the third party steps into the shoes of the mortgagee he cannot be a mortgagee but merely a chargee since the delivery of title deeds to him does not vest title of the property whether legal or equitable in him. A simple example of this concept is where a guarantor or indemnitor settled the debt of the defaulted borrower and takes up the title Deeds deposited as security for the loan in mortgage transaction, taking the position of the former creditor will not guarantee the surety/guarantor a mortgagee status but only holding the title deeds as an equitable charge created by operation of law.

It is critical to note that, any type of charge created equitable or legal, written, parole or by operation of law; neither consent of Governor nor that of the Local Government chief executive is required.

Agricultural Charge

Another form of creating a charge of land is by way of agricultural charge, the principle of *Quit, Quit Planteto solosolo cedit* and the provision of Section 18(1) Interpretation Act, Cap 192 LFN, 1990 defined Land to mean not only vacant land but also buildings and other thing attached to the earth ..., these and other

laws brings made Agricultural Charge a type under charge of land, this is via;

- i. A charge on land in which the borrower holds a legal interest.
- ii. A charge on land in which the borrower holds a right to farm.
- iii. A charge on crops on such land.(Smith, 2006)

Enforcement of Security under Charge of Land

A question of enforcement of security under charge agreement always arises only where there is default by the charger to fulfill his obligation. In this situation, the charge may apply to the Court under equity for an order of either judicial sale or appointment of receiver over the property charge only, since an equitable charge cannot foreclose. This was expounded by **Idigbe JSC** in the case of **Ogundiani v. Araba (1978)**.

“... the strict mode of enforcing the charge is, however by sale (or appointment of a receiver under an order of Court) but never by foreclosure.”

The method above has been radically departed in case of enforcement of agricultural charge. The Conveyancing Act, 1881 and the Property and Conveyancing Law, 1959 has given the charge power of sale.

Similarly, Section 12(1) of the Agricultural Credit Guarantee Scheme Fund, (1977) provides that; the creditor may “dispose of any security obtained in respect of the loan.” Relying on the above provisions of the two Acts and the Court pronouncement, we can say that under the Agricultural charge; a chargee may apply for foreclosure in default of payment.

Advantages of Charge of Land

A Charge of Land Agreement may be an advantage to a chargor in most situations and in few cases to the chargee as follows:

- i. The chargee has no inherited right to enter into possession of the land and cannot therefore exercise possessory right like creating lease over the charged property. This gives the chargor a chance to continue enjoying his charged land without any interference whatsoever including sell.
- ii. Where the charged agreement is registered under the registration of Titles Act, Cap 166 laws of Lagos State, 1994. Section 51(1) vest in the chargee the rights, powers and remedies conferred by the charge

and the right to recover and receive the money secured thereby free from all estates (rights) whatsoever including those of the state. When applying this remedy, it shall be noted that estate of every registered owner of a charge is subject to any registered charge or encumbrance, having priority to his charge. It is clear that this type of advantage favours the chargee the way the first one favours the charger.

iii. Since a charge does not require transfers of neither a proprietary nor a possessory interest in the land charged as security, it is a settled law that its valid creation does not need Governor’s consent. See **Okunnaye v. First Bank of Nig. Ltd (1996)** where the Court held that an Equitable Mortgage created by a deposit of title deeds did not amount to alienation of interest in land and therefore, did not require Governor’s consent.

iv. A charge of land as a security to secure a credit is easier to be created since it does not require the consent of Chief Executive of a State or Local Government; this eased the delay for obtaining their consent and allows the parties to benefit from their transaction within a shortest time.

Conclusion and Recommendations

From the above discussion we were made to understand that a charge of land whether created via consensual agreement of the parties or by operation of law does not confer neither a proprietary nor possessory estate to the chargee, thus cannot give him remedies enjoyed by mortgagee in case of default to pay or discharge an obligation by the debtor, but only creates a right to claim payment through Court sale or Appointment of receiver over the property charged.

It is also realized that charge of land as a security in secured credit transaction that provides for the deposit of title deed in the charge and entitle him to all remedies enjoyed by mortgagee was held to be a legal charge.

The paper informed us about the advantages of a charge agreement for its simplicity in creation and giving the parties a security needed depending on the content of the covenant. The write up hereby recommend for a debtor a deed of equitable charge of land since neither proprietary estate nor possessory estate is taken away from him this enable him to continue enjoying the charged land until payment or order of the Court to sell or appointment of receiver.

On the part of the chargee, where believe of fulfillment of obligation is stronger, the charge agreement is also recommended because the procedure for creating a valid security for loan is made easier

under this concept. However, where the amount to be advanced is much, a creditor is advice to go for more secured arrangement like Legal Mortgage or Equitable Mortgage as the case may allow.

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