EQUIPMENT LEASING IN THE NIGERIAN BANKING ENVIRONMENT: A LEGAL PERSPECTIVE

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AND

MY DARLING WIFE AND GOOD FRIEND; JACKIE & OUR LOVELY CHILDREN; JOE JR, KENNY, SHIRLEY AND SANDRA.

ABSTRACT

There is today a great variety of economic ventures in Nigeria needing huge capital resources for their development. These ventures usually require very expensive equipment which financially cannot easily be acquired by people who need it. Even where they can afford to do so they generally would not like to purchase it as doing so would not only tie down their capital but also saddle them with equipment they probably only require to carry out a specific project. But since the businessman or industrialist must use the equipment for the execution of his business, an alternative source of financing has to be found, and equipment leasing has been found to be the most attractive.

Even though equipment leasing was introduced in Nigeria only in the early 1960's, it has grown into a multi-billion naira business in less than three decades and has generated a special interest in the Nigerian banking institutions, among others. Despite the huge scope and size of the industry, it is unfortunate to note that this commercial activity is very much misunderstood by the general public and the operators, and worse still there is no adequate and / or specific legislative structure governing it. The effect of this is that the industry is developing in very many directions.

This thesis therefore attempts to examine fully the legal perspective of this mode of financing within the Nigerian banking environment, with a view to stream-lining the operations or providing some sense of direction in this highly lucrative and vibrant commercial activity.

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CHAPTER ONE

INTRODUCTORY
[THEME AND SCOPE OF THESIS]

1.01 The term "Equipment Leasing" has been variously defined by different legal systems and even within a given legal system different definitions could be given from the stand point of the professional bodies. Despite the various definitions or concepts of this commercial activity, one factor seems to remain common to all of them and that is that equipment leasing (sometimes called chattel leasing) is a contractual arrangement whereby a party called the "lessor" allows another party called the "lessee" to use his equipment in return for an agreed fee called a "rental". Its basic characteristic being the differentiation of *use* from *ownership*; the lessor retaining the legal title while the lessee has the right to the use and possession of the equipment.

1.02 Equipment leasing is undoubtedly the most innovative financing option in today's Nigeria. The demand for it has created an industry of huge scope and size and even greater potential, as more and more of the nation's equipment needs are more happily, efficiently and readily met through this complex, yet exciting industry. What is its origin and how did parties get into it? What has made this industry exciting? Why has it caught the attention of the banking industry in particular, and the government, businessmen, the media and the consuming public? Why has this commercial activity which was only introduced in the country in the early 1960's become such a powerful multi-billion naira industry in less than three decades? These questions and more I shall be discussing in this work. Suffice it to say at this juncture that the dynamics of this highly lucrative and vibrant industry is not a subject that is altogether straightforward as it cuts across a number of other disciplines such as international trade, finance, insurance, taxation and various areas of law etc. A clear understanding of the dynamic forces behind this

complex commercial activity, and particularly of the legal framework is consequently absolutely vital for its successful operation.

1.03 In this thesis therefore, I shall attempt to investigate and discuss the various aspects of equipment leasing in the Nigerian banking environment from a legal perspective. In order effectively to achieve this purpose, the thesis has been arranged beginning with Chapter 1, "Introductory [Theme And Scope of Thesis]", followed by the other nine chapters. The purpose of this Chapter, as the title indicates, is to introduce the basic meaning of equipment leasing and the general scope of the thesis.

1.04 This is followed by Chapter 2, the "Nigerian Banking Environment", which investigates and discusses the different institutions within the Nigerian banking system, their origin, objectives / functions, legal status, achievements and / or failures and their relationship to one another and factors affecting it.

1.05 Chapter 3, "Historical Development Of Equipment Leasing", discusses the historical evolution of equipment leasing in the world in general and Nigeria in particular. The factors responsible for its growth in Nigeria were also examined.

1.06 Chapter 4, "Nature Of Equipment Leasing", brings out the various definitions of equipment leasing from different major legal systems of the world as well as Nigeria. The Chapter also discusses the different types of equipment leasing, their relationship to one another and how they could be entered into. The distinction between equipment leasing and other similar commercial activities which are often confused even by the operators of leasing business is made. The benefits and disadvantages of equipment leasing as well as reasons for leasing by both the lessor and the lessee are discussed.

1.07 Chapter 5, "Legal Aspects Of Equipment Leasing", extensively discusses the complex nature of equipment leasing. Its membership of the family of bailments is also discussed. The numerous major legal provisions in equipment leasing contracts which unfortunately have not been tested in the Nigerian courts are also highlighted. Solutions are also suggested to the difficult legal issues that are usually connected with equipment leasing.

1.08 In Chapter 6, "Legal Aspects Of International Equipment Leasing", the legal nature of equipment leasing is further discussed but confined to international leasing transactions. The provisions of Unidroit are examined and discussed and recommendations made as to how some of the problems associated with international equipment leasing could be handled.

1.09 Chapter 7, "Legal Documentation Of Equipment Leasing", takes up the important issue of documentation and the steps to take in booking a lease. Specimen of lease agreements are also provided because of my belief that the complex legal nature of equipment leasing calls for a good degree of skill and circumspection in the way lawyers or lessors frame the clauses of the document which outline the terms of the relationship between parties to the leasing contract.

1.10 Chapter 8, "Legal Aspects Of Equipment Leasing Insurance", extensively discusses various aspects of leased equipment insurance. Issues as to who has the obligation to insure and what should be insured against are treated. Recommendations are also made regarding the protection of parties' financial interests through insurance.

1.11 In Chapter 9, "Legal Aspects Of Equipment Leasing Taxation", taxation of equipment leasing is fully examined. It is necessary to go into details because it is observed that most investors would appear to be interested in equipment leasing in

Nigeria because of the tax advantages. The topic is discussed from both the lessor's and lessee's point of view.

1.12 Chapter 10, "Future Development Of Equipment Leasing And Conclusion", concludes the thesis by identifying those issues that tend to militate against the development of the equipment leasing industry in Nigeria and goes further to proffer solutions to these problems. While observing that the rules of common law and some statutes at present govern the equipment leasing business, the Chapter nevertheless notes the difficulties and therefore calls for a sustained policy on the part of the government to ensure an orderly, adequate and rapid development of the industry by promulgating a specific equipment leasing law.

1.13 I must point out here that there is very scanty literature (both legal and otherwise) on equipment leasing in Nigeria and even in United Kingdom. Responding to my request for materials on equipment leasing, an internationally reputed legal scholar; Professor R.M. Goode in a letter to me stated "materials on leasing are rather thin..." This view was confirmed also by a leading authority in equipment leasing; T.M. Clark, when he said:

> "There is very little literature on leasing in the U.K. ... Enquiries concerning leasing statistics and general information on leasing in the U.K. should be made to Equipment Leasing Association".[1]

1.14 Speaking also on the general lack of written works on equipment leasing and the paucity of legal cases on the subject another leading international scholar Professor Ole Lando stated:

> "Reported conflicts cases on leasing and letting on hire are few and the literature on the subject is not abundant".[2]

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1. Clark T.M, Leasing (1978) (McGraw-Hill), p. 296.

2. Lando. O. International Encyclopedia of Comparative Law, (1976) (Mohr) vol. III, chap. 24, s. 259, p. 139.

CHAPTER TWO

NIGERIAN BANKING ENVIRONMENT

2.01 The banking environment of any given society, as a major segment of the financial system, is the framework within which capital formation takes place. It is the framework within which the savings of some members of the society are made available to the other members of the society for productive investment.[1]

2.02 Although many non-banking institutions interface actively with banks as we generally know them in their traditional functions, such as the insurance companies, building societies, pensions and provident funds organisations,[2] etc, the structural configuration of the Nigerian banking environment in the strict sense consists of the following institutions:

1. **The Central Bank of Nigeria**
2. **The Commercial Banks**
3. **The Merchant Banks**
4. **The Development Banks**
5. **The Community Banks**

I shall now briefly discuss the various major segments that make up the banking environment, including the non-banking institutions that compete with the conventional banks.

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1. Odife, D O, Understanding the Nigerian Stock Market (1984) (Vantage Press) p. 41.

2. See s. 61 of the Banks And Other Financial Institutions Decree (BOFID) 1991.

The Central Bank of Nigeria

2.03 A central bank of any nation occupies the apex of the banking environment or system and in general terms carries out basically the same functions, though the structure may differ from one country to another. A central bank, by whatever name it is called,[3] differs from other banking institutions within the same banking environment with regard to its role and operation. It is generally regarded as the hub of the monetary and banking system of each country. It is a privileged banking institution with enormous powers whose advisory functions, among arrays of other functions, gives it a unique position in any country. It is the banker's bank, a bank of last resort, banker and adviser to the Government on financial and monetary matters. It is generally the only authority for the issue of a legal tender or currency in any given country.[4]

2.04 The Central Bank of Nigeria (CBN) was established to accelerate the economic development of Nigeria. Like its counterparts in other countries of the world, the CBN is expected to act as an institutional catalyst which propels the economy towards the desired economic goals of the country through the continuous use of active monetary policy to regulate and manage the currency and credit system. It is an institution specially designed to achieve a healthy balance of payments position for the country, to develop and achieve the desired rate of economic development for the country, to curb unemployment of resources, to ensure relative price stability, etc.

2.05 In Nigeria the CBN is a juristic person capable of suing and being sued in its own name. It is not an arm or department of the Federal Government as is thought by many people, especially the civil servants and other Government functionaries. Thus, in the

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3. In Nigeria it is called the Central Bank of Nigeria, in Britain it is known as the Bank of England and in the United States of America it is called the Federal Reserve Bank.

4. Okigbo, P N C, Nigeria's Financial System (1981) (Longman,) p. 238.

important case of Trendtex Trading Corporation Limited v Central Bank of Nigeria,[5] the issues at stake were whether the Central Bank of Nigeria, as a Government bank and prime bank, was to be taken as a department or arm of the Government of Nigeria and whether its act in issuing a letter of credit for the payment for cement ordered by the Federal Ministry of Defence, Lagos was to be regarded as being in the nature of a governmental act (actus jure imperium).[6] The Court of Appeal held, reversing the judgment of the High Court, that the Central Bank of Nigeria was not an arm or department of the Government and that its act in issuing the letter of credit was not of the nature of a governmental act.

2.06 The Court of Appeal observed, in reaching its decision, that the law which established the CBN - the Central Bank Act 1958 - with its subsequent amendments, contained no indication and manifested no intention that the CBN was to be an arm or department of the Government. Shaw, L J, had this to say:[7]

> "If it was designed as a department of state many titles indicative of that status come readily to mind. What was conferred on it was the title of a bank. Nowhere in the legislation is it called anything but a bank ... The 52 sections of the principal Act and the several amending orders and enactments contain no direct indication that the bank is a department of the Government and there are many indications which deny it that status. The very name has a commercial ring."

2.07 The second reason for the rejection of the High Court decision by the Court of Appeal was the nature of power and functions of the CBN. The Court of Appeal noted that there was no identification between the Government and the nature of powers and functions of the CBN. Section 4 of the Central Bank Act, for example, provides that the CBN is "to act as banker and financial adviser to the Federal Government". This

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5. [1977] Q.B. 529; [1977] 1 All E.R. 881, C.A.

6 The situation today would be regulated by the State Immunity Act 1978, in England.

7. [1977] Q.B. 529 at p. 573-574; [1977] 1 All E.R. 881 at p. 906 C.A.

provision clearly envisages the Bank's functions in this regard as independent and external to the immediate realm of Government. While one may contend that the function of issuing legal tender and safeguarding and defending the international value of the currency is undoubtedly of the nature of governmental function, that alone does not confer on the CBN the status of an arm or department of the Government. The Court of Appeal in support of this view had this to say,[8]

> "It is clear enough that the bank was the subserving agent of the Government in a variety of activities ... this is not adequate to constitute it as an organ or department of Government. I cannot find in the constitution of the Bank or in the functions it performs or in the activities it pursues or in all those matters looked at together, any compelling or indeed satisfactory basis for the conclusion that it is so related to the Government of Nigeria as to form part of it."

Historical Background of The Central Bank of Nigeria

2.08 The establishment of the West African Currency Board (WACB) in 1912, following the recommendation of the Emott Committee appointed by the British Colonial Authorities to study two basic issues, namely the financing needs for the export trade of expatriate firms in West Africa and the eradication of the muddled, unsatisfactory and inconvenient currency position in the British West Africa, may be said to be responsible for the emergence of a central banking system in Nigeria, even though the first banking institution - the African Banking Corporation (ABC) - was established in 1892. The regulation, defining the constitution, duties, and powers of the WACB were provided in the Colonial Office Memorandum of 12 December 1912, although they underwent amendments in 1915, 1924 and 1949.[9] The objectives of the Board were inter alia to issue a West African currency, ensure speedy convertibility of this currency with the old silver currency which was subsisting and to provide an efficient control mechanism for the currency issue.

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8. [1977] Q.B. 529 at p. 575; [1977] 1 All E.R. 881 at p. 907.

9. See Appendix 1.

2.09 Due to the shortcomings of the WACB, which included the absence of other central banking functions such as supervisory powers over commercial banks, formulation of monetary policies, etc, some educated Nigerians began to doubt the suitability of such an institution. The disenchantment with the services and functions of WACB and the subsequent clamour for an alternative financial institution gathered greater momentum when Nigerians, who fought for Britain during the Second World War, came back to Nigeria in the early 1950s with their ideas of what an institution discharging a central banking function should be. Such an institution, they believed, should be seen as a vehicle for the consolidation of the country's financial resources for the primary purpose of rapid economic development. They expected the institution would:

(1) act as a financial agent for the Government,

(2) float, buy and sell Government bonds and commercial papers,

(3) act as a lender of last resort,

(4) act as a monetary authority to determine and maintain economic stability,

(5) act as a regulator for the flow of money in circulation,

(6) undertake currency production.

2.10 It was against the background of the general disenchantment with the services and functions of WACB that Dr K O Mbadiwe on 5 April 1952 moved a motion at the Federal House of Assembly calling for the establishment of a Central Bank of Nigeria "for the purpose of rapid economic development in all its phases".[10] Even though the motion was defeated, it clearly showed how dissatisfied Nigerians were with the existing WACB and their desire to have a properly constituted central banking institution.[11] In a quick reaction to the defeated motion, the Nigerian Colonial Authorities, in Novem-

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10. House of Representatives Debates, (1952) first session, volume I, p. 377 (Government Printer Lagos).

11. Although Dr Mbadiwe's motion was defeated, it afforded Nigerians the rare opportunity to press for, and finally got passed, the Aid to Pioneer Industries Ordinance, which had a retroactive effect from 1 July 1951. This introduced the first ever tariff concessions in the country designed to stimulate industrial development.

ber 1952, appointed Mr J L Fisher, an adviser to the Bank of England, to inquire into the desirability and practicability of establishing a central bank in Nigeria as an instrument for promoting the economic development of the country.[12] His report and recommendation were published in October 1953. Mr Fisher stated in the report that it would be "inadvisable to contemplate the establishment of a central bank at the moment".[13] Fisher's recommendation against the establishment of a central bank was based on his belief that:

(1) it would be difficult to establish a bank "which could operate satisfactorily in such a narrow field",[14] and

(2) "because he could not see how a central bank could function as an instrument to promote the economic development of the country".[15]

He therefore recommended a programme of transition to a new monetary system in three stages, namely:

(1) the transfer of the WACB which was in London to West Africa;

(2) the establishment of a Nigerian Currency Board;

(3) the establishment of a bank of issue which would gradually develop into the fully-fledged Central Bank of Nigeria.

In his conclusion, Mr Fisher stated:

> "Given further development of the indigenous banking system and growth in the financial mechanism, the establishment of a central bank would be a logical and useful step in due course".[16]

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12. Fisher, J L, Report on the Desirability and Practicability of Establishment of A Central Bank in Nigeria as an Instrument for Promoting the Economic Development of the Country (1956) (Government Printer Lagos).

13. Ibid, p. 18.

14. Ibid, p. 18.

15. Ibid, p. 18.

16. Ibid, p. 18.

2.11 In 1955, that is two years after Mr Fisher's report was published, the International Bank for Reconstruction and Development (IBRD) held a contrary view, particularly over his (Fisher's) recommendation on timing when it (IBRD) "recognised the increasingly rapid strides towards self-government"[17] in Nigeria. The IBRD had argued that:

> "the continued political and economic advancement in Nigeria is bound to lead to the establishment of a central bank. To postpone the day when functions of currency issue and the management of foreign assets are performed in Nigeria will also postpone the day when Nigerians will be able to perform these functions responsibly by themselves".[18]

The IBRD consequently recommended the establishment of a 'State Bank of Nigeria' with limited functions. The functions, according to the recommendation, would include:[19]

(1) the right to issue currency;

(2) to serve as a depository of the funds of the Government and their agencies;

(3) to receive deposits from other banks;

(4) to regulate the operations of the banks in the system and to purchase and sell Government securities;

(5) that the Nigerian authorities should seek for expert assistance from monetary authorities in the United Kingdom or from the International Monetary Fund (IMF).

2.12 Following the IBRD's report, the Nigerian Colonial Government, then headed by the Governor-General, Sir J Robertson, invited Sir J B Loynes in 1957 to report on a number of financial matters in the light of the recommendations of the 1953 Mission of the IBRD. It must be emphasised that Sir J B Loynes's task was different from that of Mr Fisher. While Mr Fisher's task was to inquire into the desirability and practicability or otherwise of establishing a central bank in Nigeria, Sir J B Loynes was told by

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17. Report of the International Bank for Reconstuction and Development, The Economic Development of Nigeria (1955) (John Hopkins Press), p. 97.

18. Ibid, p. 97.

19. Ibid, p. 97.

the Colonial Authorities that there would be a central bank and all he was required to do was to report on specific issues aimed at finding the best method of implementing the decision. This view is supported by the terms of reference of Sir J B Loynes's appointment which state:

> "Having regard to the political and economic development of Nigeria, to the existing organization of banking and currency and to the importance of maintaining monetary stability at home and the credit standing of Nigeria abroad; and in the light of the recommendation of the 1953 Mission of the IBRD - to advise on
>
> **1.** the establishment of a federal institution to perform appropriate central banking functions;
> **2.** the introduction of a Nigerian Currency; and the administration of such a currency so as to preserve its external value and its acceptability within the country;
> **3.** the relationship of the federal institution to the Federal and Regional Governments, to Government institutions, to the commercial banks and to the public; and
> **4.** the role of such an institution in the development of a local money and capital market".[20]

2.13 Sir J B Loynes's report, while agreeing with the IBRD's recommendation on the establishment of a central bank for Nigeria (IBRD called it 'State Bank of Nigeria'), disagreed with IBRD's recommendation that the central bank should be given limited functions initially. Sir J B Loynes, in his report, said:

> "I believe that a central bank in Nigeria should be able to build for the future in the knowledge of its lasting powers and responsibilities. It seems both an act of good sense and of confidence to legislate for a long period ahead rather than impose a narrow framework which the bank may soon outgrow".[21]

Other recommendations of Sir J B Loynes included:

1. powers of the central bank over the issue of national currency;
2. the central bank's role as the banker to the Government and other banks;
3. the central bank's role in promoting monetary stability;

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20. Loynes, J B, Report on the Establishment of the Nigerian Central Bank, The Introduction of a Nigerian Currency and Other Associated Matters (1957) (University of Lagos Library edition).

21. Ibid, p. 4.

4. ownership and control of the central bank,
5. capital structure of the central bank.

2.14 Following Sir J B Loynes's report, which the Colonial Administration accepted, the Government simultaneously enacted the Central Bank of Nigeria Act 1958[22] and the Banking Act 1958.[23] While the former dealt with the establishment and organisation of the Central Bank of Nigeria, the latter concerned itself primarily with the rules under which the commercial banks should operate.[24]

Objectives and Functions of the Central Bank of Nigeria

2.15 Section 4 of the Central Bank Act 1958[25] provides the principal objectives of the Central Bank of Nigeria (CBN) as follows:

1. to issue legal tender currency in Nigeria;
2. to maintain external reserves in order to safeguard the international value of the currency;
3. to promote monetary stability and sound financial structure in Nigeria; and
4. to act as banker and financial adviser to the Federal Government.

2.16 These objectives, which have remained unchanged in the subsequent statutes of the CBN, have one feature in common: they are of a very limited scope. Except the fourth objective - acting as banker and financial adviser to the Federal Government -

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22. Laws of the Federation 1958 Cap. 30. This was repealed and replaced by the Central Bank of Nigeria Decree, 1991.

23. Laws of the Federation 1958 Cap. 19. This was repealed and replaced by the Banks And Financial Institutions Decree, 1991.

24. See the Central Bank of Nigeria Journal, Twenty Years of Central Banking in Nigeria 1959-1979, p. 37 for a more comprehensive account of the development.

25. This provision is exactly the same with section 2 of the Central Bank of Nigeria Decree, 1991.

the rest were essentially the objectives and functions of the replaced West African Currency Board.[26] Certain contemporary roles of a central bank such as:

1. organisation and provision of development finance;

2. acting as agent for the Government;

3. the development of research and procurement of monetary data and statistics on the economy; and

4. the development and control of the financial system;

would all appear not to be covered by Section 4 of the CBN Act 1958 and its subsequent amendments. Although these objectives may be subsumed under the third objective - promotion of monetary stability and sound financial structure in Nigeria[27] - there is clear evidence to show that the failure to mention them in the statute and its subsequent amendments was deliberate.[28] Sir J B Loynes, in making his recommendations for the setting up of a central bank for Nigeria, did not want to deviate so much from the earlier report of the IBRD which recommended inter alia the setting up of a 'State Bank of Nigeria with limited functions'. It was then felt that it was not proper to saddle a central bank with such functions given the level of the indigenous banking system. But why the position has remained unchanged, given the level of sophistication and operation in the banking industry coupled with an array of banking and financial experts within the CBN, still remains a mystery.

2.17 In pursuit of the above objectives of the CBN, including implied statutory roles, the CBN issues the naira notes and kobo coins, acts as banker of last resort to the other banks (ie commercial, merchant, and development banks), and operates as banker to the Government. Acting in an agency capacity, the CBN manages the national debt, represents the Government in international financial institutions such as the Interna-

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26. Nwankwo, G O, The Nigerian Financial System (1987) (Macmillan) p. 8.

27. Ibid, p. 8.

28. Brown, C V, The Nigerian Banking System (1966) (George Allen & Unwin), p. 136.

tional Monetary Fund (IMF), the World Bank and its specialized organs, administers foreign exchange regulations and helps in formulating and implementing monetary policies.

2.18 The CBN, in its efforts to develop a sound financial system, regulates and supervises the operations of the commercial banks, merchant banks, etc by ensuring their compliance with the banking legislation in all matters relating to capitalization, lending, maintenance of certain operational ratios like cash and liquidity ratios, branch opening and closure and other conditions necessary for a sound banking environment.

2.19 The provision of development finance is, as I stated under the modern role of the CBN, also undertaken by the CBN through its issue of financial instruments like treasury bills and certificates, Government stock, etc. These activities have in no small measure enhanced the development of local money and capital markets. Other developmental and promotional roles include granting assistance to the Government in the fulfilment of its goals of economic development, and this the CBN has been doing in two ways. The first is by making credits available for the financing of Government projects and programmes of economic development. The second way is by promoting and developing the structure of institutional facilities such as the establishment of the Nigerian Industrial Development Bank (NIDB), the Nigerian Bank for Commerce and Industry (NBCI), etc.

2.20 All these functions the CBN has embarked on primarily to make the financial resources readily available with a view to creating a better banking environment which would ultimately lead to developing a sound and viable economic structure for Nigeria.

The Achievements of the Central Bank of Nigeria

2.21 Judging by the objectives and functions of the CBN which I have discussed, it would appear that the institution as a prime bank of Nigeria has done creditably well. It has, for example, between 1958 and 1993 successfully issued and replaced five tender currencies. It has adequately safeguarded and defended the international value of the Nigerian currency. It has, with the assistance of the Federal Ministry of Finance and the determination of Nigerians, tried to shape the economic destiny of the country. The CBN has been of tremendous assistance especially to the Government, not only in making credits available for the financing of Government deficits on a continuously increasing scale, but it also has sponsored and promoted active money and capital markets through which funds are made available for financing Government debts.[29]

2.22 Others of its numerous achievements include its assistance in the indigenisation of the banks, assistance in the development of banking habits and culture in Nigerians, insistence on the mandatory establishment of rural branches by the commercial banks, the development of manpower for the banking industry through taking a leading and active part in the affairs of the Financial Institutions Training Centre (FITC) Lagos, and the Nigerian Institute of Bankers (NIB) Lagos.

2.23 In order to make monetary and financial information readily available, the CBN has established and developed a strong and enviable research department which primarily concerns itself with research on economic and financial matters. This department has been of great assistance to the nation in the formulation of its monetary, financial and economic policies, as well as to the banking institutions, foreign and local investors and scholars.

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29. Olalokun, F A, Structure of the Nigerian Economy (1988) (University of Lagos Press), p. 178.

The Commercial Banks

2.24 The term 'commercial bank' is defined by the Banks And Other Financial Institutions Decree 1991 as:

> "any bank, in Nigeria, and whose business includes the acceptance of deposits withdrawable by cheque"[30]

The same Decree went on to define the term 'banking business' as:

> "the business of receiving deposits on current account, savings account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance or such other business as the Governor may, by order publish in the Gazette, designate as banking business".[31]

The word "Governor" means the Governor or any of the Deputy Governors of the Central Bank of Nigeria.[32]

Historical Background of the Commercial Banks in Nigeria

2.25 The history of commercial banking in Nigeria dates back to 1892. The establishment of the first commercial bank - the African Banking Corporation (ABC) - in Lagos in 1892 was necessitated by the activities of the transnational corporations, the financial transactions of the Nigerian Colonial Government, the decline of the barter system of trade, the gradual acceptance of the British Silver Currency and the expansion of trade in Lagos and the hinterland in the 1880s and 1890s. But all these developments could not have caused the establishment of the African Banking Corporation, at least not by 1892, but for the energy, drive and initiative of the local agent of Elder Dempster and Company, Mr George William Neville, who saw in these developments the need

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30. See s. 61 of the Banks and Other Financial Institutions Decree, 1991.

31. Ibid.

32. Ibid.

for settled cash transactions in Nigeria and for the beginning of a bank.[33] It may be necessary to point out that Elder Dempster and Company, a shipping firm which operated steamship services between Liverpool in the United Kingdom and West Africa, had firmly established itself in Lagos before 1825. On noticing the need for the establishment of a bank in Lagos, though based more on the economic gains to his company than anything else, Mr Neville urged and persuaded Sir Alfred Jones, then Chairman of Elder Dempster, to set up a commercial bank in Nigeria. Based on the facts and figures made available to him, Sir Alfred had no difficulty in persuading the African Banking Corporation, then operating in South Africa, to widen its interest by opening a branch in Lagos, Nigeria. This was done in August 1891, and Mr Neville was appointed its first manager, but the right to import silver coin from the mint in the United Kingdom for use in Nigeria was not given to the bank until January 1892 when it then officially commenced business.

2.26 The delay in securing the right to import silver coin dampened the enthusiasm of the African Banking Corporation which began to wonder whether the decision to extend its activities to Lagos was in fact a wise one. To make matters worse, Lagos was at about the same time hit by trade recession caused by the local uprising between the Ijebus and Egbas in March 1892, which uprising made the movement of persons and goods very risky. While this was going on, the Nigerian traders started wondering whether the role of Mr Neville as a trader (local representative of Elder Dempster and Company) and manager of the African Banking Corporation did not amount to unfair competition to them. Petitions were then forwarded to the Colonial Office complaining of Mr Neville's position. Following these developments, Mr Neville recommended to Sir Alfred that the African Banking Corporation be taken over by Elder Dempster and Company which Sir Alfred accepted. The Bank was consequently taken over by Elder Dempster and Company for a consideration of one thousand pounds (£1,000.00) which was paid to the African Banking Corporation. Elder Dempster and Company operated

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33. Okigbo, op cit, p. 76.

the Bank as a private bank until December 1892 when at the request of the Colonial Administration in Lagos through the Crown Agents, a joint stock bank was incorporated in London, known as the Bank of British West Africa (now known as and called First Bank of Nigeria Limited) on March 1894 with an authorized capital of one hundred thousand pounds (£100,000.00) of which thirty thousand pounds (£30,000.00) was called up and twelve thousand pounds (£12,000.00) paid up.[34] The Bank of British West Africa (BBWA) opened its first branch in Lagos immediately after incorporation while the second branch which was cited in Old Calabar was opened in 1900.[35]

2.27 Another bank called the Anglo-African Bank was established in 1899 in the Old Calabar by the Royal Niger Company (now called the United African Company (UAC)) to compete with BBWA. The Bank subsequently changed its name to the Bank of Nigeria and opened up branches in Brutu, Lokoja and Jebba. However, due to fierce competition and the monopoly for the importation of silver coin enjoyed by BBWA, they sold out to BBWA in 1912.

2.28 Five years later (ie in 1917), another bank known as Barclays Bank DCO (Dominion, Colonial and Overseas) opened its first branch in Lagos and subsequently opened nine other branches in different parts of Nigeria. This bank later changed its name and it is today known as the Union Bank of Nigeria Limited. Up until the late 1930s the business of commercial banking in Nigeria was in the hands of these two expatriate banks, the Bank of British West Africa (BBWA) and Barclays Bank (Dominion, Colonial and Overseas). In 1949 another expatriate bank, the British and French Bank, was established in the country.

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34. Ibid, p. 78.

35. Adekanye, F, Elements of Banking in Nigeria (1986) (Graham Burn), p. 167.

2.29 The first indigenous bank in Nigeria, contrary to views held by some writers, was the Industrial and Commercial Bank which was established in 1929.[36] This was quickly followed by the establishment of other indigenous banks, namely:

1. The Nigerian Mercantile Bank, 1931
2. The National Bank of Nigeria, 1933
3. The Agbonmagbe Bank (now Wema Bank), 1945
4. The Nigerian Penny Bank, 1948
5. The Nigerian Farmers and Commercial Bank, 1947
6. The African Continental Bank, 1947
7. The British and French Bank, 1948
8. The Pan Nigerian Bank, 1951
9. The Standard Bank of Nigeria, 1951
10. The Premier Bank, 1951
11. The Nigerian Trust Bank, 1951
12. The Afroseas Credit Bank, 1951
13. The Onward Bank, 1951
14. The Central Bank of Nigeria, 1951[37]
15. The Provincial Bank of Nigeria, 1952
16. The Metropolitan Bank of Nigeria, 1952
17. The Merchants Bank, 1952[38]

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36. Source: Central Bank of Nigeria Journal: Economic and Financial Review, vol. 6, No 1, 1968, p. 13. The Industrial and Commercial Bank, which came into existence in 1929, represented the effort of Nigerian traders to establish their own banks. This bank went under in 1930. See also Okigbo, op cit, p. 86. See also Nwankwo, op cit, p. 46. Brown, op cit, p. 25 was not, with due respect, stating the correct position when he implied that the National Bank of Nigeria, which came into existence only in 1933, was the first Nigerian indigenous bank.

37. There is no relationship whatsoever between this commercial bank, which was established in 1951 but which went under in 1954, and The Central Bank of Nigeria (CBN) which was established by the CBN Act of 1958 and which commenced operations on 1 July 1959.

38. Note that this bank is not a merchant bank but a commercial bank and has no relationship with merchant banks which came into existence in Nigeria for the first time in the early 1960's.

18. The Union Bank of British Africa, 1952

19. The United Commercial (Credit) Bank, 1952

20. The Cosmopolitan Credit Bank, 1952

21. The Mainland Bank, 1952

22. The Group Credit Bank, 1952

23. The Industrial Bank, 1952

24. The West African Bank, 1952

2.30 The period up until early 1952 was one during which the Government pursued a non-interventionist policy in the business of commercial banking. The period was thus one of unregulated banking and subsequent inevitable mass failure of banks. The situation was aptly summarized by an official of the Federal Ministry of Finance as follows:

> "Like a bolt from the blue, the authorities were faced with an intolerable and chaotic banking situation. Mushroom institutions with signboards across derelict windows called themselves banks ... The situation was aggravated by the very late reaction from the authorities who at the eleventh hour recognised the need for regulating banking business by specific legislations".[39]

2.31 It is very remarkable to note that by 1954 twenty-one out of the twenty-five indigenous banks had gone into liquidation with sixteen of them collapsing in 1954 alone. A number of reasons had been attributed to this mass failure such as fierce competition with the very experienced and relatively sophisticated expatriate banks, undercapitalisation, rapid expansion and absence of knowledge and skill required for the banking industry. Other reasons were most clearly expressed in the Standard Bank's winding-up notice which appeared in the Daily Times newspaper of 24 September 1952.

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39. Ayida, A A, A Critical Analysis of the Banking Trends in Nigeria (1960). Seminar paper delivered at the Nigerian Institute of Social and Economic Research (NISER), p. 30.

It states:

> "The Standard Bank of Nigeria Limited cannot by reasons of its liabilities, persistent stealing, bad management, inexperienced accounting and other difficulties carry on its business"[40]

2.32 The unregulated and chaotic banking environment during this period led the Colonial Government to appoint Mr G O Panton to look into the existing state of banking in Nigeria and make recommendations. It was the recommendations of Mr Panton that formed the basis of the first ever legislation regulating banking business in Nigeria, titled 'An Ordinance for the Regulation of the Business of Banking', which was passed in May 1952.[41] The Act made far-reaching changes in the business of commercial banking. For example, Section 2 (1) of the Act prohibited the formation of a banking company or partnership consisting of more than ten persons for the purpose of carrying on the business of banking unless it was registered as a company. It also provided that before such a proposed company was registered it must possess a nominal capital of between thirty thousand naira (N30,000.00) and fifty thousand naira (N50,000.00) with at least fifty percent (50%) of this amount paid up and in cash. Furthermore, the Act provided that, even after registration, the new banking company must seek for and obtain a valid licence from the Colonial Financial Secretary. The Colonial Financial Secretary on his own part can only grant this after ensuring that the new bank maintained a satisfactory degree of liquidity.

2.33 Following the attainment of independence in 1960, preceded by the establishment of the Central Bank of Nigeria in 1958, together with the numerous banking enactments which began in 1952, and the sheer determination of nationalists, the period 1959-1970 witnessed the establishment of new banks despite the great collapse of commercial

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40. Daily Times Newspaper of 24 September 1952, p. 1. The winding-up statement of Standard Bank of Nigeria Limited is further reinforced by the case of The Queen v. Patrick Jacob Osoba (1961) 1 All NLR 1, in which the banking licence of Merchants Bank was withdrawn in 1960.

41. Panton, G D, Report on Banking in Nigeria (1948) (Government Printer Lagos).

banks from the 1930s to early 1950s. The Nigerian Enterprises Promotion Decree 1972, was repealed and replaced by the Nigerian Enterprises Promotion Act 1977.[42] In Schedule 2 of that Act banking (all types, ie commercial, merchant, and development banking) was included as one of those enterprises in which Nigerians must have a sixty percent (60%) equity interest, and this acted as a booster to the 'proliferation' of commercial banks in Nigeria which reached its climax in the late 1980s with the introduction of the Structural Adjustment Programme (SAP) by the Federal Military Government of Nigeria late in 1986. With only two commercial banks in Nigeria up until the 1930s, Nigeria had, as at December 1992, 66 banks.[43] The banks are:

1. Access Bank Nigeria Limited
2. Afribank Nigeria Public Limited Company
3. African Continental Bank Public Limited Company
4. African International Bank Limited
5. Amicable Bank of Nigeria
6. Allied Bank Limited
7. Allstates Trust Bank Limited
8. Bank of the North Limited
9. Broad Bank of Nigeria Limited
10. Chartered Bank Limited
11. Citizens International Bank Limited
12. Commerce Bank Limited
13. Commercial Bank (Credit Lyonnais) Limited
14. Commercial Bank of Africa Limited

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42. Note that the Nigerian Enterprises Promotion Act (NEPA) 1972 did not include banking as one of those businesses affected. It was not until the 1977 amendment of the said Act that banking business was incorporated. The NEPA 1989 repealed and replaced the 1977 NEPA amendment.

43. Source: The Nigeria Deposit Insurance Corporation 1992 Annual Report pp. 70-72. More commercial banks are expected to come into existence in the near future as the Central Bank of Nigeria is already processing some applications for banking licence.

15. Commercial Trust Bank Nigeria Limited
16. Cooperative Bank Limited
17. Cooperative and Commerce Bank Limited
18. Cooperative Development Bank Limited
19. Credite Bank Nigeria Limited
20. Crystal Bank of African Limited
21. Diamond Bank Limited
22. Ecobank Nigeria Limited
23. Eko International Bank Public Limited Company
24. Equitorial Trust Bank Limited
25. First African Trust Bank Limited
26. First Bank of Nigeria Public Limited Company
27. FSB International Bank Limited
28. Gamji Bank of Nigeria Limited
29. Gateway Bank Nigeria Limited
30. Guaranty Trust Bank Limited
31. Gulf Bank of Nigeria Limited
32. Habib Nigeria Bank Limited
33. Hallmark Bank Limited
34. Highland Bank Nigeria Public Limited Company
35. Intercity Bank Limited
36. Inland Bank Nigeria Limited
37. Lion Bank of Nigeria Public Limited Company
38. Lobi Bank of Nigeria Public Limited Company
39. Magnum Trust Bank Limited
40. Mercantile Bank of Nigeria Public Limited Company
41. Meridien Equity Bank of Nigeria Limited
42. National Bank of Nigeria Limited
43. New Nigeria Bank Public Limited Company

44. Nigeria Arab Bank Limited

45. Nigeria International Bank Limited

46. Nigeria Universal Bank Limited

47. North-South Bank Limited

48. Oceanic Bank International Nigeria Limited

49. Orient Bank Nigeria Public Limited Company

50. Owena Bank Public Limited Company

51. Pan African Bank Limited

52. Pinacle Commercial Bank Limited

53. Premier Commercial Bank Limited

54. Progress Bank of Nigeria Public Limited Company

55. Republic Bank Limited

56. Savannah Bank Nigeria Limited

57. Societe Generale Bank of Nigeria Limited

58. Trade Bank Public Limited Company

59. Trans International Bank Limited

60. Tropical Commercial Bank Limited

61. Union Bank of Nigeria Public Limited Company

62. United Bank for Africa Public Limited Company

63. United Commercial Bank Limited

64. Universal Trust Bank Limited

65. Wema Bank Public Limited Company

66. Zenith International Bank Limited.

The Outline of the Objectives and Functions of the Commercial Banks

2.34 The objectives of the commercial banks as recommended by the Financial System Review Committee Report,[44] which the Federal Government accepted, include (but are not limited to):

1. actively facilitating the transformation of the rural environment by promoting the rapid expansion of banking habits in the rural and near rural communities. They will thus serve as paying and receiving stations for hand-to-hand currency and provide facilities for remittances to and from the rural areas;

2. providing savings deposit facilities for their customers and thereby help to mobilise rural savings;

3. serving as vehicles for the creation of credit in the rural areas in the form of equity and loans for small scale farmers and entrepreneurs;

4. to the extent that is consistent with banking prudence, increasingly undertaking more medium- and long-term lending even though most of the short-term lendings end up acquiring the character of long-term lending;

5. fully identifying themselves with the avowed national objectives and the Nigerian aspirations by taking a more active part in the financing of economic programmes of national importance;

6. localising their decision-making machinery so as to avoid the possibility of major banking institutions being manipulated to the disadvantage of Nigerians;

7. using a significant part of their profits to improve the quality of the services they offer.

2.35 In pursuit of the above objectives the commercial banks have, given their organisational structure and philosophy, rendered the following services:

1. mobilization of savings and other deposits;

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44. See The Federal Government of Nigeria White Paper on the Report of the Financial System Review Committee (1976) (Government Printer Lagos).

2. provision of credit facilities to customers;

3. provision of the structure for the transfer of funds;

4. provision of foreign exchange facilities for travellers;

5. provision of business status reports and references;

6. provision of facilities for the financing of international trade;

7. creation of money (but not minting);

8. the provision of management for the customers' investments including insurances;

9. provision of brokerage services (eg buying and selling of stocks and shares for their customers);

10. provision of night safe facilities;

11. provision of facilities for the custody and safe-keeping of valuables;

12. provision of business advisory services.

Structure of Nigerian Commercial Banking

2.36 The structure of Nigerian commercial banking reflected that prevailing in Britain. This should not be surprising as Nigeria was once a British colony. In fact, most British West African countries adopted the British structure of commercial banking known as 'Branch Banking'. Branch banking is a system whereby a single banking company would have branch offices in a city, state, or in another state depending on the banking law of that country, with all the branches being centrally controlled.

2.37 In the United States of America, however, a different banking structure known as 'Unit Banking' is commonly practised. Unit banking is a system whereby banking services are provided by a single office institution. The banking institutions, though they may have branches, are generally confined to the state boundaries of the parent company. Sometimes branches may be opened in other states or cities but this is not common. The USA's commercial banking is also sometimes referred to as 'Dual

System Banking' which simply means that commercial banks are subject to both the Federal and State regulatory control.

Achievements of the Commercial Banks in Nigeria

2.38 Despite the numerous problems facing the commercial banks in Nigeria, such as a high rate of inflation, unwillingness of borrowers to repay their loans and other facilities, poor banking habits and culture, an undeveloped communication network, unstable political environment, erratic monetary policies, etc, they have, on the whole, achieved a lot. They have been able to extend credits to numerous customers resulting in improvement to the economy. They have also been able, through direct contact with the people, to develop potential deposits and banking habits and culture thus mobilizing domestic savings. They have been able to reduce unemployment, especially in the 1980s, through the employment of personnel which was made possible by their rapid expansion. Commercial banks have been known to identify themselves with the economic policies of the Government by making facilities available to them. They have also been known to assist social clubs, educational and health institutions by either sponsoring projects or making donations or extending credit facilities without insisting on their stringent lending conditions. They have also been known to alleviate the problems of the rural dwellers by the provision of finance for water, electricity and roads. Commercial banks have also lent their support towards the Government literacy campaign aimed at ensuring that a large percentage of Nigerians are educated. This is in addition to their own in-house manpower development programmes.

The Merchant Banks

2.39 The term 'merchant bank' has been defined as:

> "a bank whose business includes receiving deposits on deposit account, provision for finance, consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person".[45]

It is necessary to point out here that merchant banks were the only banks statutorily allowed to engage in equipment leasing until January 1990 when commercial banks were permitted to engage in the business following protests from individuals and pressure from commercial banks. Thus the Federal Government of Nigeria Credit Policy Guidelines for 1990 Fiscal Year, otherwise known as Monetary Policy Circular No 24, 1990, states at page 5:

> "In line with the policy of enhancing the productive capacity of the private sector and the progressive liberalisation of the financial system for the achievement of greater competition and efficient allocation of resources, commercial banks shall, henceforth, be allowed to engage in equipment leasing."[46] (*emphasis mine*)

The Historical Background of Merchant Banking in Nigeria

2.40 To all intents and purposes, merchant banking in Nigeria is a development of the 1970s, even though the history dates back to 1960 when two financial institutions - Philip Hill Nigeria Limited and Nigerian Acceptances Limited - were registered to carry on merchant banking business in Nigerian. These two institutions (Philip Hill Nigeria Limited and Nigerian Acceptances Limited), which were incorporated in September and November 1960 respectively, merged in July 1969 in order to strengthen their equity base. After the merger, the new institution retained the name Nigerian Acceptances Limited (NAL) because the name was thought to be more acceptable as a Nigerian company. Nigerian Acceptances Limited continued to operate in Nigeria as the only

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45. Section 61 of BOFID, op cit. See also Padovan, J, New Influences in Merchant Banking (1977) (Bankers' Journal London).

46. Federal Military Government of Nigeria 1990 Credit Policy Guidelines.

merchant bank until 1973 when a licence to carry on merchant banking was granted to United Dominion Trust (UDT) Bank Nigeria Limited, which originally carried on business as a hire-purchase company financing vehicle advances to public servants, having been earlier incorporated in 1960 with the name Union Dominion Corporation. Following the restructuring of UDT Bank Nigeria Limited in 1977, it changed its name to Merchant Bank Limited. Two other banks - First National City Bank of New York and First National Bank of Chicago - were granted merchant banking licences in 1974. The former later folded up following its non-acceptance of the Federal Government's decision to participate in all foreign banks operating in Nigeria, while the latter subsequently changed its name to International Merchant Bank (Nigeria) Limited. In 1975 ICON Limited (Merchant Bankers) and Chase Merchant Bank (Nigeria) Limited started operation having been earlier granted licences. Chase Merchant Bank (Nigeria) Limited later changed its name in 1985 to Continental Merchant Bank. In 1979 the Nigerian-American Merchant Bank Limited, an affiliate of the First National Bank of Boston, was granted a licence. In 1982 five new banks were granted licences; they were:

1. Merchant Banking Corporation Nigeria Limited
2. Indo-Nigerian Merchant Bank Limited
3. Merchant Bank of Africa (Nigeria) Limited
4. First City Merchant Bank Limited
5. African Banking Consortium Merchant Bank.

2.41 In 1983 Grindlays Merchant Bank Limited was granted a licence and commenced operation in 1984. Between 1984 and December 1988 the following new banks were granted licences:

1. Abacus Merchant Bank Limited
2. Alpha Merchant Bank Limited
3. Crown Merchant Bank Limited
4. Financial Merchant Bank Limited
5. First Interstate Merchant Bank Nigeria Limited

6. Fidelity Union Merchant Bank Limited
7. Nigbel Merchant Bank Nigeria Limited
8. Nigerian Merchant Bank Limited
9. New African Merchant Bank Limited
10. Rims Merchant Bank Limited.

2.42 From January 1989 to December 1992,[47] thirty-two new merchant banks came into existence, bringing the total number to fifty-four. These include:

1. Centre-Point Merchant Bank Limited
2. Century Merchant Bank Limited
3. Citi-Trust Merchant Bank Limited
4. Devcon Merchant Bank Nigeria Limited
5. FBN (Merchant Bankers) Nigeria Limited
6. Industrial Merchant Bank Limited
7. Ivory Merchant Bank Limited
8. Kapital Merchant Bank Limited
9. Manufacturers Merchant Bank Limited
10. Lead Merchant Bank Limited
11. Metropolitan Merchant Bank Limited
12. Nationwide Merchant Bank Limited
13. Nigeria Intercontinental (Merchant Bankers) Limited
14. Pacific Merchant Bank Limited
15. Prime Merchant Bank Limited.
16. Afribank International Limited (Merchant Bankers)
17. Comet Merchant Bank Limited
18. Fountain Trust Merchant Bank Limited

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47. Source: The Nigeria Deposit Insurance Corporation 1992 Annual Report pp. 73-74. More merchant banks are expected in the near future as the Central Bank of Nigeria is already processing some applications for merchant banking licence.

19. Great Merchant Bank Limited
20. Group Merchant Bank Limited
21. Hillcrest Merchant Bank Limited
22. Liberty Merchant Bank Limited
23. Marina International Bank Limited (Merchant Bankers)
24. Merchant Bank of Commerce Limited
25. Midas Merchant Bank Limited
26. New World Merchant Bank Limited
27. Peak Merchant Bank Limited
28. Prudent Merchant Bank Limited
29. Royal Merchant Bank Limited
30. Societe Bancaire Nigeria Limited
31. Triumph Merchant Bank Limited
32. Victory Merchant Bank Limited

The Outline of the Objectives and Functions of the Nigerian Merchant Banks

2.43 Essentially the merchant banks in Nigeria are established in order to assist in the mobilization of funds and channelling the liquidity in the economy into medium- and long-term investments and also to perform other specialized services in the area of equipment leasing, debt factoring, investment management, unit trusts, project preparation and other related services.

2.44 In pursuit of the above objectives, the merchant banks have rendered services in the following areas:

1. Equipment leasing
2. Medium- and long-term financing
3. Loan syndication

4. Fund management on behalf of clients, such as pension funds, unit trusts and investment trusts

5. Corporate financial services, such as new stocks and bond issues, capital reconstructions, mergers and acquisitions

6. Dealing in quotated and unquoted investments

7. Acceptance of deposits from corporate clients

8. Dealing in foreign exchange and money market operations, etc

The Achievements of the Nigerian Merchant Banks

2.45 The achievements of the merchant banks in Nigeria are similar to those of the commercial banks earlier discussed. This is not to say that merchant banks are the same as commercial banks. As can be seen from the definition, merchant banks provide wholesale banking services unlike the commercial banks that offer retail banking services.

2.46 In addition to merchant banking's traditional functions (which most times overlap with commercial banking services but at different levels and degrees), the merchant banks have made tremendous improvements in their specialized services such as equipment leasing, syndication of loans, project financing and fund management. For example, between 1987 and 1990 the Nigerian-American Merchant Bank Limited financed the acquisition of the power generating business of Allied Oil Field by Leventis Technical Limited, as well as the acquisition of the Nigerian Soft Drinks Company Limited (Schweppes) by the Nigerian Bottling Company Limited. During the same period, Continental Merchant Bank Limited financed two aircraft leasing businesses, namely the acquisition of Boeing 747 aircraft from Eastern Airlines of United States of America by Kabo Airline Nigeria Limited and also the acquisition of five Brazilian-made Embraer passenger aircraft by Skypower Express Nigeria Limited. International Merchant Bank Limited, during the period under consideration, successfully initiated

and packaged the thirty million naira (N30,000,000.00) syndication on behalf of President Industries Nigeria Limited while First City Merchant Bank Limited successfully led the twenty million naira (N20,000,000.00) syndication for ENPEE Industries Limited.[48]

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48. Equipment Leasing Association of Nigeria (ELAN) Newsletter vol.1, no 1, 1988, p. 3.

The Development Banks

2.47 The term 'development bank' has been defined as a banking company that finances specific projects, particularly the types that private institutions cannot easily be induced to finance, especially when they are largely experimental in nature. Development banks in Nigeria are generally owned by either the Federal or State Governments.[49]

The Historical Development of Development Banks in Nigeria

2.48 Contrary to the view being held in certain quarters, that the first development bank in Nigeria was the Nigerian Industrial Development Bank (NIDB) established in 1964,[50] the first official development bank in Nigeria was the Nigerian Local Development Board (NLDB) established in 1946[51] with a capital of two thousand nine hundred and fifty million naira (N2,950,000,000.00) under the Ten-Year Plan for development (1946-1955). The second development bank was the Colony Development Board (CDB) established in 1949 which had a capital grant of one hundred thousand naira (N100,000.00) from the regular Government budget plus the Board's share of the assets of NLDB which had been shared among regional components in the country. Following the movement towards regionalization in Nigeria, NLDB was, in March 1949, supplemented by three regional development boards, in the East by the Eastern Nigeria Development Corporation (ENDC), in the West by the Western Nigeria Development Corporation (WNDC) and in the North by the Northern Nigeria Development Corporation (NNDC) and at the Centre in Lagos by CDB. The CDB was to operate within a ten-mile radius of Lagos to carry out the functions previously undertaken by NLDB in that area. The third development bank was the Federal Loans Board (FLB) which was established in May 1956 with an initial grant of six hundred thousand naira (N600,000.00) to take over from CDB.

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49. Nwankwo, op cit, pp. 95-98.

50. Adekanye, op cit, p. 217.

51. Okigbo, op cit, p. 130. See also Nwankwo, op cit, pp. 95-98.

2.49 Because the operations of these development banks were very wide with ill-defined responsibilities coupled with lack of managerial and technical competence, it was thought necessary to establish federal development banks with some form of specialization. Consequently, in 1964, the Nigerian Industrial Development Bank (NIDB) was established with initial equity capital of eight and a half million naira (N8,500,000.00). In 1973 the Federal Government established the Nigerian Bank for Commerce and Industry (NBCI) and the Nigerian Agricultural and Co-operative Bank (NACB) with equity capital of fifty million naira (N50,000,000.00) and twelve million naira (N12,000,000.00) respectively. The Federal Mortgage Bank (FMB) was established in 1976 with a capital grant of one hundred and fifty million naira (N150,000,000.00). It replaced and acquired the assets and liabilities of the old Nigerian Building Society (NBS) which was established in 1957 by the Nigerian Colonial Administration. The most recent addition to this group is the Peoples Bank of Nigeria (PBN) which was established by the Federal Government in 1990.

2.50 Today almost all states of the Federation have taken after the Federal Government by establishing development banks. These include:

1. Bauchi State Investment and Property Development Company Limited - Bauchi State
2. Adamawa Investment Company Limited - Adamawa State
3. Investment Trust Company Limited - Cross River State
4. Kwara Investment Company Limited - Kwara State
5. Lagos Building Investment Company Limited - Lagos State
6. New Nigeria Development Company Limited - Kaduna State
7. Niger State Development Company Limited - Niger State
8. Odua Investment Company Limited - jointly owned by Oyo, Ogun, Osun and Ondo States
9. Ondo State Investment Company Limited - Ondo State
10. Ogun State Industrial and Finance Corporation - Ogun State

11. Benue Investment Company Limited - Benue State

12. Universal Investment Development Company Limited - Edo State

13. Trans Investment Company Limited - Oyo State

14. Central Investment Company Limited - Enugu State

15. Development Finance and Investment Company Limited - Imo State

16. Kaduna Investment Company Limited - Kaduna State

17. Kwara State Agro Development Corporation - another Kwara State Development Bank.

18. Bornu Investment Company Limited - Bornu State

19. Sokoto Investment Company Limited - Sokoto State

20. Pabod Finance and Investment Company Limited - Rivers State

21. Northern Nigeria Development Bank Limited - jointly owned by all the states that constitute the old Northern Region of Nigeria

The newly created states would, like other states, soon incorporate their own development banks.

The Objectives and Functions of the Development Banks

2.51 The objectives and functions of a development bank vary from one state to another depending on the political and economic ambitions of each state or the institution setting it up. This is especially so when it is realised that the principal reason for setting up a development bank is to aid the Government in rendering financial assistance to those projects which the regular banks (commercial and merchant) would consider not lucrative and viable.

2.52 Generally, however, the objectives of a development bank primarily involve the financing and promotion of developmental projects in the country. In pursuit of these two broad objectives, the development banks render the following services among others:

1. provision of medium- and long-term finance for the public and private sectors of the economy
2. provision of an infrastructure for bringing into Nigerian funds from the international organisations such as the World Bank, International Monetary Fund, International Bank for Reconstruction and Development, etc
3. the identification of investment priorities in the economy
4. assistance to indigenous businesses, for example, by provision of consultancy services
5. the provision of loans for agricultural pruposes to states and other institutions for the development of all forms of agriculture
6. the provision of loans to states, institutions and individuals for the development of residential accommodations, industrial and commercial property
7. provision of managerial and technical advisers/partners to industrial and commercial establishements
8. promotion and development of projects.

Achievements of the Development Banks

2.53 The development banks have, in general terms, contributed immensely to the economic growth of the country. They have made tremendous progress towards their objectives through promotional activities whereby project promotion and formulation teams are sent to institutions, individuals and states to assist in identifying and formulating projects. They have been able to acquire and build residential housing for the citizens of Nigeria and also for commercial and industrial purposes. They have been

able to set up institutions such as commercial banks, marketing boards, industrial acquisition centres, breweries, farms and agro-allied industries, etc. Some development banks are known to have financed the building of roads, establishing schools, establishing chains of petrol/service stations, developing artisian village, aiding individuals and institutions to raise funds for industrial developments either directly or through other financial institutions. They have been able to attract and convince international financial institutions and countries to invest in Nigeria.

The Community Banks

2.54 The term "community bank" is defined by the Banks And Other Financial Institutions Decree 1991 as:

> " a bank whose business is restricted to a specified geographical area in Nigeria"[52]

2.55 The fundamental concept in community banking is that of a self-sustaining banking institution owned and managed by a community or a group of communities for the purpose of providing credit, deposit and some other limited banking services within its geographical area. The services of community banks are rendered largely on the basis of self-recognition and credit worthiness of their customers. In this respect they contrast with the near total reliance by the conventional banks on viable and negotiable securities as basis for granting credit facilities.

2.56 Community Banks may be owned by the following:

1. Community Development Associations;
2. Co-operative Societies;
3. Farmers Groups;
4. Age Grades;
5. Trade Groups;
6. Town Unions; and
7. Indigenes of and individuals within the community, except that no single individual should hold more than 5% of the shares of a community bank. It has to be pointed out also that two or more communities may if they so wish jointly own a community bank.

2.57 Before a community bank can commence business, it must be incorporated as a comunity bank company in order to vest it with the legal status to operate as a corporate

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52. Section 61 of Banks And Financial Institutions Decree 1991.

entity, obtain a community banking licence and must have a minimum paid-up share capital of two hundred and fifty thousand naira (N250,000.00).

Historical Development, Objectives And Functions Of Community Banks.

2.58 Community banking introduced in 1990 by the Federal Government of Nigeria is a novel concept in the Nigerian banking environment. The rationale behind the programme is to encourage development in the rural communities by the communities themselves rather than from an outside body or institutions. Thus the community banks are supposed to be tools for the financial and economic emancipation of their communities. The Central Bank of Nigeria has, following the introduction of these banks, phased out the mandatory Rural Banking Scheme of commercial banks which enjoined the commercial banks to open up branches in the rural communities. Commercial banks are, however, allowed to open new rural branches if they so wish but there is no more compulsion.

2.59 The principal objectives for establishing community banks include:

1. the promotion of rural development by providing financial and banking services (credit and deposit services) and other facilities to communities inadequately supplied with such services;

2. the rapid enhancement of the development of productive activities in the rural areas and hence improvement of the economic status of both the rural people and the rural areas; and

3. the promotion of the emergence of an effective and integrated national financial system that responds to the needs of the whole economy from the individual and grass-roots community levels through the Local Government Areas and State Governments to the National Government.

2.60 In accordance with its stated objectives, the community banks carry out the following functions:

1. accept various types of deposits such as savings and fixed deposits, from individuals and organisations;

2. issue redeemable debenture to interested parties to raise funds from members of the public;

3. receive money or collect proceeds of banking instrument on behalf of its customers;

4. provide ancillary banking services to its customers such as remittance of funds, safe deposit facilities, etc;

5. maintain and operate various types of accounts with or for other banks in Nigeria;

6. invest surplus funds of the bank in suitable instruments including placing such funds with other banks;

7. pay and receive interests as may be agreed between community banks and their customers;

8. provide credit to its customers, especially small and medium-scale enterprises based on its area of operation;

9. operate and supervise credit schemes for groups and other credit facilities designed to ensure access by its customers to farm inputs;

10. give guarantees in favour of its customers;

11. receive re-financing of other funds from National Board For Community Banks (NBCB) and other sources, private or public, on terms mutually acceptable to both the provider of the funds and the recipient community bank;

12. perform non-banking functions that promote grass-roots development such as support for individual and group formation activities which ensure individual and community participation, assistance to customers in marketing of agricultural, rural, industrial and other products.

2.61 In order to ensure that community banks do not deviate from the main purpose of setting them up, and to concentrate on the community service, they are not allowed to engage in sophisticated banking services like foreign exchange transactions, international commercial papers etc.

Achievements of Community Banks

2.62 The Community Banks though introduced in 1990, only one; the Alheri Community Bank in Kaduna State, was established that year. By December 1992, four hundred and two Community Banks were established by the thirty states of the federation and more are expected in the near future.[53] The existing ones as at 31st December, 1992 are:

Abia State:

1. Abriba Community Bank Limited
2. Akwete Community Bank Limited
3. Ariaria Community Bank Limited
4. Obia Community Bank Limited
5. Inner City Community Bank Limited
6. Ishiagu Community Bank Limited
7. Eziukwu-Aba Community Bank Limited
8. Ohafia Community Bank Limited
9. Ohaba Community Bank Limited
10. Olokoro Community Bank Limited
11. Ohamba Community Bank Limited
12. Amaoji Community Bank Limited
13. Ndioma Community Bank Limited
14. Umuariaga Community Bank Limited

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53. Source: The Nigeria Deposit Insurance Corporation 1992 Annual Report, pp. 56-63.

15. Isuikwuato Community Bank Limited
16. Ihechiowa Community Bank Limited
17. Arochukwu Community Bank Limited
18. Awon & Ebom Community Bank Limited
19. Ohazu Community Bank Limited
20. Ania Community Bank Limited
21. Aba Community Bank Limited
22. Afikpo Community Bank Limited
23. Umuofor Community Bank Limited
24. Uhie Community Bank Limited
25. Eneoha Community Bank Limited

Adamawa State:

26. Gombi Community Bank Limited
27. Jimeta Community Bank Limited
28. Song Community Bank Limited
29. Girei Community Bank Limited
30. Numan Community Bank Limited
31. Fufore Community Bank Limited
32. Ummah Community Bank Limited

Akwa Ibom State:

33. Ikot Ekpene Community Bank Limited
34. Ukanafun Community Bank Limited
35. Ituk Mbang Community Bank Limited
36. Uquo Community Bank Limited
37. Edeobom Community Bank Limited
38. Edem Aya Community Bank Limited
39. Uforo Community Bank Limited
40. Urue Offong Oruku Community Bank Limited
41. Ibiono Ibom Community Bank Limited

42. Essien Udim Community Bank Limited
43. Mbiaya Community Bank Limited
44. Eti-Etop Community Bank Limited
45. Oron Community Bank Limited

Anambra State:

46. Abatete Community Bank Limited
47. Awka Community Bank Limited
48. Awka Etiti Community Bank Limited
49. Enugu Uku Community Bank Limited
50. Onyesom Community Bank Limited
51. Ihiala Community Bank Limited
52. Isuofia Community Bank Limited
53. Nnobi Community Bank Limited
54. Oba Community Bank Limited
55. Obosi Community Bank Limited
56. Okpoko Community Bank Limited
57. Oraifite Community Bank Limited
58. Oraukwu Community Bank Limited
59. Osumenyi Community Bank Limited
60. Otunkwa Community Bank Limited
61. Ufuma Community Bank Limited
62. Umuchu Community Bank Limited
63. Umunze Community Bank Limited
64. Uli Community Bank Limited
65. Abagana Community Bank Limited
66. Umuawulu Community Bank Limited
67. Ukpor Community Bank Limited
68. Ifetedunu Community Bank Limited
69. Ado Community Bank Limited

70. Ntueke Community Bank Limited
71. Umuoji Community Bank Limited
72. Obeledu Community Bank Limited
73. Nri Community Bank Limited
74. Amesi Community Bank Limited
75. Enugwu-Adazi Community Bank Limited
76. Ochanja Community Bank Limited
77. Okija Community Bank Limited
78. Ukpo Community Bank Limited
79. Igbo-Ukwu Community Bank Limited
80. Ekwulobia Community Bank Limited
81. Uga Community Bank Limited
82. Ibeto Community Bank Limited

Bauchi State:

83. Gamaki Community Bank Limited
84. Gombe United Community Bank Limited
85. Kumo Community Bank Limited
86. Misau Community Bank Limited
87. Shongom Community Bank Limited
88. Bajama Community Bank Limited
89. Ningi Community Bank Limited

Benue State:

90. Etulo Community Bank Limited
91. Ipav-Mkar Community Bank Limited
92. Mbayion Community Bank Limited
93. Owukpa Community Bank Limited
94. Ushongo Community Bank Limited
95. Kunav Community Bank Limited
96. O.A.U. Community Bank Limited

97. Mbagen Community Bank Limited

98. Otukpo Abakwu Community Bank Limited

99. Katsina-Ala Community Bank Limited

Cross River State:

100. Iwarev Community Bank Limited

101. Shaya Community Bank Limited

102. Mbaikyaa Community Bank Limited

103. Bensoya Community Bank Limited

104. Mbatyav Community Bank Limited

Borno State:

105. Yerwa Community Bank Limited

Cross River State:

106. Akin Community Bank Limited

107. Mbukpa Area Community Bank Limited

108. Calabar Community Bank Limited

Delta State:

109. Aniocha Community Bank Limited

110. Ezechi Community Bank Limited

111. Isoko Community Bank Limited

112. Ogwashi-Uku Community Bank Limited

113. Oshimili Community Bank Limited

114. Owa Community Bank Limited

115. Ubulu Community Bank Limited

116. Emede Community Bank Limited

117. Udu Community Bank Limited

118. Agborka Community Bank Limited

119. Umunded Community Bank Limited

120. Ughelli Community Bank Limited

121. Koko Community Bank Limited

122. Emevor Community Bank Limited

123. Ezi Community Bank Limited

124. Ughievwen Community Bank Limited

Edo State:

125. Esan Community Bank Limited

126. Egueben Community Bank Limited

127. Irrua Community Bank Limited

128. Obeidu Community Bank Limited

129. Unity Community Bank Limited

130. Uda Community Bank Limited

131. Albiokunla Community Bank Limited

132. Okogbo Community Bank Limited

133. Sakponba Community Bank Limited

134. Uromi Community Bank Limited

135. New Benin Community Bank Limited

136. Ogbewase Community Bank Limited

Enugu State:

137. Ekulu Community Bank Limited

138. Ngwo Community Bank Limited

139. United Uwani Community Bank Limited

140. Emene Community Bank Limited

141. Ogui-Urban Community Bank Limited

142. Abakpa Nike Community Bank Limited

143. Egede Community Bank Limited

Imo State:

144. Akabo Amata Community Bank Limited

145. Akwokwa Community Bank Limited

146. Amaifeke Community Bank Limited

147. Amaigbo Community Bank Limited

148. Amurie Omanze Community Bank Limited

149. Ebenator Community Bank Limited

150. Emekuku Community Bank Limited

151. Home trust Community Bank Limited

152. Ihioma Community Bank Limited

153. Isiala Mbano Community Bank Limited

154. Ogbaku Community Bank Limited

155. Ogbe Community Bank Limited

156. Okigwe Community Bank Limited

157. Omuma Community Bank Limited

158. Orodo Community Bank Limited

159. Osina Community Bank Limited

160. Owerri Community Bank Limited

161. Umuaka Community Bank Limited

162. Umubu-Okabia Community Bank Limited

163. Urualla Community Bank Limited

164. Okporp Community Bank Limited

165. Nwabosi Community Bank Limited

166. Ekwe Community Bank Limited

167. Dike Nafai Community Bank Limited

168. Nnarambia Community Bank Limited

169. Uratta Community Bank Limited

170. Enyiogugu Community Bank Limited

171. Nsu Community Bank Limited

172. Obizi Community Bank Limited

173. Amuzi Community Bank Limited

174. Amiri Community Bank Limited

175. Ihileoha Community Bank Limited

176. Umuokirika Community Bank Limited

177. Ekwereazu East Community Bank Limited

Jigawa State:

178. Birni Kudu Community Bank Limited

Kaduna State:

179. Alheri Community Bank Limited

180. Amana Community Bank Limited

181. Birni Community Bank Limited

182. Gwong Community Bank Limited

183. Himma Community Bank Limited

184. Mutunchi Community Bank Limited

185. Balera Community Bank Limited

186. Karkara Community Bank Limited

187. Jama'a Community Bank Limited

188. Ni'ima Community Bank Limited

189. A. B. U. Community Bank Limited

190. Jere Community Bank Limited

191. Bajju Community Bank Limited

192. Giwa Community Bank Limited

193. Haske Community Bank Limited

Kano State:

194. Mainagge Community Bank Limited

195. Sharcity Community Bank Limited

196. Dan Marke Community Bank Limited

197. Kiru Community Bank Limited

198. Gandu Community Bank Limited

199. Wudil Community Bank Limited

200. Dawanan Community Bank Limited

201. Alfijir Community Bank Limited

202. Durasa Community Bank Limited

203. Matasa Community Bank Limited

204. Zumunta Community Bank Limited

205. Sumaila Community Bank Limited

Katsina State:

206. Kurfi Community Bank Limited

207. Garewa Community Bank Limited

208. Hinache Community Bank Limited

209. Jibia Community Bank Limited

210. Bakori Community Bank Limited

211. Albarka Community Bank Limited

212. Kankia Community Bank Limited

213. Kankara Community Bank Limited

Kebbi State:

214. Argungu Community Bank Limited

215. Kangiwa Community Bank Limited

216. Aliero Community Bank Limited

217. Yawuri Community Bank Limited

218. Jega Megaji Community Bank Limited

219. Kebbi Community Bank Limited

220. Kalgo Community Bank Limited

221. Gwandu Community Bank Limited

Kogi State:

222. Avabe Community Bank Limited

223. Egbe Community Bank Limited

224. Ihima Community Bank Limited

225. Inye Community Bank Limited

226. Ogugu Community Bank Limited

227. Isanlu Community Bank Limited

228. Ovidi Community Bank Limited

229. Ekinnin Adde Community Bank Limited

Kwara State:

230. Gerri Alimi Ifedayo Community Bank Limited

231. Omu Aran Community Bank Limited

232. Afonja Community Bank Limited

233. Balogun Fulani Community Bank Limited

234. Ilofa Community Bank Limited

235. Erin-Ile Community Bank Limited

236. Offa Community Bank Limited

Lagos State:

237. Iwaya/Makoko Community Bank

238. Shomolu Community Bank

239. Sabo Community Bank

240. Igbobo Community Bank

241. Idimu Community Bank

242. Odofin Community Bank

243. City Community Bank

244. Iva Community Bank

245. Ijeshatedo Community Bank

246. Ogba Community Bank

247. Alimoso Community Bank

248. Agege Community Bank

249. Ifesowapo Community Bank

250. Oworonshoki Community Bank

251. Independent Community Bank

252. Dopemu Community Bank

253. Satelite Town Community Bank

254. Anthony Village Community Bank

255. Ibikun Community Bank Limited

256. Kosofe Community Bank Limited

257. Opodo Community Bank Limited

258. Omashe Community Bank Limited

259. Oke-Ira Community Bank Limited

260. Jemilade Aiyetore Community Bank Limited

261. Fafolu Community Bank Limited

262. Ijeh Obalende Community Bank Limited

263. Anjorin Apapa Community Bank Limited

264. 31's Community Bank Limited

265. Akowonjo Community Bank Limited

266. Olodi Apapa Community Bank Limited

267. Kudaki Akeja Community Bank Limited

268. Awori-Alaba Community Bank Limited

269. Ijegun Community Bank Limited

270. Mafoluku Community Bank Limited

271. Alapere/Agboyi Community Bank Limited

272. Ojo Community Bank Limited

273. Maryland Community Bank Limited

274. Ira Community Bank Limited

275. Ikotun Community Bank Limited

276. Ikorodu Community Bank Limited

277. Ifako Iju Ishaga Community Bank Limited

278. Ewu Tutun Community Bank Limited

279. Ejigbo Community Bank Limited

Niger State:

280. Borgu Community Bank Limited

281. Yansamari Community Bank Limited

282. Bejin-Doko Community Bank Limited

283. Kontagora Community Bank Limited

284. Bida Community Bank Limited

285. Amugu Community Bank Limited

Ogun State:

286. Iperu Community Bank

287. Oke-Ona Egba Community Bank

288. Ajose Community Bank Limited

289. Adbado Community Bank Limited

290. Alekun Community Bank Limited

291. Aiyepe Community Bank Limited

292. Iwoye Community Bank

293. Ijebu-Mushin Community Bank Limited

294. Ilese Community Bank Limited

295. Isara Remo Community Bank Limited

296. Okun-Owa Community Bank Limited

297. Ososa Community Bank Limited

298. Ipara Community Bank Limited

299. Sagamu Community Bank Limited

300. Isoyin Community Bank Limited

301. Imodi Imosan Community Bank Limited

302. Ifo Community Bank Limited

303. Egba - Omin Community Bank Limited

304. Ifette Community Bank Limited

305. Ota Area Community Bank Limited

Ondo State:

306. Ire-Ekiti Community Bank Limited

307. Owo Community Bank Limited

308. Ore Community Bank Limited

309. Ilaje Eseodo Community Bank Limited

310. Ijesa-Isu Community Bank Limited

311. Ogbagi Community Bank Limited

312. Ado-Ekiti Community Bank Limited

313. Igbotako Community Bank Limited

314. Amoye Community Bank Limited

315. Ekamefa Community Bank Limited

316. Ekimogun Community Bank Limited

317. Ilupeju Ekiti Community Bank Limited

318. Ile-Oluji Community Bank Limited

319. Ido Community Bank Limited

320. Igbotako Community Bank Limited

321. Ijero Community Bank Limited

322. Ilutitun Osoro Community Bank Limited

323. Isowopo Community Bank Limited

324. Oke-Agbe Community Bank Limited

325. Oye-Ekiti Community Bank Limited

326. Arigidi Community Bank Limited

327. Elu-Iju Community Bank Limited

328. Omuo-Ekiti Community Bank Limited

329. Aramoko Community Bank Limited

330. Otun-Ekiti Community Bank Limited

331. Arogbo Ijaw Community Bank Limited

332. Ugbo Community Bank Limited

333. Ise Community Bank Limited

334. Iye-Ekiti Community Bank Limited

335. Moferere Community Bank Limited

336. Ute Community Bank Limited

337. Omuo-Oke Community Bank Limited

338. Oke-Igbo Community Bank Limited

Osun State:

339. Oduduwa Community Bank Limited

340. Ile-Ogbo Community Bank Limited

341. Modakeke Community Bank Limited

342. Oyan Community Bank Limited

343. Ede Community Bank Limited

344. Ola Community Bank Limited

345. Idominasi Community Bank Limited

346. Ifelodun Community Bank Limited

347. Ayedaade Community Bank Limited

348. Igbajo-Iragbiji Community Bank Limited

349. Inisa Community Bank Limited

350. Iwo Community Bank Limited

351. Aiyegunle Community Bank Limited

352. Igbojo Community Bank Limited

353. Oranmiyan Community Bank Limited

Oyo State:

354. Awe Community Bank

355. Ogbomosho Community Bank

356. Bodija Community Bank

357. Abejoye Community Bank

358. Ojoo-Shasha Community Bank Limited

359. Akesan Community Bank Limited

360. Ifedakpo Community Bank Limited

361. Isemi-Ile Community Bank Limited

362. Owode Community Bank Limited

363. Elekuro Community Bank Limited

364. Samonda Community Bank Limited

365. Omi-Adio Community Bank Limited

366. Ashi Community Bank Limited

367. Orita Bashorun Community Bank Limited

368. Akaran-Alia Community Bank Limited

369. Okeho Community Bank Limited

370. Oluyole Community Bank Limited

371. Agbeni-Ogunpa Community Bank Limited

Plateau State:

372. Akwanga Community Bank Limited

373. Nimbar Community Bank Limited

374. Wunato-Berim Community Bank Limited

375. Amba Community Bank Limited

376. Matol Community Bank Limited

377. Jos Community Bank Limited

378. Daffo Mangai Community Bank Limited

379. Renyel Community Bank Limited

380. Jos Central Community Bank Limited

381. Jos Metropolitan Community Bank Limited

Rivers State:

382. Akpor Community Bank Limited

383. Riverline Community Bank Limited

384. Ogbakiri Community Bank Limited

385. Evo Community Bank Limited

386. Opobo Community Bank Limited

387. Delta East Community Bank Limited

Sokoto State:

388. Dogondaji Community Bank Limited

389. Tambuwal Community Bank Limited

390. Gwadabawa West Community Bank Limited

391. Shinkafi Community Bank Limited

392. Nagarta Community Bank Limited

Taraba State:

393. Marmara Community Bank Limited

394. Jalingo Community Bank Limited

395. Avyi Community Bank Limited

396. Dongo Community Bank Limited

397. Ussa Community Bank Limited

398. Gembu Community Bank Limited

399. Dan Anacha Community Bank Limited

400. Dagono Community Bank Limited

401. Karasuwa Community Bank Limited

402. Dumburi Community Bank Limited

Savings and Non-Banking Institutions

2.63 There are a number of financial institutions which mobilize savings either from the specialized groups or from the public at large that are worth mentioning only briefly, given the scope of this thesis. These institutions which stand on the periphery of the Nigerian banking environment are worth mentioning because they sometimes compete with the traditional banks. These institutions are generally referred to as Non-Banking and Savings institutions and they include:

1. The National Provident Fund;
2. The Federal Savings Bank (generally called the Post-Office Savings);
3. Insurance Companies;
4. Bureaux-de-Change;
5. Savings and Loans Group;
6. Discount Houses.

A brief discussion on the above-listed institutions may be necessary as earlier pointed out.

The National Provident Fund

2.64 The National Provident Fund is a compulsory savings scheme established under the National Provident Fund Act 1961. The scheme applies only to workers in an establishment with not less than ten employees but excludes employees of a certain category in the public sector. Under the scheme the worker and his employer each contributes a certain percentage of the worker's wage or salary per month to the fund. In return, the worker receives benefits representing the total amount contributed by him and his employer. The benefits mature in the event of death, retirement, disability or unemployment for more than one year.

2.65 The Fund is run and operated as a division of the Federal Ministry of Labour and Productivity under the National Provident Fund (NPF) Act 1961 as amended by Decree

Number 39, 1974. The investment of the funds so mobilized is by virtue of the NPF Act 1974 and the Trustee Act 1962 limited to gilt-edge (Government) securities and debentures quoted on the Nigerian Stock Exchange.

2.66 The NPF would appear not to have performed satisfactorily when viewed against the background of its objectives. The Fund, for example, has been unable to meet its obligations to the disabled, the retired, the unemployed and even the families of deceased workers.

The Federal Savings Bank (Generally called The Post-Office Savings)

2.67 One of the measures adopted by the Nigerian Colonial Administration to mobilize and encourage savings by the rural and urban dwellers was the enactment of the Post-Office Savings Bank Act 1923, which led to the establishment of the Post-Office Savings Bank the same year. The Bank continued to operate under the 1923 Act as a Post Office Savings bank until 1972 when it was reconstituted into the Federal Savings Bank, and in 1974 was further reconstituted under Decree Number 38, 1974.

2.68 The Federal Savings Bank, which was established as a unit of the former Posts and Telegraph Department (now made up of NITEL and NIPOST), on whose network of branch offices (over six hundred in number) it depends to mobilize savings, has as its main objective the provision of a ready means for the deposit of savings and so to encourage thrift.

2.69 Even though the Federal Savings Bank is empowered "to transact any banking or such other businesses as the Commissioner may direct"[54] the Bank has not thought fit to diversify its operations and has equally concentrated its investment of the sums so

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54. Section 2 (b) Federal Savings Bank Decree no. 38, 1974.

mobilized in treasury obligations and development loan stock.[55]

2.70 Viewed against the background of its primary objective, the Bank has failed to live up to expectations. This may be traceable to the very low interest rate it pays to its customers, competition with the numerous rural branches of commercial banks and the restriction on withdrawal by customers (a maximum of twenty naira (N20.00) can be withdrawn at sight, thirty naira (N30.00) at sub-post offices, fifty naira (N50.00) at main post offices and one hundred naira (N100.00) at the headquarters of the bank, all within a period of twenty-eight (28) consecutive days).

The Insurance Companies

2.71 Insurance history in Nigeria has it that, by 1900, two British insurance companies had already appointed agents and opened offices in Lagos. However, modern commercial insurance was established in 1921 by the Royal Exchange Assurance Company Limited, which operated alone until 1949 when three other British-owned insurance companies entered the insurance market in Nigeria. These were:

1. Norwich Union Fire Insurance Society (now operating as part of Guinea Insurance Company Limited)
2. Tobacco Insurance Company Limited, and
3. Legal and General Assurance Society Limited.

By the end of 1990 the total number of registered insurance companies operating in Nigeria was ninety-eight (98) and the total number of insurance brokerage companies (which, by virtue of the 1976 Insurance Act must register as unlimited liability companies), was one hundred and eight-four (184).[56]

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55. Ibid, s. 10(1).

56. Nigerian Insurance Year Book 1990.

2.72 It is of special importance to mention the creation of the Nigerian Deposit Insurance Corporation (NDIC) by the Federal Government because of the role it (NDIC) has been called upon to play within the banking environment. The NDIC which was created by Decree Number 22 of the 15th day of June, 1988 was established primarily to insure the deposit liabilities of all licensed banks in Nigeria and, when appropriate, to give assistance to such banks when in financial difficulties. Before its establishment, no such institution existed in Nigeria. The fundamental objectives for establishing NDIC are:

1. insuring all deposits of all licensed banks operating in Nigeria so as to engender confidence in the Nigerian banking system. "Insider deposits" that is, deposits of staff including directors of the licensed bank are not covered;

2. giving assistance to the banks in situations of imminent or actual financial difficulties of banks particularly where suspension of payments is threatened thereby avoiding damage to public confidence in the banking system;

3. guaranteeing payments to depositors in case of imminent or actual suspension of payments by banks up to a maximum amount of fifty thousand naira;

4. assisting monetary authorities in the formulation and implementation of banking policy so as to ensure sound banking practice and fair competition among banks in the country;

5. pursuing any other measures necessary to achieve the above objectives of the Corporation.

2.73 The NDIC and CBN are expected to work together for the effective supervision of the banking industry. Towards this objective and in order to avoid unnecessary duplication of functions both institutions are to co-operate and exchange data and information as regards the activities and "financial health" of licensed banks.

2.74 External auditors of licenced banks are obliged to recognise the Corporation's responsibility for the protection of the interest of depositors. In other words, the auditors of licensed banks are expected to be a part of an "early warning system". Accordingly, auditors must bring to the notice of the Corporation:

1. any extreme situation such as evidence of imminent financial collapse;

2. evidence of an occurrence which has led or is likely to lead to a material diminishing of the insured bank's net asset;

3. evidence that there has been a significant weakness in the accounting and other records or the internal control systems of the insured bank;

4. evidence that the management of the insured bank has reported financial information to the Corporation which is misleading in a material particular;

5. any situation where they believe that a fraud or other misappropriation has been committed by the directors or the management of an insured bank or have evidence of the intention of directors or senior management to commit such fraud or mis-appropriation;

6. any situation where there has been an occurrence which causes the auditors not to have confidence in the competence of the directors or senior management to manage the business of the insured bank in a prudent or safe and sound manner so as to protect the interest of the depositors.

2.75 NDIC, like any other insurance company whose principal aim is to provide against risks and make good the losses suffered by the assured by spreading the losses to other people, usually invests in assets with a high liquidity content to make it easy to promptly meet and settle claims. The Insurance Decree 1976 specifically provides for the investment of funds so mobilized in securities such as:

1. Cash on deposits or bills of exchange accepted by licensed banks

2. Shares in registered co-operative societies

3. Government and other securities specified under the Local Trustees' Powers Act and the Trustees Investment Act 1962

4. Loans on life policies within their surrender value
5. Loans to building societies approved by the Commissioner
6. Loans on real property, plant and machinery located in Nigeria
7. Such other investments as may be prescribed.

2.76 It is unfortunate that the basic objective of insurance, that is to say, the prompt settlement of genuine claims made by the assured, is far from being achieved in Nigeria.[57] This has led to a situation where the Nigerian public has lost faith and confidence in the insurance industry and consequently turned to the social clubs and friendly societies that now attempt, in various forms, to perform some aspects of the insurance business.

Bureau-de-Change

2.77 In January 1989 the Federal Military Government authorized the establishment of Bureau-de-Change by private individuals to serve the needs of people with small demand for foreign exchange. The main objectives for establishing Bureau-de-Change are as follows:

1. to accord legal recognition to small dealer in foreign exchange and thereby enlarge the size of the officially recognised foreign exchange market;
2. to provide free access to foreign exhange to small buyers in a convenient and informal manner;
3. to eliminate or reduce the unethical and fraudulent activities of black (parallel) market operators;
4. to protect the Nigerian citizens and other people who deal in foreign exchange from purchasing fake foreign currencies.

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57. The NDIC, having been in existence for only few years and, within this period, has concerned itself with acquiring suitable accommodation, recruiting and training staff and explaining their functions and services to both the banking industry and the Nigerian general public, cannot be assessed at this stage in terms of its achievements or failures.

2.78 Any organisation or persons wishing to transact the business of Bureau-de-Change in Nigeria must be duly licensed to do so by the Federal Ministry of Finance and Economic Development.

2.79 Every licensed Bureau-de-Change is obliged to maintain a mandatory deposit of N250,000.00 with the CBN as "caution money" for the purpose of paying bona fide claimants in the event of default or liquidation of the Bureau-de-Change. The CBN is enjoined to invest such funds in Government securities and to pay any income accruing thereon to the Bureau-de-Change periodically. If, for any reason the mandatory deposit falls below N250,000.00 the Company is required to make up the short-fall within seven days.

2.80 According to the operational guidelines released by the CBN, every Bureau-de-Change shall operate as follows:

1. deal only in bank notes and coins and the purchase of travellers' cheques. It shall not sell travellers' cheques or any foreign currency instrument other than foreign bank notes and coins;

2. the foreign currencies dealt in by a Bureau-de-Change shall derive only from private sources;

3. any person wishing to sell foreign currency at a Bureau-de-Change shall not be required, and if so required, shall not be obliged to disclose the source. The Bureau-de-Change should, however, ascertain the genuiness of the foreign currency. In the case of travellers' cheques, it should confirm the seller's identity in the conventional way i.e. by sighting the seller's passport;

4. transactions shall be on a "cash and carry" basis;

5. the buying and selling rates for Bureau-de-Change shall be subject to the CBN's prevailing rate which is issued from time to time.

6. the exchange rates and commissions at which each Bureau-de-Change is prepared to transact business shall be clearly displayed and business shall be done at those rates and commissions;

7. every Bureau-de-Change shall keep proper registers and other records of all its transactions for the purpose of enhancing business efficiency. Furthermore, a machine list or receipt showing how the amount paid to the customer was arrived at, should be issued by the Bureau-de-Change;

8. no documentation is required in respect of sales or purchases of foreign exchange by customers;

9. where a customer intends to travel with the foreign currency purchased the Bureau-de-Change, is enjoined to endorse and stamp the customer's travelling passport with the amount and currency purchased;

10. every Bureau-de-Change shall transact business only in its registered office location or premises specifically approved for that purpose and conspicuously and clearly designated;

11. every Bureau-de-Change shall fix its hours of business which must be clearly displayed;

12. transactions between Bureau-de-Change shall be allowed but such transactions must be conducted within the CBN's prevailing rate.

13. net global holding of each Bureau-de-Change organisation at the end of each of each trading week shall not exceed the equivalent of $250,000.00.

2.81 As a part of its responsibilities the CBN supervises and monitors the operations of Bureau-de-Change to ensure the orderly conduct and development of this segment of the foreign exchange market.

2.82 The Bureau-de-Change have not been in operation long enough for proper assessment, but, from the remarks being made by their clients, it does appear that the objective of setting them up may have failed. Bureau-de-Change have been accused of

colluding with illegal operators on the black (parallel) market to cause artificial scarcity of foreign exchange with the sole aim of selling it at a very high price. They have been accused of being an avenue for the circulation of fake foreign currencies and also a major source through which black (parallel) market operators obtain huge foreign exchange.

Savings and Loan Groups

2.83 Under this heading are:

1. The Social Clubs
2. 'Esusu' Clubs
3. Thrift Societies
4. Co-operative and Loan Societies.

2.84 What distinguishes them from the other institutions discussed earlier is that they collect and mobilize savings from their members and grant loans (where possible) only to their members. They sometimes operate in such a strict and confidential manner so that it is difficult for an outsider to understand their abilities and achievements or failures. But the fact that there has been no reported litigation or recorded serious disputes arising from their transactions, and the fact that dependants of their deceased members commend them, go to suggest that they have, to a large extent, succeeded in their objectives.

Discount Houses

2.85 Discount Houses were introduced in Nigeria in 1992 by the Federal Government. A discount house is essentially an intermediary which borrows money repayable at short notice, mostly at call or overnight from banks and other financial institutions. The borrowed funds which could be quite substantial are used to acquire a portfolio of short-

term instruments comprising principally of treasury bills and medium-term bonds, certificates of deposit and other short-term assets. Basically, therefore, the primary functions of a discount house is to provide liquidity for the rest of the banking system acting as a link between the Central Bank of Nigeria and the commercial operators dealing in short-term money market instruments.

2.86 The principal objective for the introduction of discount houses may be summarised as follows:

1. to promote the rapid growth and efficiency of the money market;
2. to act as an intermediary between the CBN and the licenced banks;
3. to facilitate the issue and sale of short-term government securities by tender;
4. to provide discount/re-discount facilities for treasury bills, government securitites and other eligible financial instruments acquired by banks;
5. to accept short-term deposits from banks;
6. to provide short accommodation to banks;
7. to undertake other functions as may be prescribed by the CBN from time to time.

2.87 Discount houses are prohibited from a number of conventional banking activities or transactions. For example, a discount house is not permitted to:

1. grant loan facilities to its directors or the general public;
2. deal in gold or foreign exchange, including the opening of letters of credit;
3. accept any money for deposit or loan which is repayable on demand by cheque, draft, order, or any other instrument drawn by the depositor on the discount house.

2.88 The promotion of a discount house in Nigeria can only be done by a consortium of local banks and finance companies with or without the participation of international banking or finance institutions. Before a discount house can commence business, it must be incorporated as a company, obtain a discount house licence and have a minimum paid-up share capital of one hundred thousand naira (N100,000.00).

2.89 Perhaps the major reason for establishing discount houses is the need to create a conducive institutional environment for the take-off of the Central Bank of Nigeria's indirect method of monetary control often referred to as "Open Market Operations" (OMO). The prospects for the viability of the discount houses are enhanced by the abundance of Federal Government securities and the possibility of new issues for State Governments and banks. The success of the measure would, however, depend amongst other things on the growth of the economy, structure of the assets and innovativeness of the operators in developing a secondary market in securities. Furthermore, to ensure its success, it is hoped that measures would be put in place such that major banks in Nigeria would be obliged to keep some of their funds with the discount houses.

Factors Affecting the Banking Environment

2.90 A number of factors have affected and will continue to influence the banking environment. These include but are not limited to:

a) the legal structure
b) the economic and monetary policies
c) the political situation
d) the technological growth, and
e) the social factor.

It might be desirable to discuss these factors albeit briefly.

a) The Legal Structure

2.91 The legal framework within which banks operate in Nigeria is defined principally by the Banking Act[58] and other credit and monetary Circulars and Guidelines issued periodically by Government. It was the recommendation of Mr. Panton in 1948 in his "Report on Banking in Nigeria" that formed the basis for the first ever banking

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58. Banks and Other Financial Institutions Decree (BOFID) 1991. Others include but are not limited to Companies Act, Tax Act, Insurance Act, etc.

legislation - the Banking Act 1952,[59] which Act brought sanity to the chaotic banking situation of the 1950s. The Act specified for the first time a minimum paid-up capital for both the indigenous[60] banks and the expatriate[61] banks. The minimum paid-up capital for the indigenous banks and the expatriate banks were twenty-five thousand naira (N25,000.00) and two hundred thousand naira (N200,000.00) respectively. The 1952 Act was subsequently amended in 1958. Also in 1958 the Central Bank of Nigeria Act was passed establishing the CBN. The Government also in 1958 raised the minimum paid-up capital of banks to five hundred thousand naira (N500,000.00).

2.92 The most sweeping legal reform came with the passing of the Banking Act 1969. This Act not only repealed and replaced the 1958 Banking Act, but went further to enjoin that all banks in Nigeria must be incorporated as Nigerian banking companies. It also raised the minimum paid-up capital of indigenous banks to six hundred thousand naira[62] (N600,000.00) and that of expatriate banks to one and a half million naira[63] (N1,500,000.00). The CBN was given more powers under the Act to monitor banks' returns and control competition etc. Subsequent amendment to the Act brought in the operations of the merchant banks within its purview.[64] The minimum paid-up share capital of commercial and merchant banks has continued to be raised by the Government and currently it stands at fifty million naira[65] (N50,000,000.00) for the commercial

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59. The Banking Act 1952 (See the Laws of the Federation No 15 1952).

60. These are banks owned by Nigerians.

61. These are banks owned by foreigners (ie non-Nigerians) and generally are branches of banking institutions overseas.

63. Section 6(1)(b) of the Banking Act 1969.

64. Merchant banking in Nigeria to all intents and purposes is a development of the 1970s even though its early history dates back to 1960.

65. See the Central Bank of Nigeria Circular Number BSD/DO/2B/VOL 1/4 of 1st March 1991, though the commencement is with effect from 14th February 1991. Before now it was twenty million naira (N20,000,000.00) - see Central Bank of Nigeria Circular Number BSD/CS/18/198 of 19th October 1988 though the commencement was with effect from 13th October 1988. See also s. 9(2)(a) of the Banks And Other Financial Institutions Decree (BOFID) 1991.

banks and forty million naira[66] (N40,000,000.00) for the merchant banks. For the newly introduced community banks the minimum paid-up share capital is two hundred and fifty thousand naira (N250,000.00).[67]

2.93 Another aspect of the legal structure that is worthy of note is the Nigerian Enterprises Promotion Act which was first promulgated in 1972, amended in 1977 and repealed and replaced with the NEPA 1989. The Act sought to entrust Nigerians with the control of their economy which hitherto was in the hands of foreigners. The impact of this Act on the banking environment was that banks were grouped under Schedule 2 of the Act which requires that foreign equity interest was limited to forty per cent while Nigerians had sixty per cent. This Act and other subsequent measures introduced by the Government led to the phasing out of expatriate banks[68] in Nigeria and the emergence of state owned banks.

b) The Economic and Monetary Policies

2.94 The Government's economic and monetary policies change very often. These policies are traditionally contained in the yearly budget speeches usually made in January, but if the need arises to introduce new policies or modify existing ones, any time during the year, the Government would not hesitate to do so. These policies have far-reaching effects on the banking environment. Their implementation is usually through the Credit Guidelines and Bankers' Tariff issued and monitored by the Central Bank of Nigeria.

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66. See the Central Bank of Nigeria Circular Number BSD/DO/2B/Vol 1/4, op cit. Before now it was twelve milion naira (N12,000,000.00) - see Central Bank of Nigeria Circular Number BSD/CS/18/VOL/198, op cit. See also s. 9 (2)(b) of BOFID, op cit.

67. See s. 9(2)(d) of BOFID, op cit.

68. By 1974 there were no more expatriate banks in Nigeria.

2.95 Economic and monetary policies are basically designed to solve the economic and monetary problems and this to a large extent accounts for their erratic nature, even though in some situations their ever changing nature, as in Nigeria, may be due to the inability of the designers in appreciating the problems involved. Contemporary economic and monetary policies in Nigeria would appear to have such objectives as the moderation of inflation rate, the stabilization of the exchange rate and reduction of pressure on balance of payments, inducing increased financial saving, investment, education, employment, industrial and agricultural growth.

2.96 In order to achieve these objectives, the economic and financial engineers periodically issue directives such as stating what the loan portfolio of banks would be, the percentage of credit expansion of banks and the lending rates and areas. For example within the last five years the CBN has constantly classified agriculture and manufacturing as a high priority area (called preferred sector) while marketing (excluding agriculture), lending to professionals (such as lawyers, doctors etc), lending for development of residential houses etc have been classified as low priority areas (called non-preferred sector).

c) Political Situation

2.97 A condusive political climate is a sine qua non for an effective performance of banks and any other business activity for that matter. It is a common knowledge that when there is stability within a political system, both foreign and local investors would be attracted to invest in that given political system and where there is instability the contrary is the case. Not even the indigenous inhabitants would feel safe to invest in an unstable political system. In Nigeria political stability now seems an elusive concept given that the country has witnessed a bloody 21/2 years civil war and six coup d'états. This type of political climate does not make investors comfortable especially long-time investors. The direct effect of this unstable political system on the banking environment is that the composition of the top management personnel of banks as well as the boards

of directors keep changing each time there is a new Government. Similarly each new regime abandons the subsisting economic and monetary policies and comes up with its own based of course on the advice of its own economic and financial designers. This type of situation no doubt has serious repercussions on the growth and efficiency of the banking institutuions.

d) Technological Growth

2.98 The provision of banking services in Nigeria would be classified as poor when compared with the services in the western world. This is evidenced in the long queue and delays in the banking halls, late receipt of statements of accounts, inefficiency in customer service delivery etc.

2.99 The banking environment is, however, gradually abandoning its rudimentary technology in its operations and steadily adopting modern technology. It is becoming common these days to find computers in banks. The need for the use of computers in banks cannot be over-emphasized especially with the increased demand for efficient customer service delivery and the growing number of volume of cheques particularly in the retail banking business.

2.100 Fear has, however, been expressed that the increased computerization of the banking environment in Nigeria may worsen the already high unemployment rate and possible retrenchment of bank staff. There is also the fear that the use of computers by the banks could make it possible for the private and public intelligence agencies to obtain information on individual's or company's financial position. The effect of this danger on the banking environment is that the banker who is enjoined to keep secret the financial information of his customers may now not be able to discharge that duty. A law ought to be passed protecting bankers from this liability.

e) The Social Factor

2.101 The level of social awareness has great influence on the level of operation of banks within a given country. In Nigeria, especially within the rural communities, banks are treated with suspicion. The rural populace sees banks as institutions for the elite and the wealthy and therefore believe that they are not organisations that would protect their interest. Most of these rural dwellers would prefer to either bury their money in their houses, barns, farms or give it to a trusted person who probably has adequate security such as the village head. They merely save and usually have no need to borrow. Most of the things they require for their living can be obtained from their farms. Under this type of situation, money hardly changes hands and the effect of this is that the level of bank operations within these areas is low.

2.102 Realising the important role that the rural communities can play in the development and growth of the banking environment, especially as over 50% of the Nigerian population resides in the rural areas, the Government came up with regulations aimed at encouraging banking habits and culture inter alia. The government made it mandatory that the commercial banks must have branches in the rural areas under the Rural Banking Scheme. Under this scheme, banks were to open a total of 766 rural branches by the end of 1989. It is worthy of note that the compliance rate shows a 99% success. As part of the scheme commercial banks were required to invest at least 40% of the deposits mobilized in a given rural area in that same community. Similarly the banks were encouraged to study the changing demands of the communities they operate in and to respond positively to such demands. These efforts by the Government no doubt have direct influence on the banking environment as the rural dwellers now feel relaxed with banks and have gradually started disabusing their minds with regard to their conception of banks. The banks have even on their own discovered that there are a lot of unutilized funds in the rural communities. They have in their usual style tried to tap these good sources of cheap funds which funds are then lent to borrowers who normally reside in the urban areas, among other many productive investments, for good profits.

The fact that the hitherto neglected rural areas are good sources of funds may be partly responsible for commercial banks meeting their Central Bank of Nigeria mandatory targets in the establishment of rural branches.[69] However, as earlier said, following the introduction of Community Banks in 1990, it is no more compulsory for commercial banks to open rural branches.

2.103 The prevalence of bank fraud world-wide is another social factor that undermines the operations of banks in Nigeria is no exception. Cases of defrauding the banks through impersonation, issue of dud cheques, using non-existing personal or business names to obtain credit facilities etc are very rampant. Unfortunately, most bank frauds are carried out with the co-operation of bank staff.

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69. It does appear that the impressive 99% compliance rate in the establishment of rural branches was motivated more by economic gains to the commercial banks following their discovery that the rural areas are good sources of cheap funds rather than their disposition to comply with the CBN's condition or their patriotism.

CHAPTER THREE

THE HISTORICAL DEVELOPMENT OF EQUIPMENT LEASING

Brief Early History

3.01 Contrary to the general misconception by some writers that the history of equipment leasing dates back to 1877, the year the Bell Telephone Company first rented telephones in the United States of America, there is sufficient evidence to prove that the Sumerians had been involved in this type of commercial activity about 2000-3000 BC.[1] These leases involved rentals of agricultural tools to farmers by the priests in the city-state of Uruk (sometimes referred to as Ur) which city was owned and ruled by the goddess called Inanna. The Inanna's clergy who were also government officials recorded these transactions in cuneiform (wedge-shaped) script on wet clay tablets. When the script of a tablet was finished it was left out to dry in the sun or even baked in a furnace depending on the importance attached to a particular transaction. The baking in the furnace method was adopted for the important transactions because it was believed that the procedure made it impossible to add, alter or delete text and that the furnace secured next to eternal life for the document. Thus this was how the Sumerians, the originators of leasing, produced the first ever world leasing records.[2]

3.02 About 800 years after the Sumerians had started recording leasing transactions, King Hammurabi of Babylon in 1700 BC compiled the ancient Sumerian and Babylo-

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1. Hanson, D G, Service Banking (1985) (Institutes of Bankers London), p. 325. See also Johnson J M, Fundamentals of Finance for Equipment Lessors (1990) (American Association of Equipment Lessors), p. 3.

2. Livijn, C-O, The History of Leasing, (World Leasing Year Book 1988 - Euromoney Publications), pp. 43-45.

nian (Akkadian[3]) laws concerning leasing. These formed part of his impressive collection of laws (282 paragraphs) which the king had inscribed on a 2.3 metre high pillar of diorite.[4] Historical evidence shows that about 200-600 BC the ancient Egyptians were engaged in leases of both personal and real property and so were the Greeks and the Romans.[5]

3.03 The Roman law even at this early period (ie around 200 BC) recognised the rights and duties of parties to a leasing or letting/hiring contract, better known as locatio et conductio.

There was no special method of entering into locatio et conductio provided that:

1) one of the parties agrees to lease and the other party agrees to take the leased object,

2) the parties agree on the price known as merces or pretium. The merces or pretium must be at least partly in money[6] otherwise the transaction would be nudum pactum (ie a bare promise of a thing without any consideration or equivalent) and which was actionable only in Justinian law.[7] There was, however, one exception and that is where the merces could be a proportion of the product of the work of one partly expended on the property of the other,[8]

3) the equipment or object to be let must be a specific one and in principle must be a thing not consumed by use.

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3. Akkad (sometimes called Accad) is an ancient city lying north of Babylon.

4. Livijn, C-O, The History of Leasing, op cit, p. 45.

5. Nevitt, P K, and Babozzi, F J, Equipment Leasing, (1988) (Dow Jones-Irwin), p. 26.

6. Adams, J N, Commercial Hiring and Leasing, (1989) (Butterworths), p. 5.

7. Thomas, Ph J, Introduction to Roman Law, (1986) (Kluwer Law and Taxation Publishers), p. 105.

8. Watson, A, Roman Private Law Around 200 BC, (1971) (Edinburgh University Press), p. 137

3.04 Professor Thomas states that the locator (lessor) need not be vested with the ownership right as long as he could give the conductor (lessee) physical control over the equipment or object and thus it was possible to lease another's property, for example by sub-lease, and so the lease could continue even if the lessor sold the property as long as he had arranged for the lessee to remain in control.[9] It should be pointed out that the conductor (lessee) had no right to the equipment enforceable against any third party and so his right of action was limited only to the lessor. Consequently if the lessee's tenure and enjoyment was interfered with by third parties, the lessee could only go to the lessor who had the duty to protect the lessee's tenure.[10]

3.05 The lessor also had the duty of ensuring that the lessee obtained not merely the physical object of the transaction but also that the lessee had an undisturbed enjoyment of the object. And flowing from this duty of undisturbed enjoyment by the lessee was the requirement that the object must be in a serviceable condition and suitable for the purpose for which it is intended otherwise no rent was payable by the lessee.[11] Similarly where as a result of the lessor's action, for example negligence or fraud, the lessee was unable to enjoy the equipment for the whole term of the lease he lost his right to rent pro tanto[12] (ie rent was paid proportionately). The lessee could not, however, deduct from his rent for minor inconveniences. Even though as already shown the lessee had physical possession of the object leased his right to the object was unprotected and consequently where eviction of the lessor took place, the lessee automatically lost that physical possession over the equipment. His only remedy under this situation would be an action for damages against the lessor since he (lessee) had no real right in the equipment leased but merely a personal right against the lessor. Where also the lessor

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9. Thomas, op cit, p. 106.

10. Ibid, p. 107.

11. Adams, op cit, p. 6.

12. Ibid, p. 6.

sold or donated or disposed in any other manner or transferred the ownership of the leased equipment, the new owner was not bound to allow the lessee to continue having custody of the leased equipment even if there is still an unexpired term of the lease. The lessee's continued possession of the leased equipment would therefore be on the approval/permission of the new lessor.[14]

3.06 The lessee was enjoined to return the leased equipment to the lessor at the expiration of the leased term, to pay his rent as at when due and also to take reasonable care of the leased object. Thus where he was negligent in the use of the subject matter of the lease transaction and injury or damage resulted, the lessee was liable to damages. But where the object was destroyed or damaged without any fault from the lessee, for example by flood or fire, the lessee would not be liable for any damages and in fact would be relieved of any rent payable for the period during which he did not enjoy the object. Similarly, where the object was destroyed or damaged without any fault from either of the parties, for example by an outbreak of war, the lessee would neither be liable to any damages nor be required to pay any rent.

3.07 As would be seen later in this thesis, some of the characteristics of leasing under the Roman Law concept of Location Conductio are similar to contemporary equipment leasing schemes. In fact the Roman Emperor Justinian's Codification not only referred to leases of both equipment and real estate, but went so far as to distinguish between a finance lease and short-term rentals of equipment.[15]

3.08 The Phoenicians[16] in about 1200 AD adopted and applied the distinction created

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14. Thomas, op cit, p. 107.

15. Nevitt and Fabozzi, op cit, p. 26.

16. Phoenicia is an ancient maritime nation extending from the Mediterranean Sea to Lebanon mountains, now occupied by the coastal regions of Lebanon and parts of Syria and Israel. The Phoenicians dominated the trade of the ancient world especially maritime about 1000 BC and established trade posts and colonies throughout the Mediterranean.

under the Roman Code between leases to their ship chartering business. Their ship chartering schemes would today represent a fairly good example of contemporary equipment leasing transaction as the 'trip and short-term' charters are similar to Operating Leases[17] while the 'long-term bareboat' charters would qualify as Finance Leases.[18] It is believed that the 'Hell or High Water'[19] clause found in some contemporary equipment leasing agreements originated from the Phoenician ship chartering agreements between the shipowners as lessors and ship users (charter parties) as lessees.

3.09 In Britain, equipment leasing records also show that this commercial activity throve many years before 1877. By 1248 history has it that one Bonfils Mangamelli of Gaeta had hired a suit of armour for the Seventh Crusade paying a rental of almost 25 per cent of its value. By 1284 the Statute of Wales had declared that the legal action of covenant was also available for leases of moveable property.[20] Clark states that by 1558, both land and chattels were being leased as a way of secretly transferring property with the intention of defrauding creditors who had relied on the strength of the apparent ownership of the property and it was in the bid to curb this practice that the Fraudulent Conveyances Act 1571 was passed. The Act provided that except for leases which were bona fide (ie in good faith - without fraud or deceit) and for good consideration:

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17. This term will be fully explained later in Chapter 4.

18. id.

19. This is a clause in an equipment leasing contract which reiterates the unconditional obligation of the lessee to pay rent for the entire term of the lease regardless of any event affecting the equipment or any change in the circumstances of the lessee. The effect of this is that the lessee waives any right that exists or may arise to withold any rent from the lessor or any assignee of the lessor for any reason whatsoever, including any set-off, counterclaim, recoupment or defence - see generally the World Leasing Year Book (1985) (Euromoney Publications), p. 432.

20. Clark, T M, Leasing, (1978) (McGraw Hill), p. 4.

> "any conveyance, lease, rent ... of lands, tenements, hereditaments, goods and chattels ... shall from henceforth be deemed to be clearly and utterly void".[21]

3.10 Matthew Bacon in 1798 had observed that people having realised the benefits of leasehold interests were willing to extend this type of property:

> "to all sorts of interests and possessions whatsoever, being led thereto by that known rule that whatever may be granted or posted with forever, may be granted or posted for a time; and therefore not only lands and houses have been let for years, but also goods and chattels".[22]

3.11 Railway history has it that the London's first railway - the London and Greenwich - was leased to the South Eastern Railway in 1844 for a period of 999 years. The lucrativeness of this form of transportation led to the formation of many companies whose sole purpose was leasing railway wagons. Thus the prospectus of one of these first wagon companies - the Birmingham Wagon Company (BWC), which appeared in the Railway Times and in the Mining Journal in August 1854, stated:

> "By far the greater number of wagons used upon the railways by coal and other mineral proprietors are leased for a fixed term of years, at rentals varying from £13 to £20 per annum, according to their capacity and cost of construction - the latter ranging from £65 to £110 each. Such wagons, being the property of private capitalists and supplied by few individuals have proved unequal to the demands; it is therefore considered by the promoters of this undertaking, that a legitimate field is open for a joint-stock company, and hence the Birmingham Wagon Company is proposed to be formed".[23]

Following the issue of the prospectus, the Birmingham Wagon Company was duly constituted on 20th day of March 1855, thus becoming the world's first registered leasing company.

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21. Ibid, p. 4. See also The Fraudulent Conveyances Act 1571, 13 Elizabeth 1, Ch 5.

22. Bacon, M, A Treatise on Leases and Terms for Years (1798) (London) p. 7.

23. See The Railway Times of 1854, 17, 840, and The Mining Journal of 1854, 24, 546. See also Clark, op cit, p. 6.

3.12 Decided cases even show that by the early 1830s, the courts had started adjudicating on cases involving equipment leasing. This is evidenced by the case of Robson and Sharpe v. Drummond[24] in which the dispute at stake was a five-year lease of carriage contract commencing from February 1824 for a rental of 75 guineas per annum.

3.13 If these recorded and undisputed facts about equipment leasing existed before 1877, it is then very difficult to maintain that the business of equipment leasing first started in the United States of America. Rather, the correct position with regard to the early history of equipment leasing in the USA is that it developed long after leasing of equipment was known to the Sumerians, Babylonians, Egyptians, Greeks, Romans, Phoenicians and later the British and in fact took after the pattern which existed in Britain in the sense that its roots can be traced to the method of financing railroad equipment and the development of instalment credit.

Brief Contemporary History

3.14 The genesis of the modern era of equipment leasing history is traceable to the USA tax legislation of the 1940s and 1950s which created a conducive environment for the setting up of the first modern leasing company - the United States Leasing Corporation of San Francisco (now known as and called the United States Leasing International Inc) by one Henry Schoenfeld in May 1952 with a capital of $20,000. In fact , by the late 1940s leasing of equipment in the USA had started generating so much interest from the general public that the Committee on Accounting Procedure of the American Institute of Certified Public Accountants issued Researched Bulletin No 38 enjoining that lessees should make financial statement disclosure of long-term leases.[25]

24. (1831) 2B & Ad, 303. Over a century before this case Holt, C J, had established in the case of Coggs v. Bernard (1703) 2Ld Raym 909 that one of the six classes of bailment was hiring of chattel for use. Holt's classification of bailment which was based on Roman Law concept of bailment as contained in Justinians's Codification were rearranged into five classes by Sir William Jones and Story in their books Essay on the Law of Bailments and Story on Bailments respectively - see generally Adams, J N, op cit, p. 6.

25. Johnson op cit, p. 3.

3.15 The advantages of leasing such as 100 per cent financing, tax reliefs, higher yields etc, which were positively influenced by the favourable tax legislation and deregulation in banking led to its rapid growth in the USA and by 1959 the leasing industry was so well developed that the leading USA leasing companies started expanding their activities to other countries. Thus the US Leasing International Inc. in June 1959 set up the Canadian subsidiary - Dominion Leasing Corporation, and in association with the Mercantile Credit Company of United Kingdom set up the Mercantile Leasing Company in London in June 1960. In 1963 the United States of America national banks were permitted to lease personal property and accordingly a number of banks began leasing. Apart from the banks some other major companies, especially those in manufacturing and marketing, such as IBM and Rank Xerox respectively, not only took active but a leading part during the period in the development and growth of the USA leasing industry since in any case they must stimulate sales for their products.[26]

3.16 By the next two decades (that is 1970s and 1980s) the business of equipment leasing had become so developed, creative, imaginative and popular in the USA that the authors of "Equipment Leasing" in 1988 stated thus:

> "More equipment is financed today by equipment leases than by bank loans, private placements or any other method of equipment financing. Nearly any asset that can be purchased can also be leased from aircraft, ships, satellites computers, refineries and steam generating plants on the one hand to typewriters, duplicating equipment, automobiles, and dairy cattle on the other hand. According to the American Association of Equipment Lessors, 80 per cent of American companies currently use leasing each year to acquire the use of over $100 billion of capital equipment".[27]

3.17 Leasing got a strong foothold in Europe in the 1960s with companies being established in France and Italy in 1961, in Germany in 1962 and most parts of Europe in 1966. The first Japanese Leasing Company, the Orient Leasing Company, was

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26. Ibid p. 5.

27. Nevitt, and Fabozzi, op cit, p. 1.

established in 1963. By the close of the 1970s leasing had become so widely recognised as a primary source of equipment finance.

3.18 The United States of America leasing companies, however, continued to dominate the world market, constituting about 50 per cent of the world's leasing market. Dr Johnson, representing the American Association of Equipment Lessors (AAEL) states in his book published in 1990 that:

> "Equipment leasing is presently responsible for financing assets at the rate of $100 billion to $120 billion per year".[28]

Canada incidentally accounted for leasing business of only $1.1 billion between 1979 and 1983.

3.19 Britain and France in Europe stand out in their turnover with a recorded figure of ECU 20,000 million and ECU 16,000 million respectively in the volume of leasing business in 1989. During the same period (ie 1989) the former West Germany recorded a turnover of ECU 8,000 million, Spain ECU 8,000 million, Italy ECU 7,000 million, Sweden ECU 3 million, Netherlands ECU 2,000 million, Austria ECU 1,000 million, Belgium ECU 1,000 million, Switzerland ECU 959 million, Ireland ECU 784 million, Denmark ECU 779 million, Portugal ECU 763 million, Finland ECU 591 million, Norway ECU 320 million, Luxembourg ECU 161 million and Bulgaria ECU 75 million. The European Federation of Equipment Leasing Companies Association (otherwise called Leaseurope) Annual Report[29] states that the value of new business for the year

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28. Johnson, op cit, p. 2. Note that Dr Johnson's book was published two years after that of Nevitt and Fabozzi.

29. See Leaseurope Annual Report 1989 p. 44. Note that Leaseurope is made up of the following countries: Austria, Belguim, Bulgaria, Switzerland, former W. Germany, Denmark, Spain, France, Great Britain, Ireland, Luxembourg, Netherlands, Portugal, Sweden and Finland. See generally also Leasing Year Book 1989 by Euromoney Publications.

under consideration (ie 1989) was ECU 71 billion[30] which was an increase of ECU 11 billion when compared to the 1988 figure.

3.20 Asia is a great success story for the leasing industry with Japan leading and followed by South Korea which only established the first leasing company in 1972. Statistics show that the size of the leasing market in Japan and South Korea rose from Y813 billion and W22 billion in 1977 to Y5,297 billion and W2,554 billion respectively in 1988. During the 1987 lease year Indonesia recorded a turnover of Rp1,195 billion while Taiwan had NT$10.27 billion.

3.21 The World Leasing Year Book 1989 further reports that some eastern block countries have made institutional changes to accommodate equipment leasing. Thus equipment leasing is now an important financing option in countries like China which only established its first modern leasing company - the China International Trust and Investment Corporation - in 1980. Bulgaria similarly established its first modern leasing company - Bulgarleasing, in 1985 while in Hungary the legal framework for leasing was set up in the 1970s, but full leasing activities started in the 1980s.

3.22 Despite the serious economic problems facing the Latin American countries such as hyper-inflation etc, they have been very active in equipment leasing business and have recorded an appreciable turnover in the volume of business. Records show that in 1988 Brazil leased assets totalling approximately US$2,900 million, Mexico US$500 million, Venezuela US$500 million, Chile US$150 million and Argentina US$10 million.[31]

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30. ECU stands for European Currency Unit which is adopted by Leaseurope as the standard for statistical purposes and at the time of 1989 Leaseurope Annual Report publication had an exchange rate value of ECU = US$0.81 - see Leasing Year Book 1989, op cit, p. 44.

31. Leaseurope 1989, op cit, p. 11.

3.23 In Australia the leasing market figures from the Australian Equipment Lessors Association indicated a rise from A$1.8 billion in 1977 to A$6.8 billion in 1987.

3.24 For the rest of the world, including the developing nations, the World Bank, through its private sector arm - the International Finance Corporation (IFC), has played significant roles in formulating and promoting equipment leasing industry. Records available show that the IFC was instrumental to the establishment of equipment leasing in Korea, Thailand, Philippines, Uruguay, Columbia, Ecuador, Peru, Indonesia, Portugal, Dominican Republic, Pakistan, India, Turkey, Egypt and Zimbabwe. The IFC has also agreed to be directly involved in funding shareholders in the formation of leasing companies in Jordan, Sri Lanka etc.[32] Some African nations, notably Nigeria, Cameroon and Zambia, are also actively embracing equipment leasing as a very viable option in project financing.

3.25 Nigeria being the focal point of this thesis, a detailed study and account of the historical trends and growth of the equipment leasing industry would, I believe, be necessary.

The Evolution and Growth of Equipment Leasing Industry in Nigeria.

3.26 The Equipment Leasing Association of Nigeria (ELAN) records show that the first leasing transaction in Nigeria was in the 1960s when equipment was leased to Nigerians by off-shore (that is cross-border leasing) British leasing companies. This was, however, halted by the introduction of stringent exchange control measures at the onset of the devastating Biafran/Nigerian Civil War in 1967 which lasted for about thirty months. Leasing activities again commenced two years later (that is in 1972) when Benworth Finance Nigeria (BFN) Limited and NAL Securities Limited (now called NAL Merchant Bank) offered limited amount of leasing.

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32. Gill, D, Legislative Structures for Equipment Leasing (1984) seminar paper delivered at the Second World Leasing Convention, Washington, USA.

3.27 During the 1970s, five merchant banks were granted operating licences bringing the number of merchant banks operating in Nigeria to six. With the entry of these merchant banks in 1974/75 (it may be essential to point out that merchant banks were the only banks allowed to engage in the business of equipment leasing then) the leasing industry received a new lease of life and a greater volume of business was booked between 1976 and the close of the 1970s.

3.28 As these merchant banks expanded their activities in the leasing industry coupled with their varied operational styles and the need to promote and protect their business interests as equipment lessors, it became necessary for a formal forum to be established to discuss these objectives. In response to this, the Equipment Leasing Association of Nigeria was formed by the six operating merchant banks on 29th day of June 1983. The founding members of this association are:[33]

(1) Chase Merchant Bank Limited now called Continental Merchant Bank Limited.

(2) ICON Limited (Merchant Bankers)

(3) International Merchant Bank Limited

(4) NAL Merchant Bank Limited

(5) Nigerian-American Merchant Bank Limited

(6) Nigeria Merchant Bank Limited.

3.29 Following the economic crisis of the country which was principally caused by the severe decline in the oil revenue, a need arose to completely revamp the nation's economic system. Consequently the Structural Adjustment Programme (SAP) was introduced by the Federal Military Government of Nigeria about the third quarter of 1986. This economic programme abolished the inefficient and bureaucratic import licensing procedure and established the Foreign Exchange Market (FEM) which led to the nose-diving of the currency (Naira) in the bid to find a realistic exchange rate for the country. Still as part of the SAP, the Federal Military Government of Nigeria,

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33. Source: Equipment Leasing Association of Nigeria (ELAN) Newsletter vol. 1, no 1 of 1988.

through the Central Bank of Nigeria, restricted banks from exceeding certain credit ceilings and also deregulated the interest rate structure in the banks. The combined effect of all these economic measures in Nigeria was an acute cash shortage. Under this situation, it was time for industrialists, who must execute their projects, to start looking for an alternative source of funding, and naturally the nature and scope of equipment leasing transaction was found as the best alternative.

3.30 It must be pointed out that before SAP was introduced in 1986, which programme completely changed the economic scenario of the country, the leasing industry had suffered some drastic decline and neglect. This was mainly due to the huge oil revenue of the country which resulted in the high liquidity of banks and ipso facto the ability of their big customers (industrialists) to import and pay for virtually any machinery or plant they needed. Very few industrialists knew of the benefits of equipment leasing before the SAP, and the few that knew felt it was more beneficial and dignifying to own their equipment. But, following the catalytic effect of SAP, the leasing industry was once more activated, and has continued to grow.

3.31 The statistics below would at a glance show the growth pattern of leased assets owned at year end at cost which is an indication of the growth in Nigeria.[34]

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34. Equipment Leasing Association of Nigeria (ELAN) Annual Reports and Accounts 1991, p. 31. It should, however, be noted that the value of assets shown above indicates only the assets acquired by ELAN members. There are few other institutions that are engaged in equipment leasing outside the banking environment and who are not members of ELAN. It is being estimated that the value of the leased assets by ELAN members for 1992 and 1993 lease year would increase up to N2.25 billion and N2.50 billion respectively provided there are no adverse policies affecting its operation.

Leased Assets Owned at Year End

1985	N39 million
1986	N116 million
1987	N596 million
1988	N1.05 billion
1989	N1.60 billion
1990	N1.86 billion
1991	N2.03 billion

The enormous growth in the equipment leasing industry, particularly post SAP period, was due mainly to the following factors.

(1) The abolition of the inefficient and bureaucratic import licence regime which inhibited the importation of equipment into Nigeria. Since most equipment used in the country is imported, the difficulties surrounding the import licence regime discouraged a lot of people from contemplating the importation of the required equipment. But following the abolition of import licences in 1986 and the absence of a local substitute for the imported plant and machinery, it became inevitable to import the required equipment this time not on an out-right purchase basis, but on a lease basis.

(2) The introduction of the Foreign Exchange Market (FEM), which led to the devaluation of the naira. The devaluation of the naira inevitably meant that financing of capital assets would require huge funds which generally would be beyond the reach of most industrialists.

(3) The restriction on the credit expansion ability of commercial and merchant banks by the government. The resultant effect was that leasing as an alternative means of finance was strengthened as the regulatory authorities did not then treat equipment leasing transactions as lending.

(4) The introduction of a deregulated interest rate structure also aided the leasing business.

(5) The government's policy on the backward integration programme for the manufacturing sector coupled with the ban on importation of selected raw materials. This resulted in a search for local substitutes and the setting up of new projects to explore their potentials. This search for local substitutes and the desire to set up new projects could not be carried out without equipment, and so this provided lessors with good opportunities.

(6) Other government policy measures that assisted the leasing industry are:

(a) the non-oil export promotion drive,

(b) duty-free status of fish caught by Nigerian vessels. This led to increased demand for leasing of fishing trawlers,

(c) removal of the Nigerian Airways monopoly on the domestic routes which led to an influx of private airlines which required aircraft on a lease basis.

(7) The establishment of ELAN, which increased the awareness of both the lessors and the lessees. The period 1987 to 1988[35] particularly witnessed great increase in the value, volume and nature of business. During the period the following leasing transactions took place:

(a) Nigerian-American Merchant Bank (NAMBL) provided lease finance for:

(i) Leventis Technical Limited to acquire Allied oil field;

(ii) Nigerian Bottling Company (Cocoa-Cola) to acquire the Nigerian Soft Drinks Company (Schweppes);

(b) Continental Merchant Bank (IMB) provided aircraft leasing facilities for:

(i) Kabo Airline to procure a Boeing 747 aircraft from Eastern Airlines of United States of America;

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35. ELAN's Newsletter vol. 1, no 5, 1990.

(ii)Skypower Express to acquire five Brazilian Ambraer passenger aircraft;

(c) Continental Merchant Bank (CMB) again led a syndicated lease of N20 million in favour of Spintex Nigeria Limited;

(d) International Merchant Bank (IMB) led a N30 million lease syndication in favour of United Spinners Limited;

(e) First City Merchant Bank (FCMB) successfully initiated and packaged a N20 million lease syndication for Enpee Industries Nigeria Limited;

(f) Merchant Bank of Africa (MBA) similarly successfully packaged and agented a N25 million lease syndication for Five Star Industries Nigeria Limited.

CHAPTER FOUR

NATURE OF EQUIPMENT LEASING

Various Definitions

4.01 Perhaps it might be better to state from the outset that different legal systems of the world have different definitions of the concept of equipment leasing. Even within a particular legal system, where no standard definition has been agreed upon, different definitions may still be given to the concept from the standpoint of a professional body such as for accounting or for fiscal or legal purposes. Discussing the concept of equipment leasing Simon Hall stated that equipment leasing is a term which describes a number of different legal animals and which can have a very different meaning in various jurisdictions.[1] Supporting this view, Clark in his discussion of the definition of equipment leasing said:

> "There is no one generally accepted definition of leasing in the UK. Probably the best known is that adopted by ELA".[2]

Professor Adams in his discussion on the subject states that:

> " ... the word 'leasing' is used to describe transactions which are functionally alternatives to outright purchase: the bailment is really only a device the object of which is to provide the bank or finance house with a security interest in the asset being acquired".[3]

Dr Burgness in his discussion states that:

> "equipment leases may be described as contracts between a lessor and a lessee for the hire of a specific asset selected from a manufacturer or vendor of such assets by the lessee. The lessor retains the ownership of the asset. The lessee has possession and use of the asset on

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1. Hall. S. Leasing Finance (1985) (Euromoney publication), p. 51.

2. Clark. T.M, Leasing (1978) (McGraw-Hill), p. 57. Note that ELA stands for Equipment Leasing Association.

3. Adams J.N, Commercial Hiring And Leasing (1989) (Butterworths) p. 3.

payment of specified rentals over a period"[4]

4.02 Dr Shonibare in his letter to the President of Equipment Leasing Association of Nigeria stated:

> " ... the position in England is that the lessee shall take the equipment for a minimum period and shall thereafter have the option to either continue the lease at a reduced rental or to return the equipment. The practice in America is entirely different. In the United States the lessee has the option either to continue the lease at a reduced rental or to return or to buy the equipment".[5]

The position of Dr Shonibare was buttressed by Professor Goode when he stated:

> " ... In England, as in other common law jurisdictions outside North America, an equipment lease is a rental of goods under which the lessee has neither an obligation nor an option to buy. The inclusion of an option to purchase makes the agreement a hire-purchase agreements, and a provision obliging the 'lessor' to sell and the 'lessee' to buy creates a conditional sale agreement".[6]

The European Federation of Equipment leasing Company Associations (LEASEUROPE) which is made up of seventeen European nations defines equipment leasing as

> "a contract for the hire of plant, capital goods and equipment for the purpose of a business carried on by the lessee where the goods have been bought by the lessor for the purpose of the particular transaction, and title to the goods is retained by the lessor throughout the term of the contract".[7]

Clark states that in France and Belgium, an equipment user has an option to purchase the equipment at a fixed price under Crédit-Bail (this is a French term for equipment

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4. Burgess. R, Corporate Finance Law (1985) (Sweet and Maxwell), p. 171. See also Equipment Leasing Association's, Equipment Leasing (1976), p. 1.

5. The Nigerian Business Times of 22nd November 1984 at p. 5. For the definition and general principles of leasing in the United States of America, see s. 1-210 (37) of the Uniform Commercial Code (UCC) as revised by the 1987 Amendments to conform to new Article 2 A of the UCC.

6. Goode. R.M, Anatomy Of A United Kingdom Leasing Transaction With Special Reference To Default Clauses And Remedies, (1984) seminar paper delivered at the International Development Law Institute Rome, p. 2.

7. Leaseurope Journal (1988), published by Leaseurope of Avenue De Tervuren 267-1150 Brusells, p. 12.

leasing[8]) and that in France the price which is usually around 6 per cent of the cost of the equipment is agreed upon between the parties at the time of setting up the arrangement.[9] In other words, the lessee in these countries has three options at the end of the primary period and these are either to continue with the lease at a reduced rental or return the equipment or exercise the inherent right to purchase at the agreed rent.[10]

4.03 Despite the various definitions of the concept of equipment leasing given by these eminent jurists or associations, one factor appears to be common to all of them and that is: that equipment leasing contract is a contractual arrangement whereby one party in return for an agreed rent uses a capital asset belonging to another party.

4.04 Having seen that different legal systems have different definitions and that the possibility exists even within a particular legal system for various definitions of equipment leasing to be given, I shall now proceed to examine the concept and structure of equipment leasing within the Nigerian context: that being the focal point of the thesis.

What is an Equipment Lease in Nigeria?

4.05 Nigeria, fortunately, unlike most other countries, would appear to have one generally acceptable definition of equipment leasing and that is that given by the Equipment Leasing Association of Nigeria (ELAN). ELAN defines equipment leasing as:

> "A contract between the lessor and the lessee giving the lessee possession and use of a specific asset on payment of rentals over a period. The lessor retains the ownership of the asset so that it never becomes

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8. World Leasing Yearbook (1989) (Euromoney publications, Essex), p. 131.

9. Clark, op cit, p. 61.

10. Jaunait, E, French Legislation and Regulations for Equipment Leasing in the Official Account of the Proceedings of the 1976 Working Meeting, Leaseurope Brussels (1976), pp. 109-121.

the property of the lessee or any related third party, during the tenure of the lease".[11]

4.06 From the above definition we may identify the following features of an equipment lease:

1. That principally there are two parties to an equipment lease transaction, that is, the lessor and the lessee. The lessor is generally either the manufacturer of the assets, for example a computer or television set manufacturer, who allows the second party the use of the equipment usually for a short period on payment of rent, or a bank or other financial institution which purchases the equipment and lets it out to a second party for use for a long but specific period on payment of some rent. The lessee is the second party who uses the equipment on payment of rent.

2. That directly flowing from 1. above and within the general definition is a broad classification of the equipment leasing contract into two types, namely:

a) a finance lease contract which involves a longer period of contract, and

b) an operating lease contract which generally is for a short period.

3. That while the lessee has possessory right and use of the asset or equipment, that is, an exclusive right to the use of the equipment during the period of the lease, the ownership right or title in the equipment never passes to him.

4. That the lessee is enjoined to pay his rent (otherwise called rentals) in order to keep the contract alive. Consequently, refusal or neglect to pay the rentals may vitiate the contract.

5. That even though a typical equipment lease contract involves the lessor and the lessee, there is a probability of a third party being involved. Where three or more parties are involved, it is known as a leveraged lease. Basically a leveraged lease is an arrangement in which a lender advances money to the lessor on the security of the

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11. Equipment Leasing Association of Nigeria (ELAN) Handbook (Leamson), p. 1. This is an adoption of United Kingdom Equipment Leasing Association definition.

equipment and rentals and the lessor finally purchases the equipment for the use of the lessee.[12]

6. That the contract as at the time of entering into it must specify in very clear terms the particulars of the equipment to be leased. It follows, therefore, that an equipment lease contract in which the asset to the leased is not clearly specified may not be good in law.

Types of Equipment Leases in Nigeria

4.07 In the analysis of the definition of equipment leasing given by ELAN, one identified two types of leases, namely: finance leases and operating leases. I shall discuss these later. There are other equipment leasing schemes not covered by the ELAN's definition but which in the international leasing market, to which Nigeria belongs, appears to be gaining some recognition even though:

> "these have no legal significance but are used to market particular leasing products and reflect functional distinctions between one type of lease and another".[13]

Most of these equipment leasing schemes, though, developed in, and typical of, the United States of America have found their way into the international leasing system because of the USA's dominance of the world leasing market. But it may perhaps be necessary to point out that, despite the USA's dominance of the world equipment leasing market and its tendency to impose its own equipment leasing product terminologies, there is yet no universally agreed terminologies. The closest attempt at having a universal standard definition of terms would be the 'Glossary of Terms' published by the World Leasing Yearbook[14] whose terms and terminologies are constantly under

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12. Further discussion on this leasing arrangement will be taken up subsequently in this chapter.

13. Goode, R M, Commercial Law (1982) (Penguin Books/Allen Lane), p. 833.

14. The World Leasing Yearbooks are published annually by Euromoney Publications, 2 Church Street, Coggeshal, Essex C06 1TU, United Kingdom.

review and are not exhaustive. In other words, it is essential that in dealing with any particular country, one must try to appreciate the meaning and implication of their equipment leasing concept and the terms used within that jurisdiction.

Finance Lease

4.08 A finance lease (also known in some countries as a full-pay-out lease) has been defined as:

> "A contract involving the payment over an obligatory period of specified sums sufficient in total to amortize the capital outlay of the lessor and give some profit".[15]

4.09 A simple typical finance lease may be described as follows. A company that markets meat, called Beef Limited, has identified a new industrial refrigerator that can store meat fresh for six months if there is a power failure, costing two hundred thousand naira, but Beef Ltd has no immediate cash to purchase the refrigerator. It has now approached Obinna Bank Limited, informed the Bank of its intentions, the viability of the meat business, the improvements the acquisition of the refrigerator would bring about etc, and that it is unable to raise the finance for an outright purchase of the

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15. ELAN's Handbook op cit, pp. 1 and 2. Typically finance leases are net leases. A net lease arrangement is one in which the lessee pays all costs, such as maintenance, certain taxes and insurance, relating to the use of the leased equipment. These costs are not included as part of the rental payments. Note, however, that the Nigerian Accounting Standards Board (NASB) defines "Finance Lease" as one in which ownership risks and rewards are transfered to the lessee, who is obligated to pay such costs as insurance, maintenance and similar charges on the property. Usually, the agreement is non-cancellable and the lessee has the option to buy the property for a nominal amount upon the expiration of the lease. [See The Statement of Accounting Standard (SAS) II of March 1991, p. 7]. The option to buy in NASB's definition of a finance lease not only conflicts with that of ELAN (the sole authority recognised in matters relating to equipment leasing in Nigeria) but also amounts to a hire-purchase which is governed by the Nigerian Hire-Purchase Act of 1965 as amended upto 1970. The generally acceptable definition of equipment leasing (whether finance or operating) is that given by ELAN which in fact is an adoption of the United Kingdom Equipment Leasing Association's definition. In any case, any conflict in definition is usually resolved by the leasing agreement which would state whether or not a lessee has a right to purchase equipment as the end of the lease period.

refrigerator. The Bank on its own has carried out a credit enquiry on Beef Ltd and found its creditworthiness good. In addition, the Bank has found out that the business was viable since there is a high demand for beef in the area, that the cash-flow analysis was reasonable and that there is no apparent likelihood of default by Beef Ltd etc. Both parties have now agreed that the total cost would be amortized in four years at fifteen per cent per annum. The total rent, therefore, would be:

Cost of refrigerator N200,000.00

Rental for the first year

at 15% per annum, ie

$\frac{15}{100} \times \frac{200{,}000.00}{1} = N30{,}000.00$

Then multiply the N30,000.00 by the four years amortization period = N120,000.00.

Therefore, amount of rental for four years = N120,000.00

Total amount expected to be recouped by Obinna Bank Ltd = N320,000.00.

After the signing of the equipment lease agreement which must have a schedule specifying details of the equipment and the rental payable, Beef Ltd will be called upon to make the first instalmental payment which may be yearly, half-yearly, quarterly, or even monthly. On the payment of the first instalment, Obinna Bank Ltd would then pay the seller of the refrigerator and acquire the ownership of it but transfer possession by the delivery of the refrigerator to Beef Ltd and upon memorandum stating that the refrigerator was received in good/satisfactory condition. Generally Obinna Bank Ltd is not expected even to see the refrigerator which had earlier been identified by Beef Ltd. In other words, the Bank would be relying on Beef Ltd's experience, skill and competence in the choice of the equipment. The signed agreement between the parties, who are now referred to as lessor (Obinna Bank Ltd) and lessee (Beef Ltd) would generally stipulate that it is the responsibility of Beef Ltd to maintain the refrigerator, insure it, ensure that it is in good repair even after the four year lease period, ensure

that all necessary permissions obtainable from the tax and local and city councils have been obtained etc. The agreement would also generally state and confer exclusive right to use the refrigerator on Beef Ltd and may also state what happens to the equipment at the termination of the lease. But note that under no circumstances would the lessee be given the option to purchase the equipment during this period of lease and neither would the subsisting agreement contain any clause which suggests that.

4.10 An analysis of this simple description of a typical finance lease within the Nigerian banking environment has the following characteristics:

1. It is the lessee that identifies and chooses the refrigerator and not the lessor;

2. The lessor is only brought in to finance the purchase of the refrigerator;

3. During the period of the lease (ie basic or primary period) Beef Ltd cannot cancel the transaction (usually called the non-cancellable period) and it is during this primary period that Obinna Bank Ltd expects to recoup all their money (called capital outlay) together with profits (called yields). In some instances, it may turn out that the lessor may not anticipate recouping his total outlay and profit, but in any event he must seek in a finance lease to recover a major part of the initial outlay and profit. This type of situation (ie recovering a substantial part of purchase money and profit) is found only in few cases;

4. Obinna Bank Ltd, on buying the refrigerator, acquires ownership which never passes to the lessee even on full payment of the rentals which rentals are projected to cover both the cost of the equipment and the profit expected by the lessor. The fact that ownership resides in Obinna Bank Ltd during and immediately after the lease period is the fundamental distinction between a hire-purchase and a conditional sale agreement on the one hand, and an equipment lease on the other hand;

5. The lessee has exclusive use and quiet enjoyment of the equipment during the period of the lease. By virtue of his exclusive right of possession, he could, therefore, sue an unauthorized person interfering with the equipment in trespass;

6. The payment of the rental is a condition for the use of the equipment and non-payment either through neglect or refusal may entitle the lessor to avoid the contract;

7. The burden of obsolescence of the equipment falls primarily on the lessee;

8. Other features by which a finance lease can be identified include but are not limited to:

a) that it is the responsibility of the lessee adequately to maintain and insure the equipment;

b) the lessee's positive acknowledgement of the lessor's right of action in the event of default by him (the lessee) during the period of the lease;

c) the equipment is usually an industrial or commercial product rather than a consumer product;

d) the lessee's obligation to indemnify the lessor against any claims by third parties arising out of the lessor's ownership of the equipment;

e) an option open to the lessee to continue the lease at the end of the primary period at a reduced rental. The continued lease is referred to as a secondary lease;

f) the agreement may also contain a clause giving the lessee some portion of the sale proceeds but never the option to purchase. In practice, (though, this is not usually found in any finance lease agreement) the lessee would find someone willing to purchase the equipment at the end of the primary period if the lessor is willing to sell, and thereafter sell back the equipment to him (the lessee).

Operating Lease

4.11 An operating lease (also known in some countries as 'service lease') encompasses all other leasing contracts which typically are cancellable by the lessee upon giving due notice and not involving any fixed future monetary or other commitment by the lessee and usually for a short duration, for example the hire of a motor car for six months. It has to be pointed out here that the term 'contract hire', which is merely a variant of an

operating lease, is a term unknown to the Nigerian leasing environment. ELAN has thus defined an operating lease as:

> "Any other type of lease, that is to say, where the asset is not wholly amortized during the non-cancellable period, if any, of the lease, and where the lessor does not rely for his profit on the rentals in a non-cancellable period".[16]

4.12 From the above definition, a simple example of an operating lease may be given thus. A national palm oil company, Adaku Limited, seeking financial assistance from the World Bank, has just been informed that the officials of the World Bank would like to visit its palm oil mills in all its locations including its farms to assess the level of financial assistance that the Bank can give. Consequent upon this information Adaku Ltd has approached Chudi Limited, a motor leasing and servicing company, to take a lease of a new Mercedes car for the use of the officials, costing N50,000.00 for six months at the rental of N3,000.00 every month. The agreement contains provision to the effect that the maintenance will be borne by Chudi Ltd and that Adaku Ltd can only terminate the agreement on giving due notice. The agreement further states that in the event that Adaku Ltd is willing to continue the lease after six months, it should give notice of its intention to Chudi but under no circumstances will the option to renew be converted or seen as option to buy. On signing the agreement and payment of the rental which is usually en bloc for very short periods, Adaku Ltd takes lease of the car and returns it to Chudi Ltd after six months.

4.13 In this simple but typical example of an operating lease, it would be seen that on the return of the car Chudi Ltd would only receive a total of N18,000.00 from Adaku Ltd for a car costing N50,000.00. No prudent businessman or company would engage in this type of business if the sum received from Adaku were to be the only return on the investment. But fortunately Mercedes cars are known for their durability and good second-hand value. And since the useful life of Mercedes cars from the experience of

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16. Ibid, p. 2.

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Chudi is about three years, beyond which minor problems start rearing up their heads, Chudi has another 21/2 years to let out the car to other lessees. Consequently, if it is lucky enough to let it out throughout its useful life, it will earn a total of N108,000.00 against a car costing only N50,000.00. This is not all, at the end of the three years, Chudi will still sell the car at probably a quarter of the cost of purchase.

4.14 From the above example the following characteristics of an operating lease emerge:

1. An operating lease envisages a number of lessees making use of the car at different periods during its working life;

2. The lessor does not hope to recoup the cost of the car and profit from any one lessee;

3. No option is given to the lessees to purchase the car at the end of the lease period;

4. The lessor is responsible for the maintenance of the car. Failure to supply the necessary services, would void the contract;

5. The lessor calculates the rentals on the use-value of the equipment and not on the "useful life" of the car. This is unlike a finance lease;

6. The burden of obsolescence, unlike in a finance lease, falls on the lessor;

7. It is more used in relation to consumer goods, as opposed to industrial or commercial goods;

8. It is for short periods;

9. It is not as a result of the skill and competence of the lessee that the equipment is bought and so the lessor would incur liability where the equipment does not satisfy the specific requirements of the lessee provided the purpose was made known in the first place to the lessor;[17]

10. The lessee can repudiate or cancel the lease agreement provided he gives adequate notice.;

11. An operating leasing business, by its nature, requires the possession of skill, knowledge and experience in the products being leased. It is for this reason, therefore,

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17. Priest v. Last [1903] 2 K.B, 148; 47 Sol. Jo. 566, C.A.

that Professor Adams says: "Generally speaking, this business is not handled by banks, who lack the expertise to engage in operating leasing".[18]

Leasing Schemes

4.15 Having shown that the distinction in the definition of equipment leasing in Nigeria as provided by ELAN is between a finance lease and an operating lease, I shall now proceed to discuss the leasing schemes within the banking environment which are invariably either a form of finance lease or an operating lease and the leasing terms which are gradually being introduced into the equipment leasing vocabulary in Nigeria.

1. Leveraged Lease

4.16 A leveraged lease may be defined as:

> "A lease under which a lessor provides only a proportion of the capital cost from his own funds to purchase the equipment for use by the lessee while the major proportion and the balance of the funds needed to meet the purchase price of the equipment is provided by one or more institutional investors or finance houses who have no recourse to the lessor for the repayment of their loan".[19]

4.17 This type of lease which is becoming common in Nigeria usually involves huge funds, long duration of lease periods, and is typical of very expensive equipment or assets such as aeroplanes, oil rigs, ships etc, where no one lessor would be expected to finance the acquisition, and even where he is capable, may not wish to do so because of the high risk element involved. The lessor under this type of arrangement usually provides not more than 40 per cent of the total cost price while the other investors would account for the balance. The part of the fund provided by the lessor is known as the

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18. Adams, J N, op cit, p. 11.

19. The Nigerian Business Concord Newspaper (1989), Tuesday 28 March, p. 7. See also ELAN'S Handbook, op cit, p. 2.

'equity portion' or 'equity funds' while the balance is called 'debt portion' or 'debt funds'.

4.18 The institutional investors, usually banks, insurance companies, pension funds, trusteeship companies, foundations etc, are collectively referred to in the leveraged lease as 'loan participants' or 'debt participants' or 'debt holders', while the lessor who may be a single legal entity such as a bank or a group of banks or a group of financial institutions or a combination of financial institutions and other organisations, are referred to as 'equity participants' or 'equity holders'. In view of the huge funds usually involved in a typical leveraged lease arrangement, the complex nature, the attendant high level risk, and the number of parties involved, it is normal to have two additional parties appointed by the loan participants as well as the equity participants to manage their rights and obligations. These additional parties are called the 'indenture trustees' and the 'owner trustees' respectively.

4.19 To be able to fully appreciate the complex structure of a typical leveraged leasing arrangement (see diagram), it is necessary to explain the functions of each of the participants in the transaction. These participants are:

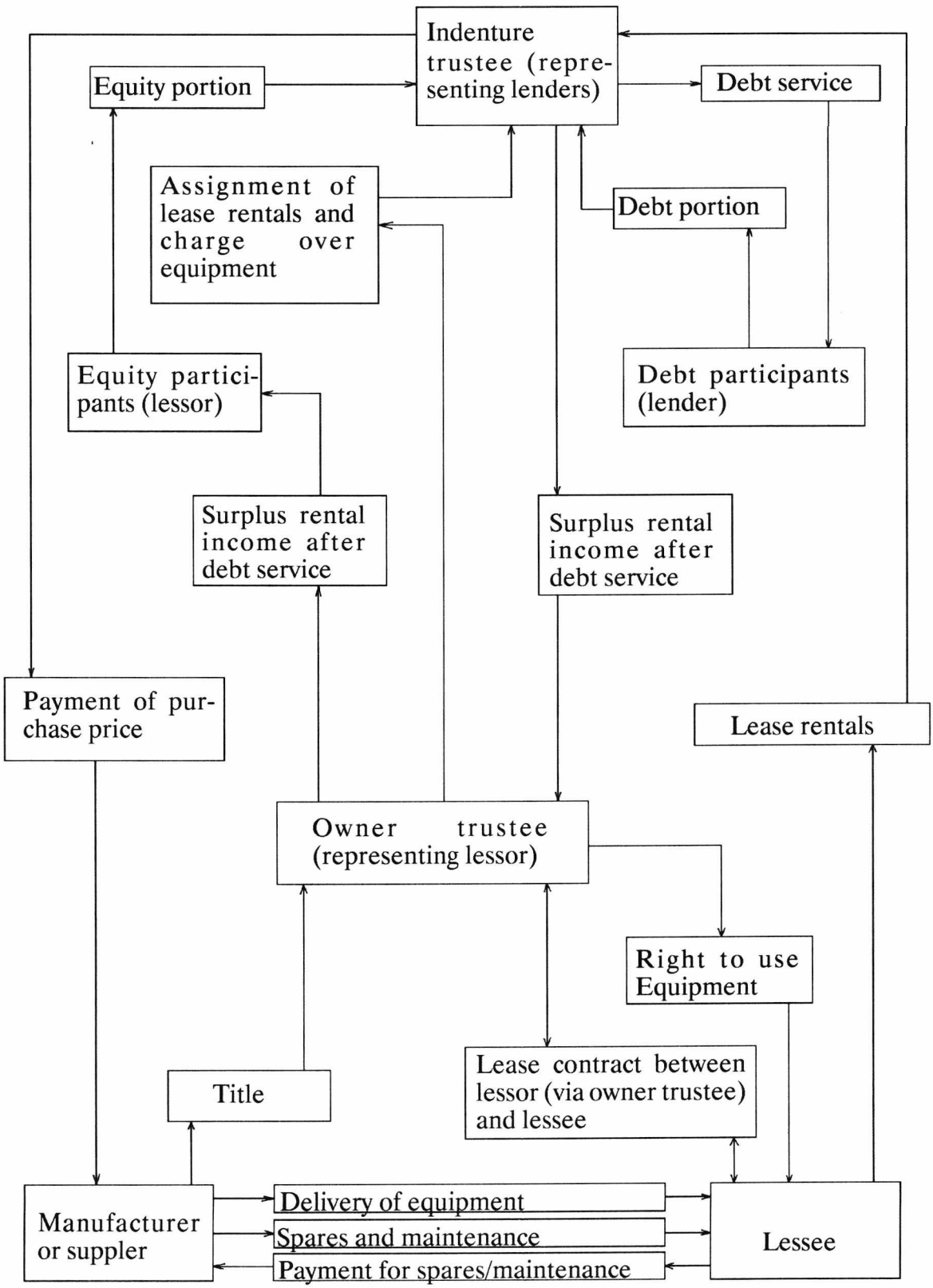

Diagram showing the structure of a typical complex Leveraged Leasing Scheme. In a simple leveraged lease arrangement, the purchase price may be paid by the lender directly to the supplier / manufacturer. See also diagram of a simple leveraged lease later in this chapter.

a) The Lessor (also called the 'equity participant' or the 'equity holder')

4.20 The lessor who usually does not contribute more than 40% of the total cost of the equipment acquires the title to the leased asset and consequently enjoys all the applicable tax benefits associated with the rights of the true owner. The lessor receives rental payment remaining after the payment of the debt service and any other costs.

b) The Lessee

4.21 The lessee selects the equipment. In other words, he does not rely on the skill or competence of the lessor in the selection of the requisite asset. The lessee is entitled to the possession and exclusive use of the equipment and he is also enjoined to pay the rentals as and when due. He is liable to the loan participants (ie lenders) for rental defaults, and this is because the lenders have no recourse to the lessor for the repayment of the loan.

c) The Lender (also called institutional investor, or 'loan participants', or 'debt participant' or 'debt holder')

4.22 These are usually banks, financial institutions and other organisations who lend the greater proportion of the funds for which the equipment is bought. Their loan is made to the lessor (equity participant) on a non-recourse basis, and is secured by a charge on the equipment purchased as well as an assignment of the rentals under the lease. The principal and interest payments that are due to the loan participants (lenders) are paid by the lessee to the agent of the lenders, (ie the indenture trustee) who finally pays it over to the lenders. Lenders, under a leveraged lease arrangement, tend to treat the supply of funds for the purchase of the equipment just like any other credit facility. Consequently where the credit rating of the lessee appears not satisfactory, they (the lenders) usually ask for further security despite the fact that they have a charge on the equipment as well as an assignment of the rental payment.

d) Indenture Trustee

4.23 The indenture trustee (also called the security trustee) represents the lenders or the loan participant. There is usually a working relationship between the indenture trustee and the owner trustee on the lease. The owner trustee who acts for the lessor (equity participant) assigns to the indenture trustee, for the benefit of the lenders, a charge over the equipment purchased as well as lease rentals as security for the loan. In addition it is the indenture trustee's responsibility to receive funds from both the lessor and the lenders and pay the seller of the equipment. He distributes the rental income from the lessee. The practice in the distribution being that the debt participants (lenders) are paid first and any surplus is then handed over to the equity participants (lessors) through their agent, the owner trustees. In the event of default, the indenture trustee takes the necessary steps to protect the security of the lenders. In some cases the indenture trustee would also be appointed as owner trustee. This situation, which is not common, is usually found in small leveraged arrangements and has the tendency to cause conflict of interest between the lessor and lender in the event of a default by the lessee.

e) The Owner Trustee

4.24 The owner trustee who represents the equity participants (the lessor) is normally not required unless there are more lessors than one. They hold title on behalf of the lessors subject to a charge over the equipment for the benefit of the lenders. He also receives the surplus of the rental income from the indenture trustees after debt servicing.

f) The Characteristics of Leveraged Leasing

4.25 From the discussion so far on the subject of leveraged leasing, the following features appear typical of the scheme:

i) At least three parties are involved; a lessee, a lessor and a long-term creditor/lender (note that the lessor may be a group of banks or other organisations and not

necessarily one legal person, while the long-term investor or creditor or lender may be also a group of legal entities);

ii) The financing provided by the creditor / lender is much higher than that of the lessor;

iii) The lessor's income or return is low during the early years of the lease but gradually rises during the later years;

iv) The creditor/lender has no recourse to the lessor for the repayment of the loan;

v) By providing only a proportion of the purchase price of the equipment the lessor (equity participant) acquires title to the equipment and consequently claims the capital allowances (tax benefits) which are ultimately passed on to the lessee by way of lower rentals. It is this ability to claim all the tax benefits on the equipment while providing only a proportion of the total cost of the purchase price of the leased equipment that is the LEVERAGED part of the leveraged lease;

vi) The creditor/lender, as a consideration and security for advancing the funds for the purchase of the equipment, takes a charge on the equipment as well as being entitled to the rentals from the lessee;

vii) Where the indenture trustee acts also as owner trustee or vice versa, his roles and functions are as an Agent Bank in a loan syndication arrangement. In other words, he is an agent for both lenders and lessors only and not an agent for the lessee. And, being an agent, there are a number of implied duties imposed on him which include but are not limited to:

a) a duty that he should neither favour either party (ie lenders or lessors) nor take such actions that are likely to cause conflict of interest between the parties;

b) a duty not to sub-delegate the powers conferred on him (delegatus non potest delegare);

c) a duty to disclose everything in connection with the agency role and which is material to his principals (ie lenders and lessors);

d) a duty to exercise such skill, care and diligence as is reasonably necessary for the

proper performance of his duties.[20]

2.Sale and Lease-Back

4.26 A sale and lease-back transaction may be defined as a composite contractual relationship in which the ultimate equipment user genuinely sells equipment to which he has ownership (title) to a buyer and subsequently and independently takes back the same equipment on lease.[21] Putting it differently, it is a transaction which involves a true sale of equipment by the owner and a subsequent true lease of the equipment back to the seller.[22] The buyer and the seller being lessor and lessee respectively.

4.27 The equipment in a sale and lease-back transaction may be new equipment in which case it is called a 'sale and lease-back before use' or second-hand equipment in which case it is referred to as 'sale and lease-back after use'. The price paid by the lessor should be the prevailing market value of the equipment.[23] This is necessary in order to treat the transaction, in the event of liquidation, as a genuine commercial lease instead of an irregular lease transaction or a sham which entitles the liquidator or court to declare it void. Thus, in the case of Re Watson,[24] Mrs Watson had asked Mr Love to lend her money against the security of her furniture. Mr Love agreed to lend her £150 and both parties entered into an agreement in which it was agreed:

a) that Mrs Watson would sell the furniture to Mr Love and sign a hire-purchase agreement thereby she agreed to hire it back from Mr Love at a rent of £40 a quarter until £200 was paid;

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20. Beal v. South Devon Railway Co (1864) 3H & C. 337 at p. 341.

21. The Nigerian Business Concord Newspaper (1989) op cit, p. 7. See also Guest, A G, The Law of Hire-Purchase (1966) (Sweet & Maxwell), p. 50.

22. World Leasing Yearbook (1989), op cit, p. 434.

23. Newbigging v. Ritchie's Trustee (1930) S C 273.

24. Re Watson, Ex Parte official Receiver in Bankruptcy (1890), 25 Q.B.D. 27.

b) that Mrs Watson was at liberty to sell the furniture on condition that the auctioneer was directed by her to pay Mr Love his £200;

c) that Mr Love was empowered to seize the furniture in the event of Mrs Watson's default.

Mrs Watson subsequently, became bankrupt while still in possession of the furniture and in an action that ensued, the Court of Appeal held inter alia:

a) that the sale of the furniture and subsequent hiring back were not genuine transactions, but were part and parcel of one transaction by which Mrs Watson obtained an advance of money on the security of the furniture. That being so, the whole transaction amounted to a bill of sale requiring registration under the Bill of Sale Acts. And, since there was no registration under the Bill of Sale Act, the purported transfer of title in the goods to Mr Love was void as against Mrs Watson's creditors and consequently her trustee in bankruptcy was entitled to take possession of the furniture and divide it among the creditors as part of the bankrupt's estate.

b) that the Court was at liberty to go behind the documents in order to ascertain the true nature of the transaction.

Commenting on the purported agreement, Lord Esher MR, said:

> "What kind of security is this document? It is at least a licence to take possession of personal chattels. If this is the case of a loan of money secured by licence to seize the furniture in default of payment, and this document is the evidence of such security, then it is obvious that the document comes within the 4th section of the Bills of Sale Act 1878. If, however, the transaction amounted to a mortgage of the furniture, then it seems to me that this document would be the evidence substantiating such mortgage, and therefore an assurance of personal chattels, and so either way the document would be within the Bills of Sale Act."[25]

Continuing he said:

> " ... because people put the thing in the form of a hiring agreement, when in truth there is no hiring, and the transaction is merely one of

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25. Ibid, p. 32.

loan and security taken, the Court cannot hold that the document is a bill of sale, though called a hiring agreement."[26]

4.28 In the eyes of the English law, as pointed out by Professor Goode, a sale and lease-back may be seen as a disguised chattel mortgage,[27] where the evidence indicates that there was no genuine intent on the part of the lessee to transfer and the lessor to acquire full ownership.[28] Other conditions which may be questionable as being genuine sale and lease-back transaction include:

a) where the purchaser is a money-lender or has no other interest in the transaction apart from lending money to the lessee;[29]

b) where the extraordinary terms of the agreement are seen clearly to militate against the lessee in the event of his default;[30]

c) where power is conferred on the lessee by the provisions of the agreement to sell the goods even though he is a mere bailee in law under the agreement;[31]

d) where the lessor does not become the absolute beneficial owner of the equipment, but is bound by the agreement to demise it back to the lessee;[32]

e) where the purchase price was otherwise tailored to meet the seller's financial requirement instead of being a genuine price;[33]

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26. Ibid, p. 34.

27. See also Adams, op cit, p. 46.

28. Goode, R M, Anatomy Of A United Kingdom Leasing Transaction With Special Reference To Default Clauses And Remedies, op cit, p. 3.

29. Cochrane v. Matthews (1878) 10 Ch D, 80n; 48 L.J. Bcy. 3n. See also Maas v. Pepper [1905] A C 102; 74 L.J.K.B. 452. See also Re Watson, (supra).

30. Motor Trade Finance Ltd v. H E Motors Ltd, unreported, House of Lords, 26 March 1926 referred to in Re George Inglefield Ltd. [1933] Ch. 1 at p. 20; [1932] All E.R. Rep 244.

31. Re Watson, (supra). See also Motor Trade Finance v. H E Motors Ltd, (supra).

32. Maas v. Pepper, (supra). See also Cochrane v. Matthews, (supra).

33. Kan Yeow Wing v. Keng Soon Motor Finance Co. (1962), 28 M.L.J. 391.

f) where the agreement was signed before the equipment was sold;[34]

g) where the supporting documents do not represent a true sale and lease-back transaction.

Thus, in the case of Polsky v. S and A Services,[35] Lord Goddard CJ stated:

> "It seems to me that one of the most satisfactory ways of deciding what the true nature of the transaction was is to see whether the documents themselves accurately set out the deal between the parties as it took place and at the time it took place, or whether the facts, or some of them, therein recorded do not truly represent that which happened, but give the transaction what I may call innocent appearance."

Briefly the facts of the case are that the plaintiff bought a car from a motor dealer for £895 and gave his cheque for this amount. In order to obtain money to meet the cheque he approached the defendants: a finance company. The transaction between the plaintiff and the defendants was carried out on the defendant's usual hire-purchase documents appropriate to a sale by a dealer to the finance company. The invoice from the plaintiff to the defendants showed the price of £895 'less first payment due under your agreement £495', and the defendants paid the plaintiff the balance of £400. The hire-purchase agreement provided for the payment by the plaintiff of £495 on signing the agreement, though the plaintiff never paid this amount, and for payment by instalments for the balance of £450 (ie £400 plus £50 'charges'). The Court of Appeal, in upholding the decision of the lower court, held that the purported hire-purchase agreement was not genuine but a sham since, although it purported to record an initial payment of £495 by the plaintiff, no cash was paid and that the purpose of the transaction was to evade the provisions of the Bills of Sale Act. The Court further stated that the transaction being a bill of sale was void for want of registration.

4.29 From the foregoing discussion, it would seem that the line of distinction between a genuine sale and lease-back transaction and a disguised loan on the security of the

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34. See Guest, op cit, p. 53.

35. [1951] 1 All E R 185; affirmed [1951] 1 All E R 1062, n; 95 Sol. Jo. 414, C.A.

chattels is tenuous and often difficult to draw, much depending on the combined effect of the intention of the parties and the surrounding facts of each case.[36] It is consequently important that where parties truly intend to enter into a sale and lease-back transaction adequate steps must be taken to establish that. In this connection, Professor Adams advises that the sale and lease-back

> " ... transactions should generally be set up so that the lessor acquires the goods before they have been used by the lessee. If this is done, the transaction is more likely to be regarded as a true sale and lease-back used to finance the acquisition of goods rather than a financing of an existing goods."[37]

Similarly if there is a true sale of equipment followed by a true leasing back of the same equipment to the seller, a genuine sale and lease-back transaction would have been established and it is irrelevant whether or not it was intended as a means of obtaining a loan.[38] Thus in the classical case of Yorkshire Railway Wagon Co v Maclure,[39] a railway company, having no power to borrow, sold its rolling stock for £30,000 to the plaintiff in order to raise funds, and at the same time hired back the stock under a hire-purchase. A term of the agreement provided that the railway company would repay the sum received on the sale and interest in five years. The defendant and two other directors of the railway company guaranteed the repayment of the hire-rent. On default by the railway company, the plaintiff sued the defendant on his guarantee. The

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36. Diamond, A L, Commercial and Consumer Credit: An Introduction (1982) (Butterworths), p. 304.

37. Adams, op cit, p. 45. Note that there is no contradiction between Professor Adam's view and a 'sale and lease-back after use' arrangement as long as the lessee has not used the equipment. In other words, though equipment may be a second-hand asset having been used by someone else, in relation to the sale and lease-back transaction, it is regarded as new in the sense that the lessee has not used it.

38. British Ry Traffic and Electric Co v. Kahn [1921] W.N. 52 at p. 53; 7 Digest (Repl.) 6.

39. (1882) 21 Ch D 309. See also Victoria Dairy Co of Worthing v. West (1895) 11 TLR, 233; British Railway Traffic and Electric Co v. Kahn [1921] WN, 52; Staffs Motor Guarantee Ltd v. British Wagon Co Ltd [1934] 2 KB, 305; Olds Discount Co Ltd v. Krett [1940] 2 KB, 117; Spenser v. North Country Finance Co Ltd [1963] C.L.Y. 212; Stoneleigh Finance Ltd v. Philips [1965] 2 WLR, 508; [1965] 2 Q.B. 537; [1965] 1 All E.R. 513; 109 Sol. Jo. 178 C.A.

defendant pleaded that the transaction was void, being an ultra vires borrowing by the company and void under section 19 of the Railway Regulation Act 1844 and section 4 of the Railway Companies Act 1867. The court of first instance held that the transaction was "merely an attempt to give a security for a loan upon the rolling stock" and so was illegal and void. But the Court of Appeal took a different view. It held that the transaction was not a borrowing under the guise of a fictitious sale but a bona fide sale of a rolling stock and a hiring back of the same stock, and that it was irrelevant that the purpose in selling and hiring back was to obtain loan, so long as there was a genuine sale and a genuine hiring back.

4.30 Another case (in fact a more directly relevant case in that it involved a lease rather than hire-purchase) in which the Court held that a genuine sale followed by a true leasing back did not amount to disguised borrowing backed up with security and so was not caught by the provisions of the Bills of Sale Act, was Clapham v Ives.[40] Briefly the facts of the case were that Ives being indebted to Holmes (claimant in this case) agreed to sell his property at the Malt Shovel Hotel to him. Both parties agreed that Tillotson should value the property. Tillotson then prepared and signed an inventory and valuation for 930L 12s 7d which was stamped with IL stamp and dated 9 August 1902. The document read:

> "Inventory and valuation for furniture, trade fittings, fixtures, stock in trade and licences at the Malt Shovel Hotel, Situate at Burnley in Wharfdale and made from John Ives to J R Holmes and Sons, brewers, Bingley. Total valuation 930L 12s 7d. Aug 9th, 1902 - (signed) JOHN TILLOTSON."

Subsequently, on 12 September 1902, Holmes granted Ives a quarterly lease of Malt Shovel Hotel and also let him the fixtures and effects set out in the schedule and at the end of the lease it was agreed that:

> "the whole of the valuation as per inventory is the property of J R Holmes and Sons, brewers, Bingley"

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40. (1904), 91 LT 69; 48 Sol. Jo. 417.

and this was signed by Ives. In September 1903 the plaintiff having recovered judgment against Ives, execution was issued against certain goods at the Malt Shovel Hotel Burnley which was carried on by Ives and thereupon the goods were claimed by Holmes on the grounds that they had already been purchased and so did not belong to Ives. The Court held that neither the document of 9 August 1902 nor the lease of 12 September 1902 constituted a bill of sale as there was good sale which passed the property independently of the documents.

4.31 As can be seen, there are two lines of cases on the subject. In one line, the Courts have held sale and lease-back transactions as not being genuine, but a sham and therefore void for want of registration under the Bills of Sale Acts. The Courts have seen cases in this category as nothing other than a loan of money backed up by some security as in Re Watson. In another line of cases, as in Yorkshire Railway Wagon Co v Maclure, the Courts have held similar transactions to be valid and genuine sale and lease-backs. The basic distinction between the two lines of cases being that the lessors in cases such as of Yorkshire Railway Wagon Co v. Maclure were genuinely interested in selling their goods. Thus in Yorkshire Railway the company needed to sell its rolling stock since it was advised that it could not borrow. Mrs Watson in Re Watson by contrast, had no genuine intention whatsoever to sell her furniture. One must reiterate, however, that there are a lot of inconsistencies regarding decisions on sale and lease-back transactions and as Professor Diamond succinctly puts it:

> "There are a great many decisions, many of which appear to be mutually inconsistent. In different cases, different facts or combinations of facts have assumed importance ... "[41]

4.32 Despite the problems associated with sale and lease-back transaction as shown above and although Professor Guest is of the opinion that they:

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41. Diamond, A L, op cit, p. 304.

" ... are best avoided by finance companies and others; such business is fraught with peril",[42]

there are a number of reasons why the device still thrives. These include:

(a) that some people do not want the public or their suppliers to know that they are utilizing a leasing facility in the execution of their projects. The lessor may therefore advance the purchase money to the lessee to purchase the equipment in the lessee's name and thereafter 'sell' the equipment to the lessor and leases it back from the lessor on a sale and lease-back basis. Alternatively, the lessor may authorize the lessee to purchase the equipment in the lessee's name as the apparent principal but in reality as an agent for the lessor who will reimburse the purchase price paid by the lessee to the supplier.

(b) that it provides a convenient method of raising additional working capital for an organisation especially when the constitution (memorandum and articles of association for companies) does not empower it to borrow or where a particular company has reached its borrowing limits.[43]

(c) that it is a convenient financial tool which could be adopted in the refinancing of short-term funds needed in procuring the assets on a more suitable medium or even long term.

3. Other leasing Schemes and Terms

(a) Capital Lease

4.33 The term 'capital lease' appears to be a term typical of the United States of America leasing industry. In the USA a lease is called a capital lease if it meets any of the following criteria:

(i) the lease transfers ownership to the lessee at the end of the lease term;

(ii) the lease contains an option to purchase the equipment at a bargain price;

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42. Guest, A. G, op cit, p. 50.

43. Yorkshire Railway Wagon Co v. Maclure (supra).

(iii) the lease term is equal to 75% or more of the estimated economic life of the property (exceptions for used property leased towards the end of its useful life,for example second-hand equipment);

(iv) the present value of the minimum lease rental payments is equal to 90% or more of the fair market value of the leased equipment after taking into consideration any related investment incentives accruing to the lessor.[44]

(b) True Lease

4.34 The term 'true lease' which is typical of the United States of America simply means a lease that complies or conforms to the rules and regulations of any given country. In the USA a true lease is a transaction which qualifies as a lease under the Internal Revenue Code so that the lessee can claim rental payments as tax deductions and the lessor can claim tax benefits of ownership as depreciation and Investment Tax Credit.[45] But, since rules and regulations regarding leases differ from one country to another, a true lease in one country would not necessarily become a true lease in another country. It has been shown, for example, that a true lease in England must not have a purchase option otherwise it would qualify as a hire-purchase transaction, but in the United States of America a true lease normally would contain an option to return the equipment at the end of the lease term (ie primary period) or the renewal of the lease, or the option to purchase the equipment. In France, as has previously been shown, a true lease (crédit-bail) would have an option to purchase at a fixed price, and the price which is usually about 6% of the cost of the equipment, is agreed upon at the time of entering into the contract. On the other hand, a true lease in England may contain a residual sharing arrangement between the lessor and the lessee, but the inclusion of that sort of clause would disqualify the lease from being a true lease in the United States of America. A true lease therefore must be defined within the legislative framework of a given country.

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44. World Leasing Yearbook (1989), op cit, p. 431.

45. Ibid, pp. 434-435.

(c) Syndicated Lease

4.35 The term 'syndicated lease' (also called 'consortium lease') is simply a lease in which a number of lessors, (not lenders) put resources together to finance the acquisition of an equipment for the lessee. As would naturally be expected, the equipment usually found in this type of transaction is very expensive (big-ticket or large market transaction) and generally because of its expensive nature, the potential risk is also high for any individual lessor to bear.[46]

(d) International Leasing And Domestic Leasing

4.36 International leasing is also known as 'Cross-border leasing' which is basically a leasing transaction in which the lessor and lessee are in different countries or sometimes in different legal jurisdictions.[47] On the other hand "Domestic Leasing" is a leasing transaction in which the major participants; the lessor, the lessee and the supplier of the equipment are of one nationality.[47(a)]

(e) Conditional Sale Lease

4.37 Conditional sale lease is a United States of America leasing term which basically is a 'conditional sale' in the United Kingdom and Nigeria.

(f) Lease-Purchase

4.38 Occasionally the term 'lease-purchase' is used in leasing transactions to indicate the intention of the lessee to purchase the equipment at the end of the lease period. The term is a legal misnomer since the provision of a clause which shows that title would pass to the lessee at the end of the lease period would put the transaction outside the

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46. Ibid, p. 431.

47. Ibid, p. 431.

47(a). Kamath. K. V, Kerkar. S. A, And Viswanath. T, The Principles And Practice of Leasing, (1990) (Lease Asia) p. 28.

purview of the definition of equipment leasing in Nigeria.[48] In fact, the inclusion of such a clause automatically converts the transaction into a hire-purchase and therefore would be guided by the provisions of the Hire-Purchase Act 1965.[49] as amended up to 1970.

(g) Full Pay-Out Lease

4.39 The term 'full pay-out lease' is of United States of America origin which is nothing more than a finance lease in Nigeria. A full pay-out lease, as the name implies, is a lease in which the lessor aims not only to recover the whole of the initial capital investment out of rentals payable under the contractual arrangement with the lessee, but also to achieve a pre-determined yield on the funds expended to finance the investment.[50] The opposite of full pay-out lease is 'part pay-out lease' or 'non pay-out lease' or 'operating lease' in Nigeria.

(h) Single Investor Lease

4.40 The term 'single investor lease' is also of United States of America origin. It simply means a lease in which the lessor provides the whole of the purchase price for the leased equipment from his own resources including any borrowing for which he (the lessor) is principally liable. The opposite of single investor lease is 'syndicated lease' sometimes again called 'multi-lessor lease'. A single investor lease, like a syndicated lease, can either be a finance lease or an operating lease.

(i) Sub-Lease

4.41 The term 'sub-lease' simply means a lease transaction in which the lessee sub-lets or re-leases the lease equipment to a third party called the sub-lessee, while the original

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48. ELAN's Handbook, op cit, p. 1.

49. Section 20 of The Nigerian Hire-Purchase Act 1965.

50. World Leasing Yearbook 1989, op cit, p. 432. See also ELAN's Handbook, op cit, p. 1.

lease transaction between the lessor and the lessee still remains in force. The general rule, however, is that the lessee cannot, without the consent and approval of the lessor, sub-lease leased equipment to a third party (sub-lessee).[51]

(j) Open-Ended Lease

4.42 The term 'open-ended lease' is one used to describe a lease transaction in which there is a provision for the extension of the lease period on already agreed conditions at the expiration of the primary period.

(k) Off-Shore Lease

4.43 The term 'off-shore lease' is one used to describe equipment leasing agreement in which the leased equipment is to be used outside the country or jurisdiction in which the leasing agreement was entered. It is basically a 'cross-border' leasing arrangement.

(l) Custom Lease

4.44 The term 'custom lease' is typical of the United States leasing market. It is a lease which is specifically designed to meet the peculiar needs of the lessee. It may, for example, schedule the rental payments to fit the cash-flow of the lessee. It has been found useful in seasonal business such farming and in non-expensive and non-cross-border leasing transactions. The opposite of custom lease is the 'standard lease' which is basically a set of terms or clauses already prepared by the lessor to govern the leasing of particular equipment usually in high demand. It facilitates the handling and closing of lease transactions as virtually no negotiations are involved having already been set out and accepted by the lessee.

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51. Discussion of the legal aspects of a sub-lease transaction is contained in Chapter 5.

(m) Consumer Lease

4.45 'Consumer lease' is a term used to describe equipment meant for individual/private use as opposes to equipment for production (industrial). Examples of equipment consumer leases include leases for cars, pleasure boats, private aircraft, televisions etc.

(n) Retail Market Lease

4.46 'Retail market lease', like other market leases such as small market lease, middle market lease etc, are United States of America terms used to describe the size of the equipment leasing business. A retail market lease is a term used generally to cover leases for business equipment costing from $500 to $50,000 and which are for a duration of between two to five years. Strictly speaking the word "retail" describes the size of the lease rather than the ultimate consumer. In other words, the word is not being used as the opposite of "wholesale". Equipment common in the retail market lease includes typewriters, personal computers, office equipment, vehicles, furniture, telecommunications etc.

(o) Small market Lease

4.47 The term 'small market lease' is used to describe equipment leases whose costs range from $50,000 to $500,000. The equipment generally found in this market segment include construction equipment, agricultural equipment, computers, small aircraft, small machine tools etc.

(p) Middle Market Lease

4.48 The term 'middle market lease' covers equipment whose costs range from $500,000 to $5 million and whose period of lease ranges from five to twelve years. Equipment in this class would include oil rig equipment, executive aircraft mainly used by top bank executives, top oil company executives, diplomats and top businessmen etc. This category would also include construction equipment, rolling stock (railroad equipment), shipping trawlers etc.

(q) Big-Ticket or Large Market Lease

4.49 While the term 'big-ticket or large market lease' is used in most countries to describe leases of equipment whose cost is very high. In the United States of America the term is reserved for equipment whose cost ranges from $5 million. In other words, the term is a relative one and should be seen from the perspective of a given country especially where the transaction is not of an international nature (ie not an international lease). In addition, Professor Adams is of the opinion that the complexity of the transaction should inter alia be taken into account in determining whether a transaction is to be treated as a big-ticket one.[52] Generally the equipment found in this category would include commercial aircraft, ships, mining equipment, oil and drilling equipment, military production equipment, energy equipment etc, and the duration of the lease usually ranges from five years to about twenty-five year or even more.

Big-ticket market leasing, unlike other market leases that require more-or-less a standard lease agreement documentation, must be custom leasing because of its complex nature. Most big-ticket market leases are in the form of leveraged lease financing due to its very high cost and the attendant high credit risk. Apart from the credit risk, there are other risks typical of big-ticket market leases which include equipment related risks, foreign exchange fluctuations, mismatch of rentals and funding (ie funding currency different from rental currency), erratic tax matters, political risks such as the possibility of nationalization of companies and the outbreak of war, import restrictions risks (for example import restrictions waiver for lessee may not be available to the lessor) and legal problems. Commenting on the legal problems arising from the big-ticket market leases, Professor Adams advises that expert advice should be sought from lawyers (and one may add other professionals such as tax specialists, accountants, engineers as the case may be)

> " ... practising in each of the different jurisdictions in order to identify any problems which may arise and which may impair the ability of any

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52. Adams, op cit, p. 67.

of the participants to realise its aims from the transaction or which may increase any participant's risk".[53]

(r) Sales-Aid Lease

4.50 The term 'sales-aid lease' is one used to describe a form of lease designed to encourage better business relationships between the lessor and lessee by offering the lessee a package deal which includes lease facilities known in the United States of America as "vendor lease" or "vendor finance lease".[54] Professor Adams further states that it is used where a manufacturer or distributor offers leasing as an alternative to an outright purchase.[55]

(s) Vendor Lease or Vendor Finance Lease

4.51 The term 'vendor lease' or 'vendor finance lease' is typical of the United States of America leasing market. Essentially it is a sales technique which combines leasing with some marketing promotion. Under this scheme, an agreement is reached between the lessor and the vendor (ie manufacturer of equipment) whereby the vendor agrees to market or sponsor the lessor's activities on a national or international scale and the lessor in turn agrees to use its best efforts to provide the lessee financing aimed at increasing the lessee's demand for equipment from the vendor. Generally the vendor arranges the lease as an agent on behalf of the lessor and most times on standard lease forms already provided by the lessor. Where the lessor thinks that the risk involved is high in a particular case, the vendor is called upon to provide security in the form of guarantee to cover such risk. But in a non-recourse vendor lease the lessor takes all credit decisions and consequently bears all credit risks.

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53. Ibid, p. 68. For further reading on the subject matter, see pp. 67-68.

54. World Leasing Yearbook 1989, op cit, p. 434.

55. See Adams, op cit, p. 13.

(t) Double-Dip Lease

4.52 The term 'double-dip lease' is one used to describe the structuring of leases aimed at obtaining tax benefits in more than one country.[56] Double-dip lease are only possible where the countries involved have different tax legislation on tax benefits claimable. For example, in Nigeria it is the lessor who is seen as the owner of the equipment and consequently entitled to the tax benefits while in the United States of America it is the lessee that claims the tax benefits. A double-dip lease could therefore be conveniently arranged between a Nigerian lessor and a USA lessee in order to obtain the benefits of the different tax legislation.

Sometimes one hears of the term 'triple-dip lease'. This is used in situations where a double-dip lease exists in addition to a third party's (for example government) rebate or incentive.

(u) Master Lease

4.53 A 'master lease' is a term used to describe an equipment leasing arrangement which provides for the lessee to obtain or acquire during a given period further equipment from the lessor without negotiating a new lease contract.[57] It is more like a standard lease, but the difference is that in a standard lease no provision is made for additional equipment to be acquired under the same terms and conditions. The specific details of each equipment to be acquired such as machine number, rentals, location, duration etc would not stated in the body of the agreement, but confined to the schedules to be attached to the agreement.

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56. World Leasing Yearbook 1989, op cit, p. 431.

57. Ibid, p. 433.

Lease or Buy Decision

4.54 A major financial decision a prospective lessee faces is whether to lease or buy the required equipment. For a private person the decision is much easier as generally the needed equipment would come under the consumer category (for example a television set) and mostly the decision is influenced by non-economic considerations. For a corporate entity the decision is much more complex and requires clear analysis and solutions that will optimise the shareholders' funds. In order to arrive at any decision the private person, or in the case of corporate entity the financial executive or manager, has to weigh the advantages of leasing against the disadvantages. Some of the advantages include:

1. Lease rentals in both finance and operating leases are allowable deductions in arriving at the taxable profit of the lessee under the Companies Income Tax Act 1979 provided the rental is wholly, exclusively, necessarily and reasonably incurred for the production of profit.[58]

2. Leasing may be the cheapest (or only) means of obtaining the use of specific equipment because of some countries' export controls and other forms of monopolistic restriction on the free supply of the equipment by way of sale.[59] This applies to a finance lease as well as an operating lease.

3. Since equipment leasing is not generally classified as borrowing[60] the lessee who has reached its borrowing limits in both finance and operating leases can still procure equipment through leasing.

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58. Further discussion on this will be taken up in Chapter 9.

59. Clark, op cit, p. 65.

60. Ibid, page 67. See also Adams, op cit, p. 24. But it is remarkable that the Federal Military Government of Nigeria Monetary Policy Circular No 24 1990, otherwise called the 1990 Credit Policy Guidelines, treated leasing as a form of borrowing by bringing it under the umbrella of credit expansion ceiling of banks. The circular is still in force even though pressure is being put on the Government to remove leasing as part of banks' (both commercial and merchant) credit portfolio. One can only conclude that if this policy is allowed to stay on it will have a negative and devastation effect on the leasing industry which is still in its infancy.

4. The fixed nature of an equipment leasing contract, whether a finance lease or an operating lease, makes it attractive to the lessee in that the terms remain generally the same whether there is an economic change or credit squeeze in the system. This is unlike a loan facility which can be called in any time and/or repayable on demand. Except in cases of default, the lessee will not be enjoined to accelerate the payment of the rentals during the lease period.

5. Since equipment leasing does not involve huge capital outlay initially, it gives the lessee optimum use of his resources. The capital which would have been invested in the acquisition would now be used in other areas of financial needs of the company. This applies to a finance lease as well as an operating lease.

6. The lessee's accounting system in both finance and operating leases is strealined in view of the regular nature of rental payments. Additionally, this helps the lessee in expenditure budgeting and cash-flow forecasting.

7. In an operating lease, the lessee is enabled to execute his project without being saddled with the equipment used only for one special purpose. Even where the equipment is not special, the risk of not getting another project in which the equipment would be utilized exists and this can be avoided by the lessee through leasing.

8. In both finance and operating leases, though more commonly in the case of finance leases, leases can be arranged on a tailor-made basis to accommodate the particular needs of individual lessees. Rentals may also be related to the earning power of the leased equipment and this could bring about the opportunity to match cash-flows over the expected life of an asset which in turn provides some measure of financial stability.

9. Leases are also beneficial to the lessee, whether in a finance or operating lease, as rentals are fixed, thereby providing a hedge against inflation.

10. Sometimes an equipment leasing contract provides for some sharing of the proceeds of sale of equipment after the primary period between the lessee and the lessor. This therefore acts as a rebate on the rentals paid by the lessee in a finance lease.

11. Lower rentals by the lessee may also be a possibility in situations where the lessor has made a bulk purchase of the equipment from the manufacturer/supplier thereby having some rebate/discount which is passed on to the lessee. This is applicable to both a finance lease as well as an operating lease.

12. Leasing, whether a finance lease, or an operating lease, is also beneficial where the project the lessee is undertaking is either new or is experimental. It is also advantageous where the needed equipment is new in the market or has not got a long performance track record.

13. Leases generally (ie finance or operating) have also been found by lessees to be easier to put in place unlike loan facilities especially where master leases which require no new negotiations are involved. An additional reason why leasing is a time-saver is due to the highly specialized and autonomous departments that are set up to handle leasing. This is unlike loan facilities that in most banks in Nigeria have to pass through several processes of filtration and which involve the sitting of different committees (depending though on the amount being sought) before a final decision, probably by the Board of Directors Credit Committee, is taken.

14. The lessee, whether in a finance or operating lease, may also wish to lease in situations where the technology he is using is not modern or is growing at such a fast rate that he fears that the usefulness of equipment would cease before the end of the normal life span of the asset.

15. In some cases the lessee has no option than to lease. This is so where the equipment is in very short supply and the owner (the lessor) does not want to sell. This applies to both finance leases and operating leases.

16. Leasing also affords the prospective lessee the opportunity to present a seemingly strong balance sheet in that there is no regulation in Nigeria enjoining him to report his obligation to pay rentals as a liability on his balance sheet. However, banks' leasing analysts, appreciative of this situation, conduct their own enquiries to find out the real financial position of the lessee, whether in a finance lease or operating lease, before entering into any leasing agreements.

17. Other advantages to both lessee and lessor:

a) With the restrictions imposed on the banks by the Banks And Financial Institutions Decree 1991 on the amount of loan/advance they (the banks) can give to a single customer (ie not more than 25% of shareholders funds in the case of commercial banks, and in the case of merchant banks not more than 50% of shareholders funds)[61] and the imposition on the credit expansion ability of the banks,[62] leasing of equipment (whether a finance or an operating lease), would appear to be the best alternative to assist the lessee in his desire to acquire the required equipment.

b) In an operating lease, leasing provides for optimum use of the leased equipment as the equipment moves from one lessee to another.

c) The lessor or his agent in an operating lease develops an expertise in the handling of the lease equipment. The same situation applies to the lessee or his agent in a finance lease.

4.55 Having seen the advantages of leasing, as shown above, the prospective lessee weighs them against the disadvantages which include:

1. Leasing involves the loss of residual value of the equipment upon termination of the lease, whether it is a finance or an operating lease but more so in a finance lease. This could be a big loss especially when the equipment has a considerable long useful life.

2. Leasing's overall cost is much higher than the cost of purchasing the equipment especially where no rebate is given on the rentals or where the lessee is not entitled to a share of the sale proceeds after sale of the leased equipment. This is so in both a finance lease and operating lease.

3. Nigerians, generally having a culture of acquiring property, would lose the opportunity if equipment is acquired by leasing since the ownership is vested in the lessor, whether in a finance or operating lease.

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61. Section 20(1)(a) of BOFID, op cit.

62. The Central Bank of Nigeria (CBN) as part of its monetary control measure, every year, announces the Banks' credit ceiling.

4. The lessee, by leasing the equipment, loses one of the most beneficial aspects of leasing - the capital allowance, which he would have been entitled to if he purchased the equipment. This is especially so in Nigeria where the tax law allows only the owner of the equipment (lessor) to claim capital allowances.

5. In view of the fact that ownership does not rest with the lessee there is absence of flexibility in the use of the leased equipment. The lessee in a finance lease would usually have to take instructions from the lessor as to servicing, maintenance, insurance etc of the equipment and this type of situation could be counter-productive to the lessee's business.

6. A lessee generally can only terminate a lease early by payment of a substantial early termination fee over and above the unamortized cost of the equipment. Consequently leasing (especially finance) may not be beneficial to the lessee if the leased equipment is to be used for relatively short duration as the additional cost following early termination is not cost-effective.

7. Lenders tend to look at a company whose business assets are acquired through leasing, whether in a finance or operating lease, as weak.

8. The lessee having only a possessory right over the leased equipment it is very doubtful whether he is able to use it as security for any borrowing[63] and it is immaterial whether it is a finance or an operating lease.

Information Necessary for the Lessor to Determine Whether or Not to Enter into a Leasing Transaction

4.56 Just as a prospective lessee has to decide whether to lease or buy needed equipment, so also has the bank lessor to decide whether to enter into a leasing transaction or not. In order to take a decision on the matter the bank lessor would naturally seek certain information and facts about the prospective lessee the extent of

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63. This issue will be fully examined in Chapter 5.

which would depend on whether it is a long-term leasing (finance lease) or short-term leasing (operating lease). It should be pointed out that most Nigerian bank lessors treat an application for an equipment lease just like any other loan facility applicaton, taking a finance lease as a medium-term or long-term loan and an operating lease as a short-term loan or what some banks refer to as an 'emergency credit accommodation' (ECA).

4.57 The information generally required includes:

1. The viability of the business organisation where the lessee is a business or the feasibility studies where it is about beginning a business. This information is necessary to the bank lessor as non-viability of the business may be a good indicator of the inability of the prospective lessee to pay the rentals. Where the prospective lessee is not a business establishement, for example, a public servant, who wishes to lease a car for a period of six months, the bank lessor would want to find out from his employer about the security/stability of his job and consequently his ability of pay the rentals.

2. The bank lessor in order to have a picture of the vaibility and profitability of the business establishment would want to find out about the turnover. In other words, is the volume of lodgement by the business enough to make him (the lessor) have confidence in his ability to pay the rentals. The lessor would request to see the profit and loss accounts of the lessee which reveals the profit and loss of the business for a specific period, usually one year. For non-business organisations such as a public servants and social organisatons, the bank lessor would call for the personal financial statement (which reveals annual income, annual expense and assets of the individual) or the statement of affairs of the social organisation which basically gives the same information as the personal financial statement.

3. The lessor would also require to see the current balance sheet of the prospective lessee, if it is a business organisation. This document basically reveals the assets, equity and liabilities of the business over a particular period. Generally the bank lessor requires balance sheets for the last three years.

4. The bank lessor would also call for the memorandum and articles of association of business establishment. This document simply shows inter alia the objects, powers and internal regulation of any given company. This is vital to the lessor in order to find out whether the business establishment has the powers to enter not only into a leasing transaction but also to do the type of business for which it has applied for a leasing accommodation from the lessor.[64]

5. The bank lessor usually also seeks to obtain the Board's resolution of the business establishment authorising the prospective lessee to enter into a leasing transaction. This is especially so in a finance lease or where the size of the leasing transaction is considered big.

6. Sometimes, the bank lessor would ask for additional security for the leasing transaction. These securities may be either a mortgage of landed property, shares held by the business organisation provided they have surrender value, insurance guaranty or, where it is a subsidiary company, a guaranty of the parent company[65] etc. This demand has led a number of people to argue that such a condition converts a leasing transaction into a loan facility transaction.[66]

7. The lessor banker would also seek to obtain the projected cash-flow of the prospective lessee, which document is aimed at finding out how the prospective lessee would pay for the rentals (ie expenses) as well as income from the business.

8. The bank lessor may also wish to find out about the quality of management, the qualifications of the key/top staff, how long the business has been in operation and

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64. Ashbury Railway Carriage Co Ltd v. Riche (1875) L R.7 H. L, 563. See also Continental Chemists Ltd v. Ifeakandu [1966] 1 All N. L. R. 1. But it is curious that despite the abolition of constructive notice of registered documents and presumption of regularity in ss. 68 and 69 of the Companies And Allied Matters Decree 1990 respectively, the bank lessors still make this demand. Section 65(b) would even appear to be more instructive on the issue of abolition of the doctrine of ultra vires as it provides thus: "If in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorized by the company's memorandum".

65. See Perry-Lease Ltd v. Imecar AG [1987] 2 All E. R. 373; [1988] 1 WLR 463; 132 Sol. Jo. 536.

66. ELAN's Newsletter, vol. 1 no.3 of November 1988.

whether it has a successful or failure business track record.

9. The lessor banker would seek to know the actual price of the equipment and the terms of payment to the supplier or manufacturer. This enables him to calculate the rentals.

10. The lessor banker would require information as to the life-span of the equipment since he has to recoup his investment (purchase price together with profit) during the lease period if the transaction is a finance lease.

11. The bank lessor will also insist that the leased equipment must be insured with a reputable insurance company (usually recommended by him) and that it be named the beneficiary in the policy even though the insurance fee is paid by the prospective lessee. This is primarily aimed at protecting the lessor against risks like theft, destruction etc. of the leased equipment. Where the leased assets are motor vehicles section 3 of the Insurance Act[67] imposes a duty on the lessor not "to use, or to cause or permit any other person to use" the motor vehicle on a highway[68] unless any liability which may be incurred thereby in respect of "the death of or bodily injury" to any person caused by, or arising out of this user is covered by a policy of insurance issued by an approved insurer. It may be pertinent to state that a breach of this duty by the lessor exposes him to criminal prosecution[69] as well as rendering him liable to damages for breach of statutory duty to an injured person who is deprived of any effective remedy through the lessor's failure to comply with the provisions of the Act.[70] It is amazing, however, to note that by virtue of Section 5 of the Act the mandatory duty to insure vehicles created by the Act does not apply to motor vehicles owned by the government if it is being used for official or government purposes, nor to a motor vehicle used for police purposes by

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67. The Nigerian Insurance Act 1976. This Act repealed and replaced the Nigerian Insurance Act 1961 and its subsequent amendment of 1974.

68. A "highway" as defined in section 2 of the Insurance Act 1976 means a roadway to which the public have access.

69. See s. 3(2) of the Nigerian Insurance Act 1976.

70. Monk v. Warbey [1935] 1 K B, 75; [1934] All E.R. Rep. 373.

or under the direction of a superior police officer.[71]

12. The bank lessor will also be concerned to know the type of asset that is being leased. This is especially so because of the tax consequences. The Nigerian tax legislation has classes of qualifying expenditure and varying rates of both the initial and annual allowances applicable.[72]

13. The lessor banker will also seek information as to where the equipment will be used. This is not just because of the natural propensity of an owner of a thing to seek to know where his property is, but because of the legal and tax consequences that flow therefrom. For example, certain types of motor vehicles are not allowed within certain jurisdictions, and the same applies to ships and aircraft that have not met certain national requirements. Taking prohibited equipment to such territories usually results in seizure of the equipment by the governmental authorities. The knowledge of the location is also necessary especially in international leasing as that may determine whether it is the lessor or lessee that may be entitled to the capital allowances or whether the double-dip lease is possible. In addition, the lessor would seek to know the location if the equipment has to be fixed to the ground and whether the premises on which it will be affixed belongs to the prospective lessee or belongs to a third party. This information is vital to the bank lessor in view of the operation of the maxim of quicquid plantatur solo, solo cedit[73] (ie whatever is affixed to the soil belongs to the soil).

14. The lessor would equally be interested to find out the date delivery of the equipment by the supplier or manufacturer is expected. This is essential for him in order to know when to apply for the tax benefits since by virtue of the tax legislation in Nigeria, the equipment must be "in use" at the end of the basis period in the claimant's

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71. Further discussion on insurance will be taken up in Chapter 8.

72. Detailed discussion on taxation will be taken up in Chapter 9.

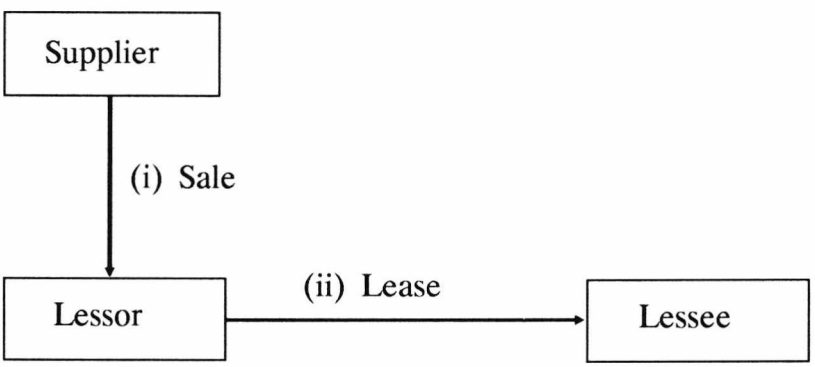
73. Fuller discussion on the subject will be taken up in Chapter 5.

business in order to qualify for the applicable allowances.[74] Similarly the date of delivery would be important to the lessor in order to find out inter alia the date of issuance of the invoice by the supplier, the date he must make payment and the rate at which he has to fix the rentals payable by the lessee. It is customary in Nigeria nowadays to put a variation clause in the leasing contract because of the high rate of inflation. Without the variation clause, it may be impossible for the lessor to alter the rate of rentals to be in line with the sporadic inflationary trends in the country. One may argue here, however, that the inclusion of such clauses (which are inevitable in the Nigerian situation) destroys part of the attractivenesses of equipment leasing, which is, that it acts as a hedge against inflation.

Methods of Establishing or Setting up Equipment Leasing Transaction Relationships in Nigeria

4.58 There are at present seven methods of bringing about an equipment leasing transaction relationship in Nigeria. Briefly, these methods are:

1. A lessee having identified an equipment he wants requests a lessor to purchase it and lease it to him. This may be diagrammatically put this way:



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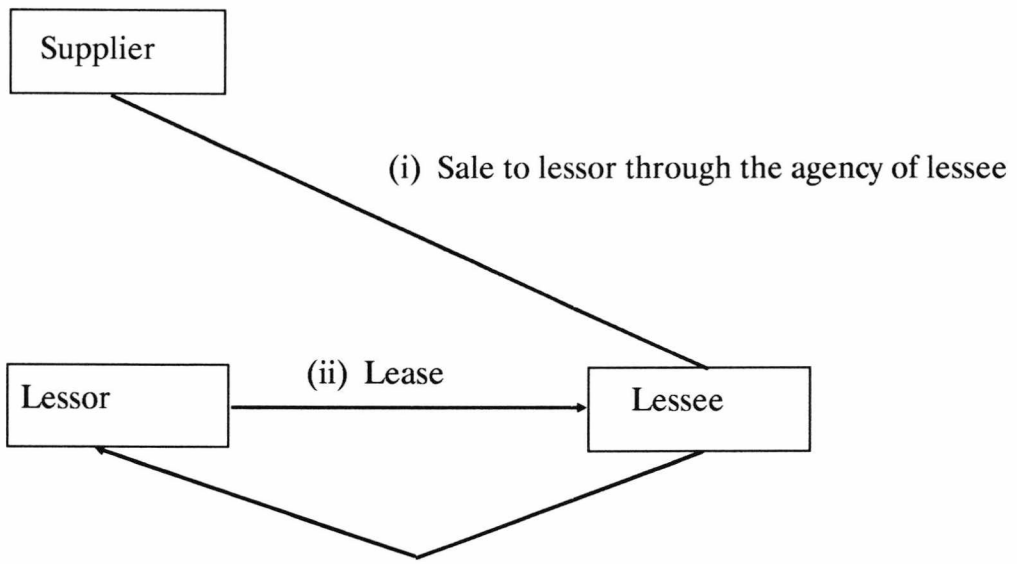
74. In practice the expression "in use" is given an extended meaning so that where a company incurs an expenditure during the basis period for the acquisition of a fixed asset, the company may still claim capital allowances on the expenditure even though the asset is not immediately in use. Further discussion on the effect of tax to the lessor generally will be taken up in Chapter 9.

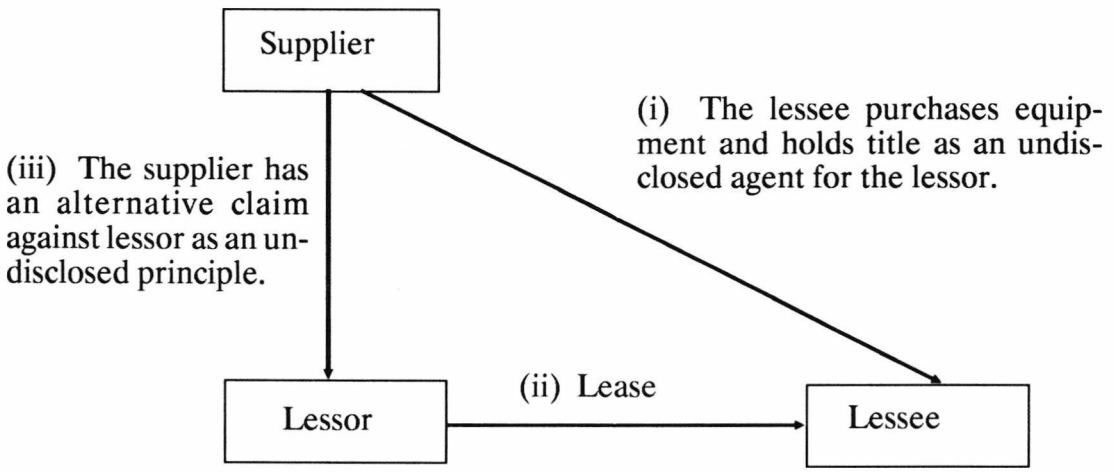
In the above equipment leasing transaction, there is no contractual relationship between the lessee and the supplier at any stage or in any capacity. Only two contracts are involved; that between the supplier and the lessor and that between the lessor and the lessee. Since there is no privity of contract between lessee and supplier, legally it means that the supplier cannot pursue the lessee for the purchase price of the equipment neither can the lessee pursue the supplier directly for any claims arising from defects in the equipment.

2. The lessee may purchase the needed equipment as a disclosed agent of the lessor and thereafter takes back the equipment on lease. In this case, the diagram would look like this:



In the above equipment leasing transaction, as in number 1, there is no contractual relationship between the supplier and the lessee as the lessee is merely an agent for the lessor. The purchase of the equipment by the lessee is in his capacity as a disclosed agent of the lessor and he (the lessee) thereafter takes the equipment back on lease from the principal (the lessor). In effect only two relationships exist, namely that between the supplier and lessor (via the lessee who would have been authorized by the lessor to purchase the equipment) and that between the lessor and the lessee.

3. The lessee may purchase the equipment in his own name but in reality as an undisclosed agent for the lessor and thereafter takes it on lease. The diagram of the relationship would appear thus:



Under this relationship, two contracts exist, namely that between the supplier and the lessor and that between the lessor and the lessee and by virtue of the legal doctrine of undisclosed principal, the supplier has an alternative claim against the lessor.

4. The lessee, having agreed with the supplier to buy an equipment on certain terms and conditions, may find out that he could not afford the purchase price and arranges for a novation.[75] But note that if title has already passed to the lessee (for example through a credit sale arrangement) the novation would involve retransfer to the supplier or manufacturer and an onward resale of the equipment by the supplier/manufacturer to the lessor, who will then lease the equipment to the lessee. Thus the relationship of the transaction would look like this:

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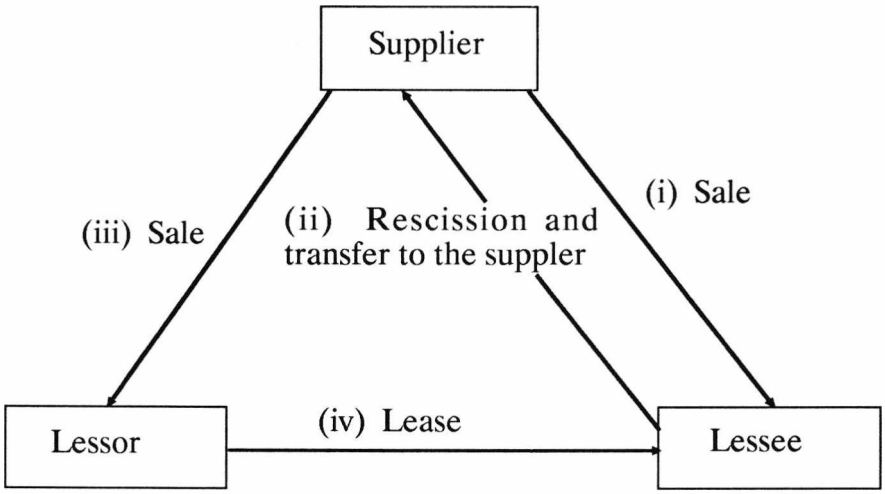
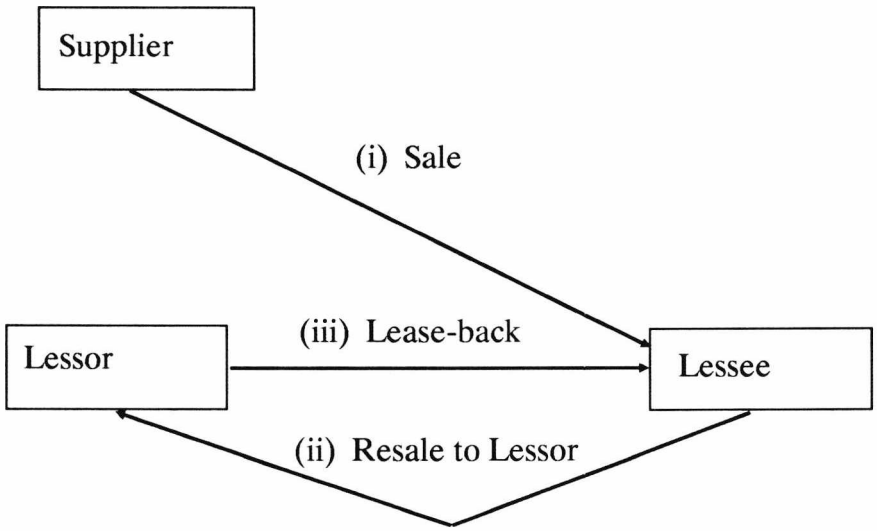
75. This is the substitution of a new obligation for an old one or of a new debtor for an old one, with the consent of the creditor (supplier).



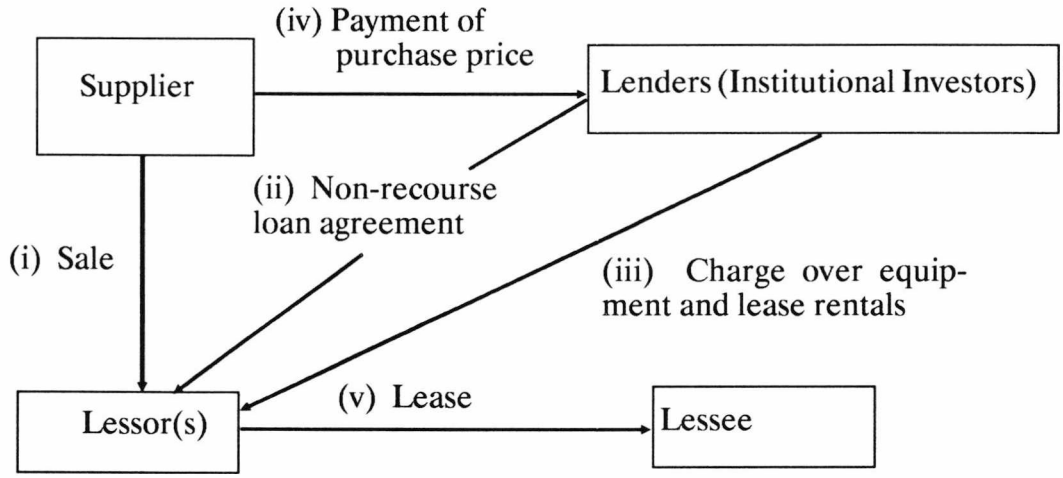
In the above diagram, there is a sale by the supplier first to the lessee, then followed by a novation which cancelled the original contract of sale (at least as regards transfer of title and payment obligation) and then a resale by the supplier to the lessor followed by a lease of the equipment to the lessee. The Federal Board of Inland Revenue insists on ascertaining whether or not the old contract has been cancelled by sighting the novation contract. Where there is no clear proof of cancellation of the old contract the Board is not likely to allow the lessor to claim the capital (and other) allowances applicable.

5. The lessee having bought the equipment sells it to the lessor and thereafter takes it on lease. This is called a sale and lease-back transaction. As pointed out earlier in this chapter there must be a true sale and a true and independent leasing back otherwise the transaction may be construed as loan on the security of the equipment. The diagram of a true sale and lease-back would look like this:



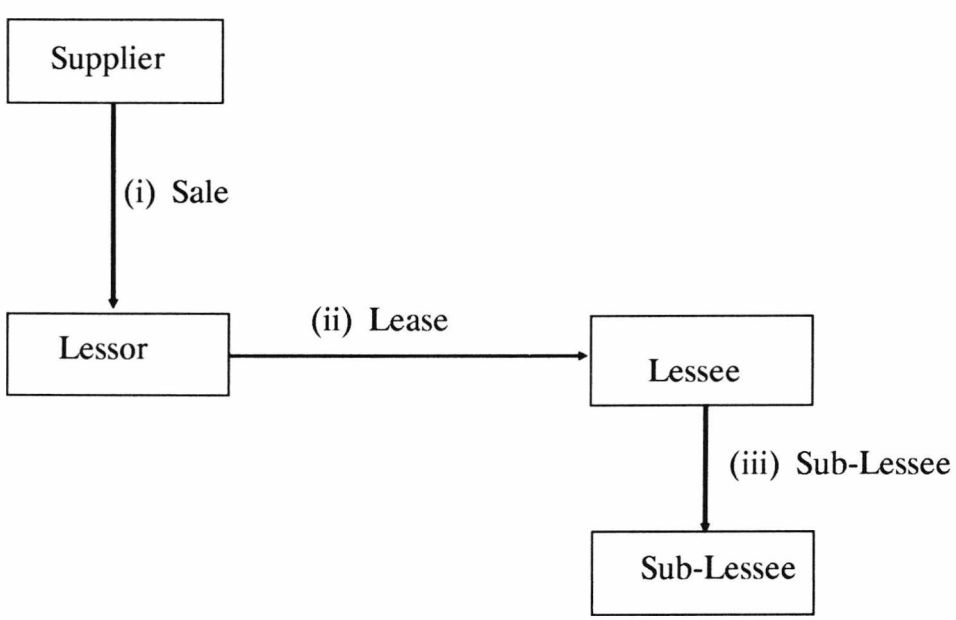
The above diagram shows that three contractual relationships are involved, namely: the sale between the supplier and the lessee, the contract between the lessee and the lessor and finally the contract between the lessor and the lessee (ie the lease-back). There is no privity of contract between the lessor and the supplier.

6. The lessor(s) brings in only a proportion of the purchase price of the equipment while the major proportion is brought in by the lenders (institutional investors) by way of a non-recourse loan agreement but on the security of the equipment and lease rentals. This is called a leveraged lease transaction. A simple leveraged lease set-up would look like this diagrammatically:



Even though the lenders pay the purchase price either directly or through their agent as in a complex leveraged lease transaction, they have no contractual relationship with the supplier, neither do they have any with the lessee.

7. Generally leasing contracts prohibit sub-leasing of equipment. But sometimes it does happen that the lessor is willing to allow a sub-lease of the equipment. This type of situation (ie sub-leasing) is very common with agricultural equipment such as tractors. The sub-leasing transaction may be illustrated diagrammatically thus:



In the above sub-lease transaction, there is no contractual relationship between supplier and lessee and sub-lease neither does any exist between sub-lease and the lessor.[76]

Hire-Purchase, Conditional Sale and Credit Sale distinguished from Equipment Lease

4.59 I have so far in this chapter been examining the various definitions of equipment leasing and the different forms, schemes and terminologies. Information necessary for lessor's decision whether or not to enter into an equipment leasing transaction, factors responsible for the lessee's decision whether to buy or lease and the methods of entering into various forms of equipment leasing transaction were also considered. At the beginning of the preceding chapter I did state that there are other forms of commercial activities which are most times confused with equipment lease, namely hire-purchase, conditional sale and credit sale. I shall now proceed to discuss them briefly in order to distinguish them from leases. They are, however, strictly speaking outside the scope of this thesis.

Hire-Purchase

4.60 As has been seen a characteristic of the Nigerian type of equipment lease is the retention of ownership of equipment by the lessor, while the possessory right and exclusive use of the equipment are conferred on the lessee. It is this fact of possession and exclusive use, as opposed to the immediate or eventual ownership of the equipment, that creates the line of distinction between an equipment lease transaction and a hire-purchase transaction, the latter being defined by the Hire-Purchase Act as:

> " the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee"[77]

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76. This relationship between the lessor and the lessee and sub-lessee will be further examined in Chapter 5.

77. Section 20 of the Hire-Purchase Act 1965.

4.61 Similarly, the authors of "Nigerian Business Law" have defined hire-purchase as:

> " a contract under which the owner of the goods lets them out on hire to another person called the hirer in consideration of periodic or instalmental payments called hire-rent and on condition that the hirer may at any time return the goods and terminate the hiring, or continue the hiring until the hire-rent reaches a stated sum, in which event either the property in the goods passes to him or he will exercise an option to purchase the goods by paying a small (usually nominal) option fee"[78]

4.62 From the above definitions the following features appear typical of hire-purchase transaction:

1. Retention of the title in the goods by the owner until the agreed term takes place;
2. Conferment of possessory right and use of the goods in the hirer;
3. Conferment of an option on the hirer but no obligation to purchase.

4.63 All the features above listed except number 3, that is, the conferment of an option to purchase, agree with the features of an equipment lease in the eyes of the Nigerian law. By conferment of an option to purchase on the hirer, the owner is seen as making an offer to sell the goods to the hirer if the conditions laid down in the hire-purchase agreement are met. The hirer on his own part is, however, not under any obligation to purchase the goods. He may exercise the option, that is, he may accept the offer once he has fulfilled the conditions, if he so wishes. But he may also decide to terminate the transaction and return the goods to the owner. He has the power to accept the offer but not bound to do so.[79]

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78. Ezejiofor, Okonkwo and Ilegbune, Nigerian Business Law (1986) (Sweet & Maxwell) p. 203.

79. Beesly v. Hallwood Estates Ltd [1960] 2 All E.R. 314; [1960] 1 W.L.R 549; 104 Sol. Jo. 407; affirmed, [1961] 1 All E.R. 90; [1961] Ch. 105; [1961] 2 W.L.R 36; 105 Sol. Jo. 61 C.A.

4.64 The famous case of Helby v. Matthews[80] is instructive on this point. In that case, Helby, a piano owner agreed to let it to one Brewster. It was agreed that the hirer should pay monthly instalments and that he may also terminate the agreement at any time by returning the piano. The agreement further gave him the option to purchase the piano upon payment of requisite number of instalments stipulated for in the agreement. During the continuance of the agreement and before all the instalments had been paid, Brewster pledged the piano which was in his possession to a third party called Matthews from whom Helby then tried to recover it.

In an action by the appellant against the respondents for the conversion of the piano, the respondents argued that Brewsters had "agreed to buy" the piano and so could pass good title to him under section 9 of the Factors Act 1889. The Court of Appeal upheld this contention.

4.65 On appeal, the House of Lords reversed the decision, holding that on true and proper construction of the agreement Brewster was not a person who has agreed to buy the piano within the meaning of section 9 of the Factors Act 1889. The House of Lords rejected the view expresses by the Master of the Rolls that the transaction was an agreement by one to sell, and an agreement by the other to buy, but with an option on the part of the buyer if he changed his mind to put an end to the contract.[81]
The House of Lords on this point said:

> "Where a person has, for valuable consideration bound himself to sell to another on certain terms, if the other person chooses to avail herself of the binding offer, he may in popular language, be said to have agreed to sell, though an agreement to sell in this sence, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sence that there can be said to have been an agreement to sell in the present case"[82]

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80. [1895] A.C. 471; [1895-9] All E.R. Rep. 821.

81. Ibid p.476.

82. Ibid p.477.

4.66 The House of Lords equally rejected the Master of Roll's reasoning that there was a contract by the purchaser to buy. On the contrary it held on this point that:

> "The only obligation which is laid upon [hirer] is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing or to pay a price for it. There is no purchase, and no agreement for purchase, until the hirer actually exercises the option given to him"[83]

4.67 The House of Lords finally held that Brewster could therefore not confer any title on Matthews and consequently Matthews acquired no rights over the piano and Helby was entitled to recover the piano from the pledgee.[84]

4.68 Since as has been seen from Helby v. Matthews (supra), that title to the goods resides in the owner, the right to seize the goods is a very potent remedy of the owner. Thus in Sengena v. Poku,[85] the defendant entered into an agreement with the plaintiff to sell to the latter "under hiring-purchase system", a lorry for £200 payable by deposit of £40 and subsequent monthly instalment of £20. It was also agreed that the defendant may seize the lorry on default. When the plaintiff defaulted the defendant seized the lorry in exercise of his power.

4.69 The court held on appeal that on the true construction of the agreement, the transaction entered into by the parties was a hire-purchase agreement and since title

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83. Ibid p.479.

84. However, see the case of Hull Ropes Co. Ltd v. Adams (1895), 65 L.J.Q.B 114; 44 W.R. 108; 40 Sol. Jo. 69, D.C., where an agreement by a so-called hirer to pay a stated sum per month till the full price of the subject matter be paid, when it was to become his own property, was held, in the absence of a provision that he might terminate the "hiring" by re-delivery to the owner to be an agreement to buy within section 9 of the Factors Act 1989. See also the case of Lee v. Butler [1893] 2 Q.B 318; [1891-4] All E.R. Rep. 1200.

85. (1943) 9 W.A.C.A. 143.

was vested in the owner and had not passed on to the plaintiff, the defendant was entitled to seize it.

4.70 Similarly, in Olametan v. C.F.A.O.[86] the court held that the hirer of an article on hire-purchase terms acquires no proprietory interests other than those conferred on him by the hire-purchase and consequently, if he sold, pledged or in any other manner disposed of the goods (except in market over)[86(a)] without approval or consent of the owner, the sale or pledge or transfer was void and the purchaser acquired no title.

4.71 A transaction described as a lease may in fact be a hire-purchase. And as was held in the case of Alhaji Gaya v. Joe Allen & Co. Ltd.,[87] the courts are entitled not to look at the title or form of the agreement only but to "go behind the form of the document to discover what the real transaction was". In this case the plaintiff claimed the return of a lorry which had been seized by the defendant company for non-payment of instalments. The plaintiff averred that the transaction was a hire-purchase, while the defendants argued that it was a leasing agreement. The agreement contained no clause giving the plaintiff the option to purchase, but there was evidence that the plaintiff had been told that after one year he might be allowed to buy the motor vehicle. This evidence was confirmed by the defendant's witness who was the sales clerk and who explained the terms of the agreement to the plaintiff. Additionally, the plaintiff said in his evidence that based on the sales clerk's explanation and assurance, he had thought that after one year he would become the owner of the motor vehicle unconditionally.

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86. (1959) L.L.R 42. See also Mustapha v. Adenekan (1967) F.N.L.R 77.

86(a). Section 22 of the Sale of Goods Act 1893 provides that: "where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys in good faith and without notice of any defect or want of title on the part of the seller". The Sale of Goods Act 1893 is a statute of general application in Nigeria.

87. (1976) 1 F.N.R. 31.

4.72 After reviewing the agreement as well as the evidence, Jones C.J, held that the agreement between the plaintiff and the defendant while under the guise of a leasing agreement was in fact a hire-purchase agreement within the meaning of the Hire-Purchase Act 1965. He said:

> " I also find on the evidence that the twelve months rents was the purchase price of the vehicle and I note the plaintiff even paid the delivery charge from Lagos of N60. I also note that in the attachment to Exhibit 16 which is called "a literacy docket" plaintiff is referred to as "the purchaser". Parol evidence is not normally admissible to add to or vary a written agreement but one exception to this rule is misrepresentation and I hold the view that the present case is such exception. Similarly parol evidence is admissible to prove the true nature of the transaction. In the Hire-Purchase Act 1965, hire-purchase is defined as "the bailment of goods in pursuance of an oral agreement under which the bailee may buy the goods". It seems clear to me that the agreement, Exhibit 16, does not contain all the terms agreed between the parties. One very important term is missing that is, the term that after twelve months, plaintiff would be given the option of buying the vehicle. Has this term been included, Exhibit 16 would have been a hire-purchase agreement. Since I find that this was a term of the contract agreed between the parties I therefore find that the real transaction between them was a hire-purchase agreement".

4.73 Arising therefore from the decisions of the cases cited above together with the definition of hire-purchase is the fact that the ultimate objective of the hirer is the ownership of the subject matter of the agreement; whereas in an equipment lease the ownership of the leased equipment must at all times remain vested in owner (lessor). Thus in the case of Samuel Aro v. J. Allen & Co. Ltd.[88] the Federal Court of Appeal in deciding whether an agreement was a lease or a hire-purchase reasoned that since:

1. there was no provision in the agreement for the hirer to purchase the tractor;
2. there was no provision for the passing of property to the hirer in the agreement;
3. and the agreement only gave an option to the hirer to renew the transaction,

the agreement was a lease not a hire-purchase.

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88. F.C.A./L/105/77 of 14/6/79. (Unreported).

4.74 Similarly in the case of Alhaji Akibiya v. Alhaji Sambo[89] the Supreme Court had to decide whether an agreement in respect of a motor vehicle was a lease or a hire-purchase. In that case the plaintiff/respondent entered into an agreement with the defendant/appellant term of which was for twelve months commencing from 1st January 1972 at a monthly rent of £184 and renewable for another term of twelve months at a rent of £15 per month subject to certain conditions and stipulations under clause 3 of the agreement. There was no option given to the plaintiff/respondent to purchase the motor vehicle, rather the owner's right of property was carefully safeguarded in the agreement. In particular clause 7 of the agreement provided in part as follows:-

> "... if the lessee shall fail to observe or fulfil any term of this Agreement or shall do or suffer anything whatsoever which in the lessor's opinion bona fide formed upon reasonable grounds will or may have the effect of jeopardising the lessor's right of property in the vehicle then and in every such case the lessor may forthwith and without notice terminate the lease created hereby ..."

4.75 Furthermore, clause 14 of the agreement stipulated:

> "For the avoidance of doubt it is hereby expressly declared that this agreement is not and is in no way intended to be one falling within the ambit of the Hire-Purchase Act 1965".

4.76 After reviewing the circumstances of the case and the agreement the Supreme Court held, allowing the appeal, that since the ownership of the vehicle remained in the lessor (owner), and never at any time passed to the respondent, either directly or through any agency and since no option to purchase was conferred on the respondent by the agreement, the agreement was a lease. It further held that the transaction was not a hire-purchase because it did not fall within the definition of a hire-purchase agreement in section 20(1) of the Hire-Purchase Act 1965.

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89. (1978) 11 & 12 S.C. 139.

Conditional Sale (also called Conditional Credit Sale)

4.77 The term 'conditional sale' sometimes referred to by some authors as 'conditional credit-sale' may be defined as "an agreement for sale under which title remains in the seller until the purchase price has been paid in full or the buyer has complied with any other conditions prescribed by the agreement for the transfer of title to him".[90] The case of Lee v. Butler[91] is a good example. In that case, S by a written contract, agreed to let certain furniture on hire to B. B, in turn bound herself to pay by way of rent the sum of £1 immediately, and an further £96 in three months' time. As soon as she paid the total of £97, the property in the furniture should pass to her but not before. Furthermore, if B defaulted in payment or removed the furniture from her home address, S could recover possession of the furniture without notice. Before the second instalment was paid, B sold and delivered the furniture to X who acted in good faith and without notice of S's right. S sued X to recover the goods.

4.78 The Court of Appeal held that the crucial fact was that B had bound herself to pay the total sum of £97. If she failed to pay the total price she would be in breach of contract. If she performed the contract and paid the full price the property in the furniture would automatically pass to her. She was therefore a person who has "agreed to buy the goods" within the meaning of section 9 of Factors Act 1889. The sale to X therefore was just as valid as if S had expressly authorised B to sell the goods to X. Consequently B could pass the property in the furniture to X, and X was entitled to retain the furniture which had become his property.

4.79 A conditional sale differs from hire-purchase in that the buyer is contractually committed to buy the goods in a conditional sale agreement, while a hirer in a hire-purchase merely has an option to buy which he may or may not exercise. In a

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90. Goode, op cit, p. 823.

91. Lee v. Butler [1893] 2 Q.B. 318; [1891-4] All E.R. Rep. 1200. See also Jibowu v. Kuti (1972) 2 U.I.L.R. 367.

conditional sale, the buyer is allowed possession of the goods in question having agreed to buy them, but he is not to become the owner of the goods until all the instalments or conditions stipulated have been fulfilled.

4.80 As the seller is not generally entitled to recover possession of the goods sold under a conditional sale, because he does not still own them, he will ensure that the terms of the agreement entitle him to do so. If the buyer fails to pay an instalment on the due date, the seller may, for example, be able to repossess the goods from the buyer and resell them to recover what he is owed. However, he may not be able to recover the goods where the buyer has sold and delivered them to a third-party as section 25(2) of the Sale of Goods Act 1893 may give the third-party purchaser good title. Section 25(2) provides:

> "where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or document of title with the consent of the owner".

4.81 This is because unlike the case of Helby v. Matthews (supra) there is in fact an agreement to buy. For the seller therefore to protect himself adequately, he may draft the conditional sale agreement in such a way to enable him have recourse to the buyer if resale of the goods does not satisfy the unpaid balance of the price. It should, however, be noted that even though the seller may repossess his goods from a buyer and resale them if the buyer is in default, he cannot, unlike hire-purchase recover the goods from a third-party if the buyer has sold and delivered the goods to the third-party. The seller's only remedy under this situation will be to sue for the price of the goods.

4.82 The difference between an equipment lease and a conditional sale was vividly brought out in the United States of America case of Re Atlanta Times Inc.[92] where the court held that:

> "the court has been urged to view the transaction as if the total rent were the purchase price and the monthly rental the equivalent of instalments. Such approach to the transaction overlooks the prime, essential distinction between a lease and a conditional sale to wit: in a lease, the lessee never owns the property. In the absence of a right or option in the lessee to acquire ownership of the lease property the transaction is one of a lease".

4.83 The reference in the above case to "rent" and "monthly rental" is another reminder to the significance of payment of periodic rentals by the lessee to the lessor in an equipment lease contract. In fact the issue of rental is a pivot on which the whole transaction of equipment leasing revolves. Rentals consequently are sine qua non for the determination of the issue as to whether or not a transaction is an equipment lease. The legal consideration for the lessee's exclusive use and possession of the leased asset, whose ownership lies in the lessor, is the rental. It therefore follows that its absence would be a good pointer to the fact that there was never an equipment leasing transaction in existence while a default in payment may vitiate or negate the subsisting contract.

Credit Sale (also called Outright Credit Sale or Outright Sale)

4.84 It is essential to point out that the term "credit sale" is not the same as the term "conditional sale" or "conditional credit sale" which some legal text book writers tend to use interchangeably. The tenuous, but legally significant, distinction was expressed with admirable clarity by the authors of "Nigeria Business Law" at pages 207 - 208, where they stated:

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92. 259 F Supp 820 (USDC 1966).

> "A credit sale agreement is a contract under which an owner sells and delivers goods to a buyer without any reservation of property and agrees to accept payment of the whole or part of the purchase price by instalments"[93]

4.85 A simple legal analysis of the definition would reveal that:

1. The buyer has on entering into the contract acquired title to the goods and consequently has vested in him the ownership right even though the price for the goods is payable by instalments.[94]

2. If therefore the buyer has ownership vested in him, it would be legally impossible for the seller to take the goods back where the buyer defaults in the payment of the purchase price or its instalments. The seller's only remedy under this situation would be to sue for the price of the goods.[95] In fact, the buyer can sue the seller for trespass if the latter tries to recover the goods as he (the buyer) has both possessory right as well as ownership right vested in him. Being the legal owner of the goods, the buyer can pledge it as security or sell the goods and confer good title on the purchaser.

3. A credit sale agreement by virtue of conferring ownership right on the buyer is an outright sale. Consequently, once there is proof to show that a credit sale (outright sale) has taken place, it is immaterial that the buyer of the goods has defaulted in making payments as agreed, the seller has no legal right to repossess the goods even though the buyer has agreed in the contract to that course. Thus in the case of Adesokan v. Incar (Nigeria) Ltd,[96] the court held that where there is an outright sale of goods and the purchaser defaults in paying instalments, the seller has no right to retake the goods even though the purchaser in his contract has agreed to that course.

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93. Ezejiofor, Okonkwo, Ilegbune, op cit.

94. Opagini v. Adeyemi (1974) U.I.L.R. 547

95. Ibid.

96. [1970] N.C.L.R. 47.

4.86 Similarly in the West African Court of Appeal case of Kofi v. Mensah,[97] the question that had to be decided in order to determine whether or not the defendant had the right to seize the lorry was, whether the lorry had been sold outright under a credit sale by the defendant to the plaintiff, in which case the property in the lorry would vest in the plaintiff or whether there was a hire-purchase agreement in which case the property would remain in the defendant, so that he could take possession of the lorry on failure by the plaintiff to pay the instruments.

4.87 After reviewing the case, the court found out that the transaction amounted to a credit sale even though the plaintiff had agreed in the contract that the defendant could recover the lorry in the event of default of payment by the plaintiff. The court held:

> "When an outright sale of goods takes place and the purchaser makes a default in paying the agreed instalments the seller has no right to retake the goods even though the purchaser in his contract has agreed to that course, and his only remedy would be to enforce payment of the instalments by action in the courts".

4.88 Again in the case Yakassai v. Incar Motors (Nigeria) Ltd.[98] the defendant/respondent sold and delivered to the plaintiff/appellant, a Fiat truck together with a trailer after he (plaintiff) had paid certian amount of money as deposit towards the purchase of the vehicles. But there was still some balance to be paid on the vehicles. This was in March 1968. In October 1969, the said vehicles were taken to the defendant's workshop for repairs, thereupon the defendants seized the vehicles on the ground that full payment had not been made by the plaintiff. When the defendants would not release the vehicles as demanded by the plaintiff, he (plaintiff) sued asking for the return of the vehicles or their value fixed at £5,000:12s:4d and damages for the detention which was limited to £3,000.00. It was argued for the plaintiff at the High Court that the transaction between the plaintiff and the defendant was an outright sale and as such the defendants

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97. (1930) 1 W.A.C.A. 76.

98. (1975) 5 S.C. 107.

had no right to seize the vehicles as they did. On the other hand, the defendants contended that the transaction was a hire-purchase agreement, but no hire-purchase agreement was ever tendered in court. For some strange reasons the court come to the conclusion that the transaction amounted to a conditional sale; an issue which was never raised on the pleadings, and which was never canvassed by either party and entered judgment for the defendant.

4.89 On appeal the Supreme Court allowing the appeal held:

1. That the High Court erred in basing its decision on an issue which was never raised on the pleadings and in respect of which no evidence was adduced at the trial.

2. That from the pleadings and the facts of the case, it was absolutely clear that the transaction between the parties was an outright credit sale.

3. That in the circumstances, it was not open for the defendants to seize the vehicles as they had done. Their remedy would be to enforce payment of the instalments by action in court.

4. That it would be otherwise if the defendants had been able to establish that what they entered into was a hire-purchase agreement.

4.90 Explaining the difference between an outright credit sale and a hire-purchase, the Supreme Court further said:

> "We are in no doubt whatsoever that the facts of this case show clearly that the vehicles were sold outright by the defendants to the plaintiff. In other words, we take the view that the property in the vehicles had passed to the plaintiff ever before the defendants effected the seizure which is the subject matter of this action. That being so, we think that the respondents in the present case acted wrongly when they seized the vehicles as they did. The difference between the outright credit sale and a hire-purchase is that in the former, the property in the vehicles passes to the purchaser as soon as the contract is entered into, whereas in hire-purchase agreement, it is always open to the owner of the vehicle to take possession of it on the failure of the hirer to pay the instalments. In an outright credit sale, the seller's remedy lies in an action to recover the balance of payment owed by the purchaser".

4.91 Where there is proof that a transaction is an outright credit sale, the loss or destruction of the goods cannot exonerate the buyer from his liability to pay for the price or balance due. Thus in the case of Amao v. Ajibike And 3 others,[99] the first defendant agreed to purchase from the plaintiff an Austin 5-ton chassis and in pursuance of which he paid a certain sum as deposit. By a written agreement dated 20th July 1954, the first defendant confirmed the oral agreement to purchase the said 5-ton chassis and promised to pay the balance in three equal instalments. The agreement did no contain any clause to the effect that the hirer has an option to determine the transaction by returning the chassis.

4.92 By another agreement of the same date, the second, third and fourth defendants agreed to stand surety for any unpaid balance. The plaintiff delivered the chassis but two weeks later it was destroyed by fire. As a result of this, the first defendant refused to pay any instalment due and the sureties equally refused to discharge their obligation.

4.93 In an action by the plaintiff for the balance of the purchase price, the court held that despite the words "hire-purchase" and "hirer" in the agreement between the plaintiff and the first defendant, the agreement was one of an outright credit sale and not a hire-purchase. As Kingdom C.J. observed:

> "The determination of the question depends in turn upon the true interpretation to put upon the agreement between the first defendant and the plaintiff. It is an established rule that in interpreting this so called hire-purchase agreement, the substance of the transaction evidenced by the agreement must be looked into and not its words... The test to be applied is whether or not the party receiving the goods has the legal right to return them at his own option and thereupon, to cease paying instalments. If he has, the agreement is an agreement to hire-purchase. If he has not, the agreement is an agreement to sell".

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99. (1955-56) W.R.L.R. 121.

4.94 The tenous distinction between a credit sale and hire-purchase sometimes cause some confusions to parties to these legally different transactions and as is expected, the problem is worse with illeterate persons. Thus in the case of Amina Arab v. J. Allen Ltd.,[100] the plaintiff and the defendant entered into an agreement in respect of a lorry. The agreement provided for the payment of a deposit and certain instalmental payments. The plaintiff having paid the required deposits, took delivery of the lorry, but subsequently fell into arrears with regard to the instalments. The defendant pursuant to the agreement seized the lorry. The plaintiff thereupon sued the defendant claiming, inter alia, the return of the total sum of N1,600.00 she paid to the defendant in respect of the transaction.

4.95 It was the plaintiff's contention in the court that the transaction was an outright credit sale, while the defendant maintained that it was a hire-purchase transacion.

4.96 After explaining the essential distinction between an outright credit sale and a hire-purchase, that is, that if it were a hire-purchase the defendant would be entitled to seize the lorry under the terms of the agreement, but if it were a credit sale agreement, the defendant would have to bring an action in the court for the instalments due and could not seize the lorry unless it is in execution of the law court's order after the issue of a writ of fierie facia, Justice Williams said:

> "This illustrates the difficulty with which commercial organisations are faced where they are dealing with comparatively unsophisticated people in respect of hire-purchase transactions. It is not easy to explain that a hire-purchase agreement clothes a person with all the apparent indicia of ownership but that the person does not in fact become owner until all instalments have been paid and the item is then purchased, for say, one shilling. It is not easy for an unsophisticated to realise that although he is using the lorry for gains, is responsible for the insurance and upkeep and generally appears to be the owner, even to the extent of having the lorry registered in his name, the ownership remains in the hire-purchase company, who can repossess it for failure to pay any instalments without a court order ..."

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100. [1966] N.C.L.R. 276.

4.97 The legal distinction, therefore, between these similar but different commercial activities which I have just discussed and an equipment lease, was succinctly summarized by Thorpe in his paper "International Financial Leasing",[101] where he said:

> "The distinction between these different types of transaction depends upon whether the property in the goods passes to the buyer or remains with the vendor. In the latter case where the property is retained, the transaction is either a lease or a conditional sale depending on whether the property will pass to the 'lessee' pursuant to that transaction or not. If so, then it is a sale, if not then it is a lease".

Types of Equipment that could be Leased in Nigeria

4.98 While generally any tangible and durable asset may be a qualified object for the equipment leasing contract, some assets have higher demand than others. Numerous factors contribute to the desirability of equipment, some of which include: the nature and level of industrial/commercial activity in any given state of the federation, the income-yielding ability of the equipment, the equipment's durability and marketability. Other factors include the newness of the equipment, the maintenance costs, the rate of obsolescence, the portability and the state-of-the-art of the equipment. Some other factors that may be of special interest to the bank lessor would include the administrative costs (ie the bank lessor prefers leasing few items of equipment rather than numerous items with attendant high administrative cost), whether the business premises belong to the lessee or a third party in view of the legal maxim of quicquid plantatur solo, solo cedit, the rate of applicable tax benefits and whether the equipment can easily be identified or severed when mixed up or attached to other equipment especially those not belonging to the lessor.

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101. Thorpe, G.C, International Financial Leasing (1983), being a seminar paper delivered at the Commercial Law Summer School, Queen Mary College, University of London, p. 26.

4.99 From experience, the following equipment appears very profitable to the banks and consequently attractive to them:

1. Oil drilling equipment.
2. Mining equipment.
3. Manufacturing/construction equipment:
    a) Road construction;
    b) Building construction;
    c) Car assembly plants;
    d) Motor-cycle and bicycle assembly plants;
    e) Electronics assembly.
4. Transportation:
    a) Aircraft;
    b) Ships (including trawlers);
    c) Road (especially commercial haulage);
    d) Rail.
5. Industrial equipment:
    a) Power generating machines (electric generators);
    b) Textile tools and looms;
    c) Machine tools;
    d) Cranes;
    e) Fork-lift trucks;
    f) Brewers' kegs;
    g) Elevators and conveyors.
6. Agricultural equipment:
    a) Food processing;
    b) Tractors;
    c) Others especially poultry equipment.
7. Other equipment (but less attractive):
    a) Motor-cars (leasing and repairs);

b) Office and service industries' equipment:

i) furniture;

ii) telecommunications;

iii) computers;

iv) air-conditioners;

v) professional services equipment such as equipping a doctor's medical laboratory or a lawyer's chambers.

c) Distributive trade equipment;

d) Recreation/sports equipment;

e) Equipment that is either new in the market in Nigeria or old but has no long performance track record.

4.100 The equipment items under group 7 above are generally classified by most banks' credit/leasing executives as undesirable unless the equipment is to be leased to a financially very strong lessee. The transaction is usually seen as unsecured. Equipment in this group generally requires a high degree of maintenance or has an uncertain value on repossession or an uncertain residual value at the termination of the lease. This group being seen as the least attractive of the seven groups, banks only lease equipment belonging to the class if they are willing to lend unsecured in a credit transaction. This is in contrast to the other groups, especially group 6 - Agricultural Equipment. Apart from the initial and annual allowances provided for the leasing of agricultural equipment under Schedule 2 of the Companies Income Tax Act 1979[102] there is a further 10% investment allowance accruing to the lessor who leases equipment under group 6. As pointed out in the preceding chapter the Federal Government in the execution of its Structural Adjustment Programme (SAP) banned not only the importation of selected raw materials but also banned some popular food items like rice. This resulted in the search for local substitutes both for industrial use and human consumption and

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102. Further discussions on Capital Allowances under the Companies Income Tax Act 1979 will be taken up in Chapter 9.

consequently the agricultural sector got a boost. Another governmental measure that encouraged this enormous rise in agriculture included the Central Bank of Nigeria's (CBN) Credit Guidelines, which directed banks to set aside specifically a certain percentage of their loan portfolio for all types of agricultural activities.

CHAPTER FIVE

LEGAL ASPECTS OF EQUIPMENT LEASING

5.01 It is important to note that at present there is no specific legislation for the operation of equipment leasing in Nigeria. The equipment leasing transactions in Nigeria are currently governed by a number of statutes such as the Nigerian Companies and Allied Matters Decree (CAMD) 1990, various tax laws, the Nigerian adopted common law rules [1] etc. In support of this assertion, Chief Dele Orisabiyi (former President of ELAN) said:

> " ... there is no enacted law on equipment leasing in Nigeria. Leasing contracts are therefore mostly governed by the rules of common law and the company law".[2]

It is similarly worthy of note that there is yet no decided case in Nigeria involving equipment leasing. Thus Chief Orisabiyi further stated:

> "In the absence of any codified law on leasing in Nigeria, the position of the law is uncertain given the lack of any litigation as yet ..." [3]

One can only add that even in England there is dearth of case law on equipment leasing. Commenting on the absence of case law in the United Kingdom, Clark stated:

> " ... there is virtually no case law in the U.K. concerned with financial leasing. Provisions which have appeared in leasing agreements regularly since 1960 such as lessors remedies for breach, remain to a large extent uninterpreted by English Courts. Notwithstanding the fact that the dearth of case may show that the relations between lessors and

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1. These are the common law and equity rules which existed in England prior to 1st. January 1900, which are known in Nigeria as statutes of general application. These rules are applicable in Nigeria in so far as there is no Nigerian legislation relating to the same matter - see s. 45 (1) of the Law (Miscellaneous Provisions) Act 1965.

2. Orisabiyi. D, Leasing In Developing Markets: Nigeria, being a paper presented at the 8th World Leasing Convention Singapore from 4th - 6th June, 1990, p. 12.

3. Ibid, pp. 12 - 13. What the courts have so far done as can be seen from the decided cases (see Chapter 4) have been to distinguish equipment lease from other similar commercial activities.

> lessees have up to now, been particularly harmonious and their contracts most uncontentious, it is possible that following the recent rapid growth of leasing, the law on several aspects will soon be tested before the courts" [4]

Supporting the above views of Clark with regard to the possibility of litigation arising from equipment leasing contracts, Chief Orisabiyi has cautioned that:

> " Leasing is not excluded from the numerous risks inherent in our business. Until we have litigation involving leases we would be far removed from the issues of what could go wrong. For instance, even if everything was right, what if no one required the asset you have just repossessed and thus you cannot recoup your investment. Let us take caution while the current windfall returns on our leased assets lasts. Let us give a thought to what could go wrong, let us not be caught unawares " [5] [*emphasis mine*]

5.02 In dealing with the legal aspects of equipment leasing, one may observe:

(1) that the bulk of case law authorities cited are hire-purchase cases. This is not only because of the very close similarity between hire-purchase and equipment leasing (both belong to the family of law of bailment), but also due to the newness of equipment leasing activity in Nigeria and the resultant absence of decided cases on the subject. However, it must be pointed out that these hire-purchase cases as well as all non-Nigerian cases cited only act as persuasive and not binding precedents in equipment leasing matters in Nigeria.

(2) that the clauses of equipment leasing agreements appear primarily tailored to give better legal protection to the lessor while little protection is given to the lessee. The Unidroit Convention On International Financial Leasing 1988 has tried to give adequate legal protection to the lessee, but the coverage of this Convention is limited to Internation Financial Leasing transactions - see Appendix 2. This subject is discussed further in this Chapter 6. The reason for this apparently is because of the superiority of the lessor in a leasing arrangement and also possibly because the law envisages and permits the lessee's exclusive use and possession of the leased equipment which belongs

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4. Clark, T. M, Leasing, (1978) (McGraw-Hill) p. 81.

5. Orisabiyi. D, ELAN'S Newsletter vol. 1 no. 2 of 1988.

to another; the lessor. For the lessor therefore to feel safe and at ease while parting with possession of his property, it seems reasonable that his interest which is exposed to high risk is adequately protected.

The Common Law of Bailment

5.03 Having earlier seen in the chapter dealing with the Historical Development of Equipment Leasing[6] that it was established by Holt C. J in the case of Coggs v. Bernard[7], that equipment leasing (hiring of goods for use) is one of the six classes of bailment,[8] it seems reasonable and proper to touch briefly on the general law of bailment as it affects equipment leasing for a better appreciation of the legal nature of equipment leasing. What then is a bailment? Mozley and Whiteley define a bailment as:

> "A delivery of goods by one person, called the bailor, to another person, called the bailee, for some purpose, under a contract, express or implied, that after the purpose has been fulfilled, they shall be re-delivered to the bailor or otherwise dealt with according to his direction, or kept until he reclaims them" [9]

5.04 There are six kinds of bailment, namely: [10]

1. Depositum, that is the bare deposit of goods with another, for the exclusive use of the bailor.

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6. See Chapter 2.

7. (1703) 2 Ld. Raym. 909.

8. Adams. J. N, Commercial Hiring and Leasing, (1989) (Butterworth) pp. 5 - 6. See also Goode R. M, Commercial Law (1982) (Penguin Books / Allen Lane) p. 833.

9. See Mozley And Whiteley Law Dictionary, (1988) (Butterworths), p. 44. See also Pollack And Wright, Possession In the Common Law (1888) p. 163 which defined it as follows: " ... any person is to be considered as bailee who otherwise than a servant either receives possession of anything from another upon an undertaking with the other person either to keep and return or deliver to him the specific thing according to the direction antecedent or future of the other person "

10. See Mozley and Whiteley, op cit, p. 44.

2. Commodatum, that is the lending of goods for the use or convenience of the bailee.

3. Locatio et conductio, that is the placing of goods with the bailee on hire.

4. Vadium, that is goods pawned or pledged.

5. Locatio operis faciendi, that is delivery of goods to a carrier or to a person who is to carry out some services in respect of them for payment.

6. Mandatum, this is the delivery of goods to a carrier or to a person who is to carry out some services gratuitously or without payment.

5.05 The above six forms of bailment may be broadly classified into two, namely, (a) bailment for reward [11] or consideration and (b) gratuitous bailment. In this thesis I am concerned with class (a), particularly locatio et conductio, that is hiring/leasing of goods or equipment by hirer or lessee. This shall be dealt with extensively in this chapter. Though class (b) is in the strict sense of it outside the purview of this work, I have thought it necessary to mention it briefly for completion.

5.06 Gratuitous bailment, simply put, is the bailment of chattel to be kept for the bailor by the bailee for no consideration and to be returned to the bailor on demand by the bailor or his nominee. The bailee under this circumstance has no obligation to accept the goods, but once he accepts,

> "he becomes in some degree responsible for it whilst it remains in his possession or under his control and is also bound upon demand, to redeliver it to the true owner or his nominee, unless he has good excuse in law for not doing so" [12]

Gratuitous bailment may come about by depositum or commodatum or mandatum (see numbers 1, 2 and 6 above).

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11. This would include hiring / leasing and hire-purchase, delivery of goods for work or service, custody or carriage, pledge or pawn. The focus of this thesis being on hiring / leasing, the other forms of bailment for reward shall not be dwelled upon.

12. Halsbury's Laws of England (1991) (Butterworths), para 1806, p. 835.

5.07 While generally bailment by depositum would be by agreement, it need not always be so. It may arise by necessity / emergency as in case of shipwreck, fire, flood, civil riot or other unforseen disaster. Where in any of these situations a chattel is entrusted to the care of another, even a bystander, and the person accepts, he is taken as bailee and would probably be liable for the loss resulting from his negligence or bad faith.[13] Bailment by deposit may also come about by mistake [14] or accident [15] or involuntarily. The case of Tom Nimbly v. African Steamship Company, [16] illustrates vividly an involuntary bailment. The facts of which briefly are: that Tom Nimbly booked with the defendants to travel aboard their ship from Calabar - Nigeria to Grand Cess. He had as part of his goods some sewing machines. Before the ship's departure, a misunderstanding arose between him and the ship's management which led to his been taken ashore while his machines were left in the custody of the ship's chief officer. By the time the issues were resolved, the ship had left leaving the plaintiff behind. The machines arrived Grand Cess but there was nobody to claim them or take delivery, so they were carried to Hamburg and finally lost. After some fruitless efforts to recover his goods, the plaintiff instituted an action for the loss of his goods. The full court held that the defendants were liable. Winkfield Ag C. J. in the judgment stated inter alia:

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13. Ibid, para 1807, p. 836.

14. For example where a person who is by reasons of his mental condition incapable of appreciation entrusts by mistake a chattel to another person who duly accepts it such a person becomes a bailee of the chattel - see R v. Reeves (1859) 5 Jur (N.S) 716 cited in Halsbury's Laws of England, op cit, para 1808, p. 836, where a man who was lying on the ground partially tipsy, permitted an acquaintance to take his watch off his pocket on the supposition that the acquaintance was actuated by a friendly motive, the court held that the evidence was sufficient to convict the person of offence of larceny as a bailee, that is now offence of theft.

15. Such as where a chattel is accidentally deposited in another person's land in a situation where neither the owner nor the person on whose land the chattel was deposited has control, such as by tide or wind. The party on whose land the chattel is deposited does not by the fact that the chattel was deposited on his land become a bailee, but as soon as he interferes with the chattel he makes himself a bailee - see Halsbury's Laws of England, op cit para 1809, p. 836.

16. (1910) 1 N.L.R 108

> "... that after the steamer left Grand Cess the defendants ceased to be carriers and became involuntary bailees of the luggage" [*emphasis mine*].

5.08 Bailment by commodatum has been defined as a bailment where a chattel is lent by the owner to the bailee for the express purpose of conferring a benefit upon the bailee without any corresponding advantage to its owner.[17] The obligation of the bailee is to use the goods personally [18] and at the end of the period agreed upon to return it to the owner. The bailee is expected to exercise due care and would be liable for negligence in handling the goods, though fair wear and tear are expected. He is not liable for injury by third party which he could not reasonably have forseen or prevented[19] but would be liable for ordinary expenses in using the goods. He would not be responsible for major expenses in using the goods nor is he expected to carry out repairs of inherent defects in the goods.[20] The owner / lender would on the other hand be held liable for injury to the bailee arising from defect in the goods which the owner was aware of but neglected and / or failed to inform the bailee.[21]

5.09 Bailment by mandatum arises where the bailee agrees to do some act without any reward. The essence of it is the service or labour such as feeding an animal or preserving a perishable article and not the custody.[22] Even though a bailee in this situation is not entitled to any payments for his services, he must be reimbursed his out of pocket expenses in connection with the service he renders.[23] It is his duty to act

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17. Halsbury's Laws of England, op cit para 1829 p. 849.

18. Ibid, para 1833 p. 852.

19. Ibid, para 1830 pp. 849 - 850.

20. Ibid, para 1831 p. 851.

21. Ibid, para 1832 p. 851.

22. Ibid, para 1820 p. 845.

23. Ibid, para 1828 p. 849.

prudently and horourably and to exercise reasonable care and deligence and exercise such skills as he possesses or professes. If he fails to exercise the deligence and care required of him, he is liable to the bailor.[24] He would not be held liable where the act expected of him is illegal, immoral or impossible. He is enjoined to return the goods as agreed to the bailor.

5.10 In all forms of bailment as shown from the definition, it is the owner of the chattel who gives or delivers possession (but not ownership) to another person. This possession may be actual or constructive and the latter may be as a result of mere attornment to the bailee.[25] Consequently if Mr. Chudi gives some goods to Mr. Ugo on hire or custody or carriage Mr. Ugo would be in actual possession. But if a warehouseman holding goods as an agent for an owner agrees to hold them for another person on the instructions of the owner that would be in constructive possession.[26] Similarly where a finance company obtained title to a car under an executed but illegal contract of sale and without taking delivery of the car hired it out to a company which converted it, it was held that the hiring company was a bailee.[27] In fact it has been held as in the case of South Staffordshire Water Works Co. v. Sharman,[28] that an occupier of land under which some chattels were embedded was a bailee of the chattels even though he was not aware of the chattels.[29]

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24. Ibid, paras 1821 - 1822 pp. 846 - 847.

25. Abili v. United Nigeria Insurance Co. Ltd. [1969] N.C.L.R. 196 at p. 203.

26. See Mozley and Whiteley, op cit, pages 346 and 101 respectively for the general meaning of the terms "Actual Possession" and "Constructive Possession" in law. See also Dublin City Distillers Ltd v. Doherty [1914] A.C. 823 at p. 847; 58 Sol. Jo. 413, H.L.

27. Belvoir Finance Co. Ltd v. Stapleton [1971] 1 Q. B. 210; [1970] 3 All E.R 664, C.A.

28. [1896] 2 Q.B 44; [1895-9] All E. R. Rep. 259.

29. See also London (City of) Corporation v. Appleyard [1963] 2 All E.R. 834, [1963] 1 W.L.R 982.

5.11 A licence to leave goods with another is not a bailment. Thus in the case of Tinsley v. Dudley[30] where a customer left his motor cycle in a public house premises with no attendant to look after the motor cycle. It was found as a fact that the customer neither informed the publican nor was a charge made for his leaving the motor cycle in the premises. In an action for the theft of the motor cycle, the court held following the case of Ashby v. Tolhurst[31] that the publican was not a bailee and therefore not liable. Similarly in the case of Deyong v. Shenburn,[32] the plaintiff was employed to act in a pantomime. His overcoat, two shawls and his pair of shoes were stolen during one of the rehersals. The court held that the employer was not under a duty to protect the goods from theft. The employer would have been treated as a bailee and consequently liable if he had undertaken whether directly or through his agent or servant to keep the goods. Thus in the case of Ultzeen v. Nicols[33] where a waiter in a restaurant took a customer's coat and put it on a peg, it was held that the owner of the restaurant had become bailees of the coat and were therefore bound to take reasonable care of it.

5.12 In a situation where a chattel belonging to a number of persons was delivered to another to hold on their behalf, the chattel must be redelivered to all of them unless there is a contrary arrangement. The bailee would have a good defence for refusal to redeliver to one of them or some of them. On the other hand, where a chattel is delivered to two or more bailees, the position of the law is that each bailee is responsible for the acts and defaults of his co-bailee provided it is within the ambit of their authority.[34]

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30. [1951] 2 K.B 18; [1951] 1 All E. R. 252.

31. [1937] 2 K.B 242; [1937] 2 All E. R. 837.

32. [1946] 1 K.B 227; [1946] All E. R. 276.

33. [1894] 1 Q.B 92.

34. Halsbury's Laws of England, op cit, para 1805.

5.13 Equipment Leasing (locatio et conductio) being a type of bailment in which the lessor or bailor and the lessee or bailee enter into an agreement for a fixed or determinate duration for a consideration called a rent or rental, the arrangement is thus contractual and consequently the rights and liabilities of the parties would be governed by the express or implied terms of the contract. The express terms are those that are specifically embodied in the lease agreement while the implied terms are those common law terms not expressed in words or which usage has rendered equivalent to words. It is for example implied that the bailee or hirer or lessee shall take reasonable care of the goods and shall deal with them as directed and return them to the bailor or owner or lessor at the end of the bailment.[35]

Thus in the case of Tom Nimbly v. African Steamship Co.[36] (supra), Winkfield Ag. C.J said inter alia:

> " A bailee is bound (1) to keep the goods entrusted to him with reasonable care, and (2) to return the goods when required. If the goods are not forthcoming negligence on the part of the bailee is presumed, and the onus is then in the first place on the bailee, to show circumstance negativing negligence ..."

5.14 Having seen that equipment leasing transactions are contractual a number of terms may therefore be implied in any given equipment leasing contract, though as Professor Goode has pointed out,

> "the range of terms in favour of the lessee or hirer at common law is uncertain but appears to encompass a right to let the goods on the lease, correspondence with description and sample, fitness for the known purpose (though the ambit of this obligation is unclear) and possibly merchantable quality"[37]

These terms are, however, only implied in contract in Nigeria where the parties have not agreed otherwise. If the parties have, for example, agreed on the extent of the lessor's liability for any defects in the goods, the implied condition that the goods

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35. Lowe. R, Commercial Law, (1983) (Sweet And Maxwell) p. 415.

36. (1910) 1 N.L.R 108. See also Nigerian Ports Authority v. Ali Akar And Sons [1965] 1 All N.L.R 259 at p. 265.

37. Goode, op cit, p. 845.

must be fit for the purpose for which it was hired or bought may be excluded.[38] Thus in the famous case of Stephen Anoka v. S. C. O. A, [39] one Mr. Anoka bought a lorry from the defendant not realising that the lorry had a defective engine. On realisation that the lorry had defective engine, Mr Anoka replaced the engine. When he defaulted in the payment of the rental the defendants seized the lorry and sold it. Thereupon the plaintiff instituted an action for conversion of the lorry and for breach of warranty that the lorry was fit for the purpose for which it was bought. The court had to consider the issue of fitness of the lorry and held that, in the absence of an express term in the hire-purchase agreement excluding any warranty of fitness or limiting the defendant's liability,[40] the defendant was under a duty to ascertain that the lorry was reasonably fit for the purpose for which the defendant must have known the lorry was intended to be used. However, the court came to the conclusion that since the defect in the engine was hidden and could only be detected by the defendant company after it had taken the engine to pieces, the defendant company was not liable for breach of implied warranty.

5.15 Similarly, in the case of Salami v. Bentworth Finance Nigeria Ltd.,[41] where goods were stolen from a hirer, the court held as in the case of Bentworth Finance (Nigeria)

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38. In England, the Unfair Contract Terms Act 1977 sets the limits on the ability of parties to contract out of the common law rules. The UCTA 1977 does not apply to Nigeria. The Nigerian position seems to be influenced by the basic principle of freedom of contract. This position is akin to Unidroit Convention on International Finalncial Leasing, 1988, which by virtue of Article 5 (1) allows parties to a leasing transaction to vary or exclude the non-mandatory provisions of the Convention. See also the Supreme Court of Canada's case of Elsey v. J. G. Collins Insurance Agencies Ltd [1978] 83 DLR 1, 15, where it was held " ... the power to strike down a penalty clause is a blatant interferance with freedom of contract ..." [*emphasis mine*].

39. (1955 - 56) W. N. L. R p. 113. See also Lowe v. Lombark Ltd. [1960] 1 W.L.R 196; [1960] 1 All E.R. 611, where the Court of Appeal held that the exclusionary clause in relation to fitness of purpose could not avail the owner as the clause was not "brought to the notice of the hirer" nor was "its effect made clear" to her.

40. In England this may not be possible by virtue of s. 7 of Unfair Contract Terms Act 1977. However, note Article 8 (1) (a) of Unidroit Convention On International Financial Leasing which essentially insulates the lessor from liability or defect arising from the goods unless the lessor takes part in the selection of the supplier or the specification of the good or where the lessee relied on the lessor's skill or judgment.

41. (1968) A.L.R Comm. 304.

Ltd. v. Alhaji Sani Bakori[42] that if the hirer was not in any way to blame for the theft or destruction of the goods, he will be excused from liability to redeliver the goods to the owner. But the court went further to hold that the terms of the agreement may, however, make the duty to redeliver absolute, thus placing the risk of loss solely on him.

5.16 From the above cases, it clear that the attitude of the Nigerian courts is that any express agreement overrides the terms implied by the common law. The Nigerian courts would refuse to interfer with the bargain which the parties have decided to make, regardless of its unfavourable nature to the hirer as they consider such intervention as a violation of the principles of freedom of contract,[43] provided it does not destroy the contract.

5.17 Having reviewed the general law of bailment with particular reference to locatio et conductio , I shall now proceed to examine the legal nature of equipment leasing which essentially entails an examination of the major legal provisions in an equipment leasing contract.

Examination Of The Major Legal Provisions In A Typical Equipment Leasing Contract.

5.18 The major provisions which are generally found in a typical equipment leasing contract are:

1.Provision as to title.

2.Provision as to delivery.

3.Provision as to fitness for purpose.

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42. Suit Number NCH/46/1971 High Court Kaduna Nigeria (unreported judgment dated 12:2:1973).

43. It is, however, very likely that where an express term of a contract completely destroys the very essence of the contract, the courts would not uphold the exclusion clause as that invariably amounts to non-performance of the contract. See the cases of: Amusan v. Bentworth Finance Nig. Ltd [1965] 1 All N.L.R. 382; Karsales (Harrow) Ltd. v. Wallis [1956] 2 All E.R. 866; 100 Sol. Jo. 548, C. A.; [1956] 1 W.L.R. 936; Yeoman Credit Ltd. v. Apps [1962] 2 Q. B 508; [1961] 2 All E.R. 281.

4.Provision as to quiet enjoyment.

5.Provision against illegality of use of equipment and / or breach or any relevant legislation.

6.Provision as to penalty or genuine pre-estimate.

7.Provision as to improper use of equipment leading to increased depreciation.

8.Provision as to sale of equipment.

9.Provision as to annexation of equipment.

10.Provision as to sub-leasing and / or assignment.

11.Provision as to payment of rental.

12.Provision as to insolvency or bankruptcy of lessee.

13.Provision as to acquisition of equipment by lessee.

14.Provision as to termination of contract and return of equipment.

I shall now discuss each of the above provisions.

1. Title

5.19 The issue of title in an equipment leasing contract is so central and important that if there is an evidence that the lessor might lose it on entering into the contract or immediately after the expiration of the contract, then the transaction is certainly not an equipment lease in Nigeria.[44]

5.20 It is consequently important that at all times the leased equipment must be seen to be the sole and exclusive property of the lessor and the lessee must expressly undertake to take all necessary steps to safeguard that title and other incidental rights of ownership of the lessor in the equipment.

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44. See the definition of Equipment Leasing in Nigeria in Chapter 4.

5.21 Not being the owner of the leased equipment, the rule nemo dat quod non habet, applies[45] and any disposition of the equipment or serious challenge or interfernece with the rights of ownership of the equipment by the lessee would be wrongful in law and would entitle the rightful owner (lessor) to treat the wrong as a fundamental breach of the contract, following which the lessor may terminate the contract and recover damages for the breach in addition to repossessing the equipment.

5.22 In some jurisdictions (such as the United States of America - see capital lease, and France - see crédit-bail[46]) where a typical equipment lease contract gives the lessee the option to purchase the equipment at the end of the lease term (this would amount to hire-purchase in Nigeria), the issue of title is even of greater importance. This is so because the purpose of the lessee entering into the lease contract in the first place is that he would have the option to purchase the equipment at the expiration of the lease. Where therefore the lessor lacks title, the basis of the contract is destroyed. Thus in the case of Warman v. Southern Counties Car Finance Corporation[47] (this involved hire-purchase which equates to capital lease and crédit-bail in the U.S.A and France respectively) the plaintiff took a car under a hire-purchase agreement with the defendant, paid four out of the twelve instalments, and therafter decided to pay off the balance and purchase the car. This he did but the true owner claimed the car from him. The plaintiff therefore sued for the recovery of all sums paid. The court held that he was entitled to recover all sums paid. The court's ratio decidendi being that the plaintiff had paid the instalments so that he might eventually become the owner, and not just to

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45. This latin phrase simply means - that no one can give what he has not. In other words one can never give a better title than he has. Note, however, that there are exceptions to this rule, which exception 1 shall discuss under the sub-topic "Provision as to sale of equipment" in this chapter.

46. See Jaunait. E, French Legislation and Regulations for Equipment Leasing, in the Official Account of the Proceedings of the 1976 Working Meeting, Leaseurope Brussels (1976) pp. 109 - 121

47. [1949] 2 K.B 576; [1949] 1 All E. R. 711. See also Karflex, Ltd. v. Poole, [1933] 2 K.B. 251; [1933] All E.R. Rep. 46.

use the car, and since the bailor could not pass good title to him any sum paid by him was recoverable as money had and received on a total failure of consideration.

5.23 As already shown the issue of title to the equipment is important both to the lessor and, to the lessee, though in varing degrees. The lessee, for example, will want to know that the lessor has title to the equipment to avoid the unpleasant situation where the owner of the equipment or some other person with superior title repossesses the equipment which he had leased from lessor. This could lead to devastating operational / financial problems for the lessee. For the lessor, given the various equipment leasing schemes and modes of entering into them, the issue of having good title ought to, and in fact does, occupy a special place in the legal appraisal of an equipment leasing application. The lessor will want to ensure that he obtains unencumbered title to the equipment and the safest method of achieving this is to obtain the title directly from the manufacturer by a bilateral purchase contract or by a novation contract where the lessee has already entered into a contract with the manufacturer / supplier. In the alternative, the lessee may assign the title in the equipment to the lessor as long as the vendor / seller of the equipment is not only put on notice, but also gives his consent (preferably in writing), otherwise the lessor may be obtaining title which may be subject to the intervening rights of third parties without knowing it. A contract of novation is, in any case, economically speaking, preferable to an assignment, even though both methods achieve the same objective, in the sense that the stamp duties payable on assignment contracts / agreements, currently seventy-five kobo (75K) per every two hundred naira (N200.00) is not applicable to novation contracts. In a sale and leaseback transaction the lessor should insist of having some documentary evidence to prove that the lessee has paid the manufacturer in full in order to prevent problems that may arise out of retention of title as he (lessor) may take subject to whatever interests that may have been attached to the equipment while it was in the hands of the lessee.

5.24 It is also not unusual for lessors to request the lessees to covenant that they will protect their title, refute claims by third parties, not hold themselves out in any form as the owners and ensure that the equipment is registered, if required, in their (lessors') name. Additional safeguards by lessors include affixing nameplates on the equipment and sometimes taking out newspaper advertisement or having media coverage of the handing over of equipment especially in syndicated or leveraged lease transactions.

2. Delivery

5.25 The lessor, under the common law is under an obligation to deliver the equipment to the lessee just as the common law imposes on him the duty to ensure that he has good title to the equipment he is leasing. This is so, according to Professor Goode, because hiring cannot be said to have commenced until the goods have been delivered.[48] Delivery could be actual, that is delivery of the physical equipment or it could be constructive as some symbolic act of delivery may be employed, for example handing over the keys to large equipment. The lessor may, however, be justified in refusing to deliver if he discovers that there was a material misrepresentation on which he relied upon or where the performance of the contract was frustrated.[49]

5.26 While the lessee has a duty to accept delivery, it must be in accordance with the terms of the leasing contract. The contract may stipulate the mode, time and place of delivery of the equipment and breach of any of these provisions may entitle the lessee to reject the equipment.[50]

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48. Goode R. M., Hire-Purchase Law And Practice (1970) (Butterworths) p. 200. See also National Cash Register Co. v. Stanley, [1921] 3 K.B. 292; 65 Sol. Jo. 643 D.C.

49. Goode, op cit, p. 223.

50. Ibid pp. 220 - 221. See also Bentworth Finance Ltd. v. Lubert [1968] 1 Q.B. 680; [1967] 2 All E.R. 810. See again Bowes v. Shand (1877) 2 A.C. 455; [1874-80] All E.R. Rep. 174; 46 L.J. Q.B. 561.

5.27 The lessee, it must be noted, does not lose the right to rescind a leasing contract merely because he did not act within a reasonable time, but that right would be lost where he had full knowledge of the breach of condition and elected to affirm it.[51]

5.28 Where delivery is in accordance with the provisions of the leasing contract and the lessee fails or refuses or neglects to take delivery he will be liable in damages. In addition, any loss arising from such failure, refusal or neglect and such expenses or charges that may be reasonably made for the care and safe custody of the equipment will be payable by him.[52]

5.29 Having seen that hiring does not take place until delivery, where the lessee for one reason or the other does not accept delivery, the issue of payment of rental does not arise. Under this situation the lessor's remedy will be to sue for breach of contract and ask for damages, which would of course exclude arrears of rent which would have accrued had the hiring commenced.

3. Fitness For Purpose And Merchantable Quality

5.30 The implied term of "fitness for purpose" and "merchantable quality are frequently erroneously used interchangeably in leasing contract as if they mean one and the same thing.[53] This is a misconception which touches directly on the very essence of equipment leasing and which needs to be clarified. I shall therefore try to contrast them in order to make clear their meanings.

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51. Adams, op cit, pp. 102 - 103. See also UCB Leasing Ltd. v. Holtom [1987] RTR 362; [1987] NLJ Rep. 614, C.A.

52. Guest A.G. The Law of Hire-Purchase, (1966) (Sweet And Maxwell) p. 141. See also Greaves v. Ashlin (1813) 3 Camp. 426.

53. It would seem that the reason for this is that they very often overlap each other and as Professor Adams had pointed out, a violation of one in many cases leads to a breach of the other - see Adams, op cit, p. 96.

5.31 The exact nature and scope[54] of the implied term of "fitness for purpose" is not altogether clear. The courts have at different times given different interpretations to the meaning and ambit of this term.[55] Thus in Astley Industrial Trust Ltd. v. Grimley[56] Pearson L.J. explained that:

> "the person who lets goods... assumes some contractual responsibility for the fitness of the goods for the purpose for which the hirer requires them, but the existence and extent of this obligation depends upon the contractual intention of the parties, which is to be ascertained from the provisions of the particular agreement and from the relevant fact of the situation in relation to which the agreement was made"[57]

Upjohn L.J. similarly stated that the stipulation to be implied at common law was that chattel hired must be as fit for the purpose for which it is hired "as reasonable skill and care can make it".[58] Ormerod L.J. concurred with both views.

5.32 The attitude of the Nigerian Courts is that the "fitness for purpose" liability arises only where the lessee at the time of entering into the contract specified the particular

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54. Professor Goode R.M., had said that the range of terms in favour of the lessee include "... fitness for the known purpose (though the ambit of this obligation is unclear) ..." - see Commercial Law, (1982) (Penguin Books/Allen Lane) p. 845.

55. In England, there would appear to be about three lines of authority on this implied term before the Supply of Goods And Services Acts 1982. The first line of authority holds the supplier of goods strictly liable for ensuring that the goods are fit, or at least reasonably fit for the purpose for which they are required. The second line of authority holds the supplier liable for supplying goods that are not as fit as reasonable skill and care can make them, while the third line of authority holds the supplier liable for the unfitness of goods supplied to the extent that there has been negligence on his part or on the part of those for whom he is responsible. For detailed analysis of this issue see The Law Comission Working Paper No. 71, titled Law of Contract - Implied Terms in Contracts for the Supply of Goods (1977) (Her Majesty's Stationery Office) pp. 22-50.

56. [1963] 1 W.L.R. 584; [1963] 2 All E.R. 33.

57. Ibid, p. 590.

58. Ibid, p. 598. If the hired chattel must be fit for the purpose for which it is hired, it is logical and reasonable that the lessor must be aware of the particular purpose for which the chattel is being hired.

purpose[59] for which he is leasing the equipment so as to show that he is relying on the skill and judgment of the lessor, and it turns out that the equipment does not meet that purpose. Thus in Nigerian Tools and Die Co. Ltd. v. Dere,[60] the plaintiff company agreed to supply and install for the defendant an electric band-saw and a generating set to operate it. The defendant informed the plaintiffs of the purpose for which he wanted the machines and they represented that the machines were fit for that purpose and the defendant relied on them. He paid an initial deposit of N328.00 and agreed to pay the balance in twelve equal monthly instalments of N235.00 as provided by the hire-purchase contract. The band-saw and the generating set were subsequently installed. After installation of the machines it was discovered that they were defective and unfit for the intended use of the defendants. The defendants therefore refused to pay the monthly instalments whereupon the plaintiffs instituted an action to recover same together with damages for breach of contract. The defendant counter-claimed for the rescision for a breach which went to the root of the agreement between the parties by entirely defeating its object. The plaintiffs on the other hand while admitting that the machines did not perform satisfactorily, argued that it was as a result of the failure of the defendants to provide all necessary materials for the machines to operate efficiently. In reply to this argument, the defendant contended that he was quite ignorant of sawmills and depended entirely on the skill and advice of the plaintiffs who were aware of the purpose for which the machines were required.

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59. "Particular Purpose" does not necessarily mean a special, or non-normal purpose, but simply a specified purpose whether ordinary or otherwise - see Goode, op cit, p. 270. See also Karsales (Harrow) Ltd. v. Wallis [1956] W.L.R. 936; [1956] 2 All E.R. 866.

60. [1968] N.C.L.R. 226; (1968) 3 ALR Comm. 46.

5.33 The court held:

1. That the plaintiffs had an obligation to ensure that the equipment which they supplied to the defendant was reasonably fit for the purpose for which, known to them, the defendant required the equipment.

2. That where the goods are supplied with a representation that they are fit for a purpose and the person to whom they are supplied relies entirely on the supplier's skill and judgment, to the supplier's knowledge, then the supplier assumes a duty, breach of which went to the root of the subject-matter of the agreement between the parties by entirely defeating its object, and that the court was entitled to set aside the contract where the machines were not fit for the purpose specified.

5.34 Similarly in Bentworth Finance v. De Bank Transport,[61] the court held that where the hirer makes known the purpose for which goods are required so as to show that he relies on the owner's skill and judgment, a term is implied that the goods shall be as fit and suitable for that purpose as reasonable care and skill can make them.

5.35 In Polymera Industries (Nigeria) Ltd. v. Societe Recharges[62] the plaintiffs entered into a hire-purchase agreement with the defendants for the sale of a new shoemaking machine which was still unpacked and uninspected as at the time of the contract. A clause in the agreement states that the hirer acknowledges that he has examined the goods and found them to be complete, in good order and condition and in every way satisfactory to the hirer. Another clause in the agreement states that the owner gives no warranty as to fitness of purpose, quality or description of the goods.

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61. [1968] N.C.L.R. 236; (1968) 3 ALR Comm. 52. See also Priest v. Last [1903] 2 K.B. 148; 47 Sol. Jo. 566 C.A, where the plaintiff who asked for a hot-water bottle and was supplied with one that burst, the court held that the plaintiff had sufficiently made known the intended use for which he required the hot-water bottle and consequently held the defendant liable.

62. (1964) 1 ALR Comm. 174.

5.36 When the machine was subsequently unpacked and installed, it was found not only to be a second-hand machine but full of defects. In an action that arose, for breach of contract, the defendants argued that the plaintiffs acknowledged that they had examined the goods and found them satisfactory and consequently they were estoppel from saying they had not examined it.

5.37 The court held inter alia that it is a settled law in Nigeria that the sale by hire-purchase of goods which are unfit for the purpose for which they are supplied is a fundamental breach of the contract and that the owner may not rely on a exemption clause in excluding the implied term as to the fitness of the goods.

5.38 Again in the case of Ogwu v. Leventis Motors Ltd.,[63] the facts of which briefly are as follows: The appellant took delivery of a second-hand lorry from the respondents under a hire-purchase agreement. The number plate on the lorry was BYA 648. It was subsequently discovered that the lorry delivered was not in fact the lorry registered as BYA 648 but an older lorry. The hire-purchase agreement contained a clause expressly excluding "any warranty implied or otherwise as to description, state, quality, fitness or roadworthiness".

5.39 When the lorry was delivered, it was found out that the springs were defective and the vehicle was returned to the respondents who repaired it. Soon after the lorry was returned to the appellants, he found out that the engine was bad and that the seats had broken down. In an action that commenced for breach of an implied term as to the fitness of the lorry and damages, the respondents contended that they were exempted from liability by virtue of the exemption clause in the hire-purchase agreement.

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63. (1963) N.N.L.R. 115.

5.40 The Court of Appeal held that the breach of an implied term as to the fitness of the lorry was a fundamental breach of contract and consequently the exemption clause relied upon by the respondents cannot protect them from liability.

5.41 Having seen the interpretation of the implied term of "fitness for purpose" it remains to contrast it with the implied term of "merchantable quality". What then does the phrase "merchantable quality" mean?

5.42 When goods are said to be of "merchantable quality" it ordinarily means that they are suitable for trading[64] or in a state of quality which makes them saleable.[65] Thus Professor Goode had pointed out, an expensive motor-car purchased as new may be adequately fit for the purpose of being driven along the road and yet not be merchantable quality because of poor finish, dents, and other defects which would make a buyer looking for a new car not to accept the car even though those defects do not in any way affect the performance of the car.[66] This view was adopted in the Court of Appeal case of Rogers v. Parish (Scarborough) Ltd.,[67] the facts of which are as follows: The plaintiff purchased a Range Rover motor vehicle from the defendants under a conditional sale agreement for a sum in excess of £14,000. The car was sold as new but was found to be defective in a number of respects. The car was subsequently replaced with another Range Rover on the same terms but the second car was also found to have numerous defects including gearbox, engine and bodywork. Several attempts were made to rectify

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64. Collins Dictionary of the English Language (1980) (Colliins) p. 923. See also Osborn's Concise Law Dictionary (1978) (Sweet and Maxwell) p. 218. See again The Concise Oxford Dictionary (1990) (Clarendon Press) p. 742.

65. Goode, op cit, page 270. The two statutory definitions of the phrase in Nigeria are to be found in s. 14(2) of the Sale of Goods Act 1893 (a statue of general application) and in s. 4(1)(d) of the Hire-Purchase Act 1965. These definitions are unfortunately not helpful as both Acts are not applicable to equipment leasing contracts.

66. Goode, op cit, p. 270.

67. [1987] Q.B. 933; [1987] 2 All E.R. 232.

these defects, but without success. The plaintiff thereupon rejected the car and brought an action claiming inter alia, that there was a breach of the express condition of contract that the vehicle was of merchantable quality and fit for its purpose. The court of first instance found for the defendant, holding that since none of the defects had rendered it unroadworthy, unusable or unfit for the normal purpose for which a Range Rover was used, it had been of merchantable quality and reasonably fit for its purpose.

5.43 On appeal, the Court of Appeal reversed the decision holding that it was not sufficient that the defects had not destroyed the workable character of the goods. It further held:

> "... that in respect of any passenger vehicle the purpose for which goods of that kind were commonly bought would include not only the purchaser's purpose in driving it but that of doing so with a degree of comfort, ease of handling, reliability and pride in its appearance appropriate for the market at which the vehicle was aimed at; that defects which might be acceptable in a second hand vehicle and which would not therefore render it unmerchantable were not reasonably to be expected in a vehicle sold as new; and that the plaintiffs were entitled to repudiate the contract..."

5.44 Similarly, in the case of Brenstein v. Pamson Motors (Golders Green) Ltd.,[68] where the plaintiff's new Nissan Laurel that was only three weeks old and had done only 140 miles suddenly stopped on the highway as it was being driven. The problem was that a piece of sealant had entered the lubrication system and cut off the supply of oil to the crankshaft. The plaintiff thereupon sued to rescind the contract and recover damages. The court held inter alia that the car was not merchantable at the time of delivery.

5.45 Having seen the slim but important distinction between the implied terms of "fitness for purpose" and "merchantable quality" the question then is: would the inter-changeable use of the implied terms, as found in some equipment leasing contracts, be

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68. [1987] 2 All E.R. 220; [1987] RTR 384. See also Shine v. General Guarantee Corporation Ltd., [1988] 1 All E.R. 911; [1988] BTLC 1; [1987] NLJ Rep. 946 C.A.

correct? Put differently, would it be appropriate to incorporate the implied term "merchantable quality" in an equipment leasing contract?

5.46 In answer to this question, one may have recourse to the basic definition of equipment leasing. As earlier seen equipment leasing contract is one in which the lessee has use and possession of a specific asset on payment of rental over a period, while the lessor (owner) retains the ownership of the asset throughout the period so that the property in the goods never passes to the lessee.[69] If therefore the ownership of the equipment resides with the lessor at all times and there is no opportunity of the property in the equipment passing to the lessee during the continuance of the lease, it would seem to amount to a contradiction to incorporate the implied term of merchantable quality in an equipment leasing contract. This is so because an equipment leasing contract does not envisage that the lessee shall ever obtain title and/or sell the equipment. Consequently for the lessee to expect that a leased equipment should be in a marketable or saleable state would be inappropriate. What in fact the lessee should be concerned aboulq should be the implied term of "fitness for purpose". However, it should be noted that in a finance lease, the lessee cannot insist on such implied term (that is "fitness for purpose") because by its nature, it is the lessee who identifies the equipment, examines it, has the special knowledge of its suitability in relation to his work, and in many cases negotiates the price. The lessor is generally invited only to buy the equipment. Under this arrangement, the lessee cannot be said to rely on the skill or judgment of the lessor nor can the lessor be liable merely because he had been told the particular purpose for which the equipment was intended.[70] However, where the lessor is the manufacturer of the equipment or dealer and the lessee in approaching him informs him of the intended use of the equipment so as to show that he is relying

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69. See ELAN's definition of equipment leasing in Chapter 4.

70. See Yeoman Credit Ltd v. Apps [1962] 2 Q.B, 508, [1961] 2 All E.R. 281. See also Hyman v. Nye, (1881) 6QBD 685; [1881-5] All E.R. Rep. 183. See also Burgess. R, Corporate Finance Law, (1985) (Sweet and Maxwell), p. 174.

on lessor / manufacturer's skill or judgment, the lessor / manufacturer would likely be liable if there is a breach provided the implied term was not excluded.

5.47 In an operating lease, the obligation is imposed on the lessor to ensure that the equipment is fit for the purpose, unless such is excluded and provided such an exlusion does not destroy the basis of the contract. The chances of finding the lessor liable for a breach of the implied term for fitness in an operating lease are high because in many cases, the lessee relies on the skill or judgment of the lessor. A couple, for example, visiting Lagos for a weekend, is not likely to start examining the car they want to lease. They are more likely to rely on the information given to them by the lessor as to the fitness of the car they intend to use. Thus in Reed v. Dean,[71] the plaintiffs hired a motor launch from the defendant for a holiday. The launch caught fire while being used resulting in personal injuries. It was held that the defendant was in breach of the implied term of fitness.

5.48 But a lessor would not be liable for breach of this term of fitness if the cause of an accident is latent and not discoverable by reasonable care[72] and the burden of proof rests on him.[73]

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71. [1949] 1 K.B 188; 92 Sol. Jo. 647. Note that the lessor would not be relieved of the liability merely because the lessee has inspected the equipment - see the case of Chapelton v. Barry U.D.C [1940] 1 K.B 532; [1940] 1 All E.R. 356, unless the defect was an obvious or patent one and the lessee relied on his own skill or judgment.

72. Readhead v. Midland Rail Co. (1869) L.R. 4 Q.B 379; [1861-73] All E.R. Rep. 30.

73. Hyman v. Nye, [1881] 6 QBD 685; [1881-5] All E.R. Rep. 183.

4. Quiet Enjoyment

5.49 There is an implied warranty that the lessor or his nominee or a third party must not disturb the quiet enjoyment of the lessee of the leased equipment.[74] However, where there is a prior agreement between the lessor and the lessee, for example as to the servicing of the equipment, then the quiet enjoyment may be lawfully disturbed by the lessor whenever the servicing of the equipment needs to be carried out.

5.50 Where there is a breach of this implied warranty whether by the lessor or someone with a better right than the lessor or any person claiming under a prior title acquired through the lessor, the lessee's remedy may lie in damages against the lessor rather than an outright repudiation of the contract. But where breach by the lessor is indicative of his intention to bring the contractual relationship to an end, the lessee may treat the contract as having come to an end and take steps to mitigate his loss by acquiring an equivalent equipment on lease.[75]

5. Illegality of Purpose

5.51 It is trite law that a contract that is illegal or immoral is void in law. The illegality in this context may arise because it is specifically prohibited by law[76] or because the equipment is to be used for an illegal purpose. Thus in case of J.M. Allan (Merchan-

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74. In the case of Lee v. Atkinson and Brooks, (1609) Yelv. 172; (1609) Cro. Jac. 236; where the owner of a hired horse forceably repossessed it because the hirer deviated from the specified journey, it was held that the owner might be liable in assault as he was not entitled to repossess the horse by force, his proper remedy being to sue on the matter.

75. See Adams, op cit, p. 103.

76. By virtue of s. 41(1)(e) of the repealed Nigerian Banking Act 1969, only merchant banks were entitled within the banking environment to engage in equipment leasing. Consequently any commercial bank that then engaged in equipment leasing would be violating the Act. It was not until 1990 when the Federal Military Government of Nigeria vide its 1990 Credit Policy Guidelines allowed commercial banks to engage in equipment leasing.

dising) Ltd. v. Cloke,[77] the court held that the hire of a roulette-table and other gaming equipment for a year at the weekly rent payable quarterly in advance was illegal since the transaction contravened the provisions of the Betting and Gaming Act 1960. The court rejected the argument of the plaintiff that it was not aware of the Act and so was entitled to recover the rent, the maxim being ignorantia juris neminem excusat.[78]

6. Penalty or Genuine Pre-estimate

5.52 A properly drafted equipment leasing contract would always contain a provision as to what will happen if the lessee defaults. Mostly the consequence is some form of monetary compensation to the lessor.

5.53 The basic question that arises from this type of provision is whether or not the compensation to be paid under this provision by the lessee amounts to a penalty or a genuine pre-estimate of the loss suffered by the lessor by virtue of the lessee's default. It may not be too easy to define what is a penalty or genuine pre-estimate provision in an equipment leasing contract, but it is submitted that where a fixed sum of money is payable on default by the lessee or where the provision does not allow a discount for any acceleration of payment,[79] it is likely to be interpreted as a penalty and struck down. So also are sums considered excessive to the actual loss suffered by the lessor especially where one of the parties to the contract was able to dictate to the other the choice of the terms of the contract.[80] Where the sum payable on default, by the lessee represents a fair and reasonable loss suffered by the lessor, the courts will most probably treat the

77. [1963] 2 Q.B, 340; [1963] 2 All E. R. 258.

78. This latin phrase means - ignorance of the law cannot be an excuse.

79. Goode, op cit, 388. See also the case of Elsey v. J.G. Collins Insurance Agencies (supra) where the Canadian Supreme Court held inter alia that penalty clause in a contract is designed " ... for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum".

80. Philips Hong Kong Ltd v. Attorney-General of Hong Kong, reported in the Times Newspaper of 15th February 1993, 28.

provision as a genuine pre-estimate.[81] Whether or not a provision is to be seen and interpreted as a penalty clause or genuine pre-estimate clause will depend very much on the facts of a particular case.

5.54 The legal effect of the distinction between a penalty clause and a genuine pre-estimate clause is that whereas a penalty clause would not be enforceable at law, a genuine pre-estimate of loss would be enforceable. Thus in the case of Dunlop Pneumatic Tyre Co. Ltd. v. New Garage And Motor Co. Ltd.,[82] the appellants, who were manufacturers of motor tyres, covers and tubes, supplied these goods to the respondents who were dealers, under an agreement whereby the respondents, in consideration of certain trade discounts, bound themselves not to tamper with the marks on the goods, not to sell or offer the goods to any private customer or to any co-operative society, at less than the appellants' current list prices, not to supply to persons whose supplies the appellants had decided to suspend, not to exhibit or export without the consent of the appellants and to pay the sum of five pounds by way of liquidated damages for every tyre, cover or tube sold or offered in break of the agreement. The respondents sold a tyre cover to a co-operative society at below the current list price. In an action for breach of contract, it was proved that substantially the whole of the appellant's business in these articles was done through the trade; that in order to prevent under-selling the appellants insisted upon their trade customers signing agreements of this nature, and that the probable effect of under-selling by any particular trade customer was to force their other trade customers to deal elsewhere.

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81. Robophone Facilities Ltd. v. Blank [1966] 3 All E. R. 128; 110 Sol. Jo. 544, C.A.

82. [1915] A. C 79; [1914-15] All E.R. Rep. 739.

5.55 The House of Lords held, reversing the decision of the Court of Appeal, that although the sale of an article of one type in breach of the contract must result in more damage to the manufacturer than the sale of another, the provision in the contract must be taken to refer to a single obligation to maintain prices generally and not to payment of a sum on the non-performance of any one of many obligation differing in importance; in the circumstances of the case and on the construction of the contract the provision relating to damages contained nothing unreasonable, unconscionable, or extravagent; and, therefore, the stipulation was to be taken as one for liquidated damages and the retailers were liable to pay the sum specified in respect of each breach of the contract of which they had been guilty.

5.56 But if the loss actually suffered proves to be greater than the specified sum, the latter will be treated as a ceiling and the claimant will not recover the excess under the contract. Under this situation the lessor might be able to abandon the issue of penalty clause provision and proceed to prove his total loss at common law unfettered by the penalty provision.[83]

5.57 Where on the other hand the liability imposed on the lessee on his default is a penalty, the position of the law is that, that provision in the contract would be unenforceable. Thus in the case of Bridge v. Campbell Discount Co. Ltd,[84] where the appellant, as a hirer, entered into a hire-purchase agreement with the respondents in respect of a second-hand motor car. Clause 6 of the agreement provided that the hirer might terminate the hiring by giving notice of termination in writing to the owners and that thereupon the provisions of Clause 9 should apply. Clause 9 provided that, if the agreement were terminated, the hirer should forthwith deliver up the vehicle to the owners and "(b) pay to the owners all the arrears of hire rent due and unpaid at the date

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83. Clark, op cit, p. 92.

84. [1962] A. C 600; [1962] 1 All E. R. 385. See also Amusan v. Bentworth Finance (Nig.) Ltd, (1965) 1 All NLR 382.

of termination of the hiring together with interest ... and by way of agreed compensation for depreciation of the vehicles such other sum as may be necessary to make the rental paid and payable under equal to two-thirds of the hire-purchase price ..." The appellant having paid or satisfied the initial payment and the first instalment of £10. 9s. 2d, wrote to the owners on 3rd Sept 1959 before the second instalment became due and payable, saying that owing to unforseen personal circumstances, he would not be able to pay any more instalments and asking when and where he could return the car. On 14th Sept. 1959, he returned the car to the dealers concerned in the transaction. Subsequently the respondents commenced proceedings against him under Clause 9 for the two-third of the hire-purchase price less the initial payment and one instalment paid. The particulars of claim did not refer to the appellant's letter of 3rd Sept. 1959, but alleged that on 14th Sept. 1959 the appellant purported to terminate the hiring; which the appellant in his defence admitted to. The House of Lords held:

(a) There was no admission in the pleadings that the appellant had exercised the option conferred by Clause 6, but the case was one where the appellant hirer had declared his inability to go on with the hiring and the respondent owners, having resumed possession of the car, asserted their contractual rights under Clause 9 (b) on the appellant's breach:

(b) On that basis the payment under Clause 9 (b) for the compensation by way of depreciation was a penalty, not being a genuine pre-estimate either of depreciation of the vehicle or of loss, but being a provision designed to secure to the respondents a financial return of not less than two-thirds of the hire-purchase price, if the agreement were terminated for any cause; accordingly the respondents were not entitled to recover the sum claimed but only the damage suffered.

5.58 Similarly in the case of Ford Motor Co. v. Armstrong,[85] where the plaintiff agreed with the defendant to sell to him their motor cars for sale by him in a certain district, the defendant undertaking not to sell any car or parts thereof below a certain price and

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85. (1915) 31 T.L.R 267.

agreeing to pay the plaintiffs £250 for every breach of this undertaking "such sum being the agreed damages which the manufacturer will sustain". The sum of £250 was also payable for various other breaches differing in kind. The defendant sold five cars below the price fixed. The Court of Appeal held that the £250 was a penalty and not liquidated damages and consequently not recoverable. A similar decision was reached in the case of Cooden Engineering Co. Ltd. v. Stanford.,[86] facts of which are as follows: By clause 1 of an agreement in writing made between the plaintiffs and the defendant the plaintiffs ("the owners") agreed to let and the defendant ("the hirer") agreed to hire a motor car for the term of thirty months from July 19, 1947 (subject to determination as thereinafter provided), and the hirer agreed to pay to the owners in respect of such hire the sum of £412 7s. 6d., payable as to £25 on or before taking delivery of the vehicle and as to the balance in monthly instalments of £12 18s. 3d. By clause 10:

> "The hirer shall be at liberty at any time during the continuance of the said term to return the vehicle to the owners ... and thereupon all liability on the part of the hirer for the payment of the said monthly instalments shall cease and absolutely determine, and the hirer shall be under no further liability except that he shall forthwith pay to the owners (a) all instalments which have fallen due prior to the date of such return and are then unpaid and (b) such a sum as represents forty per cent of the total amount of the monthly instalments which have not then fallen due (this sum being payable in lieu of compensation for agreed depreciation in the market value of the vehicle between the date of this agreement and the date of the return of the vehicle) ..."

By clause 11:

> "If the hirer shall ... fail to make any payment under this agreement on the day on which it is due or demanded as the case may be or shall die the owners may by twenty-four hours previous notice in writing determine the hiring or if the hirer shall commit any act of bankruptcy or if a receiving order shall be made against the hirer or if he shall make any arrangement or composition with his creditors or (in the case of the hirer being a company) if a petition to wind-up be presented or a resolution for voluntary liquidation be passed or if the hirer shall commit or suffer any analogous act or procedure in Scotland or if an execution or distress or legal process shall be levied or threatened upon the vehicle or if the hirer shall fail to observe or perform any agreement or condition herein contained the hiring shall ipso facto be

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86. [1953] 1 Q.B. 86; [1952] 2 All E. R. 915.

> determined and on any such determination by notice or otherwise the full balance then remaining unpaid of the sum mentioned in clause 1 of this agreement, together with all costs charges and expenses whatsoever which the owners may incur or for which they may become liable in exercise of their powers under this and/or any other clause in this agreement and/or which they may be required to pay in order to regain possession of the vehicle shall at once become payable to and be recoverable by them ..."

Clause 12 provided that, if the hirer should duly make all such payments as aforesaid and strictly observe and perform all the terms and conditions on his part contained in the agreement, he should have the option of purchasing the vehicle for the sum of 10s., but that no such option should arise in case of termination of hiring under clauses 10 and 11. The vehicle was delivered to the defendant, and it remained in his possession for nearly two years during which period he paid, in addition to the initial instalment of £25, seven of the monthly instalments of hire. By a letter dated February 19, 1949, the plaintiffs gave notice to the defendant determining the hire under the provision of clause 11, and on June 17, 1949, they possessed themselves of the vehicle. On a claim by the plaintiffs for the arrears of instalments together with the balance of payments under clause11, the defendant contended that, as under the clause the plaintiffs were entitled to receive the full price of the car and the car itself, the sum claimed was excessive and amounted to a penalty.

5.59 The Court of Appeal held:

(i) the sum payable under clause 11 was excessive save in the exceptional case where the car had become valueless, and, therefore, in point of amount it was a penal sum;

(ii) the fact that clause 11 provided for the determination of the hire in a number of events where the hirer was not guilty of a breach of contract did not prevent the sum payable under the clause being a penalty;

(iii) therefore, the sum was a penalty and not recoverable by the plaintiffs from the defendant.

5.60 It is, however, important to state that the rule against penalties is limited to fixed payments pursuant to a breach of contract. Consequently in a situation where termination of a leasing contract is not a result of any breach of the contract by the lessee but voluntarily as per the agreed terms, the issue of penalty or genuine pre-estimate cannot arise. Thus in the case of Associated Distributors Ltd. v. Hall,[87] where the defendant entered into a hire-purchase agreement with the plaintiffs in respect of a bicycle. The agreement provided in one clause for its determination by the hirer and in another clause for its determination by the owners. In a further clause it provided that, if the agreement was determined for any cause whatsoever, the hirer should pay to the owners such sums as together with the sums already paid amounted to half the price of the bicycle. The hirer determined the agreement under the first-mentioned clause and it was contended that the last mentioned clause imposed the payment of a penalty. The Court of Appeal held that as the defendant had exercised an option given to him by the agreement to determine it, no question of whether the payment was a penalty or liquidated damages could arise and he was liable to make the payment stipulated for in the agreement.

5.61 As penalty clauses as opposed to genuine pre-estimate clauses are not enforceable at law, and since what is a genuine pre-estimate invariably is a matter to be decided by the law courts based on the particular facts of any case, the draftsman of equipment leasing contracts have tried to devise another means of protecting the lessors and this would appear to have been achieved by means of the "Acceleration Clause".

5.62 An acceleration clause is a clause in an equipment leasing contract which enables the lessor upon a breach or default by the lessee, immediately to recover all the rents payable under the contract.[88] Thus in the case of Robophone Facilities Ltd. v. Blank,[89]

87. [1938] 2 K.B 83; [1938] 1 All E. R. 511.

88. Goode. R. M, Acceleration Clauses, being an article in the 1982 Journal of Business Law (JBL) pp. 148 - 153, for detailed discussion.

89. [1966] 3 All E. R. 128; 110 Sol. Jo. 544, C.A.

the plaintiffs were distributors of telephone answering machines which they let out on hire under an agreement with the Postmaster-General. On 4th June 1965, the defendant signed a form of the rental agreement for one of the machines with the plaintiffs for a period of seven years at a hire rent of £17.11s per quarter. The machine was to be insured by the defendant for £350. By clause 11 of the agreement, if the agreement was terminated for any reason whatsoever the hirer was not to be entitled to any credit or allowance in respect of any payments made by him under the terms of the agreement, but was thereupon to pay to the plaintiffs all rentals accured due and also by way of liquidated or agreed damages a sum equal to fifty percent of the total rentals which would thereafter have become payable. By clause 14 of the agreement, the agreement was to become binding on the plaintiffs only on acceptance by signature on their behalf. The plaintiffs did not sign the agreement on 4th June 1965, but about 9th June 1965, the plaintiff's representative called on the defendants to hand over to him certain post office forms (applying for consent for the installation of the machine) for signature and the agreement was signed by the plaintiffs at some date after 4th June 1965. On 15th June, 1965 before the machine was installed, the defendant wrote to the plaintiffs purporting to cancel the agreement. The plaintiffs sued the defendant for damages for breach of the agreement claiming under clause 11 thereof the sum of £245.11s. The plaintiffs adduced evidence at the trial before the court showing that the sum of the gross rentals payable quarterly over seven years was £491.8s, that the prime cost of manufacture of the machine (apparently labour and materials only) was £105, that the costs of the installation and removal were £5 and that the cost of maintenance over the seven years was £98. There was no cross-examination at the trial on these figures. The court deducted these amounts from the gross rentals and held that the actual loss to the plaintiffs amounted to £283.8s which was more than the agreed damages and gave judgment for the plaintiffs for £245.11s. On appeal, the Court of Appeal by a split decision upheld the validity of an acceleration clause. The Court of Appeal decided inter alia that:

> "although in computing the £283.8s there had been error in not discounting the total rentals to allow for them being received at once instead of over a period of seven years, yet on the evidence clause 11 of the agreement was not unenforceable as providing for a penalty, but the fifty percent of the rentals, the payment of which clause 11 provided was an estimate of the damage and was recoverable as liquidated damages"

5.63 Lord Diplock J, strongly supporting the validity of acceleration clause stated in the case under reference that:

> "consideration of the actual loss sustained by the plaintiffs led to the conclusion that it lay within the range of forty-seven per cent to fifty per cent of the gross rents for the unexpired period of the contract, the percentage increasing progressively, as the expired period decreased; it seemed sound business sense for parties to take steps to avoid uncertainty, difficulty and expense of proving the actual loss by agreeing in advance an easily ascertainable sum" [*emphasis mine*]

5.64 Similarly in Direct Leasing Ltd. v. Chu et al,[90] the British Columbia Supreme Court held, that an acceleration clause in an equipment lease, requiring accelerated payment of rent on default by the lessee was enforceable as a genuine pre-estimate of loss.

7. Improper Use of Equipment By Lessee Leading To Increased Depreciation

5.65 Most contemporary equipment leasing contracts contain clauses, depending on the type of equipment, that impose adequate obligations with regard to the use and maintenance of the equipment. This is because the lessor envisages that he can still generate some income by either selling the equipment at the termination of the existing lease period or alternatively lease the equipment to a new lessee or even renew the lease with the lessee whose lease had expired. If therefore the lessee uses the equip-

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90. [1976] 71 D. L. R. 3rd.

ment in an improper manner thereby causing increased depreciation of the equipment, the ambition of the lessor may be defeated.

5.66 The lessee is enjoined under the common law to take reasonable care of the equipment and as was established in the cases Coggs v. Bernard[91] and Newman v. Bourne And Hollingsworth,[92] would be liable for ordinary negligence if he failed to. However, he is not liable for the depreciation of the equipment which is a result of fair wear and tear,[93] nor is he bound to repair the equipment or incur any expenses other than is necessary under his duty of care.[94] Changing the engine oil in a car or feeding an animal, for example, would be taken as expenses that are necessary under the duty of care.

5.67 The question that often arises with the manner of use of a leased equipment is: who should be responsible for the increased depreciation which may have been caused by either the lessee's improper use of the equipment or by pressure of market forces? This issue came up before the Australian Court in the case of IAC Leasing Ltd. v Humphrey[95] where clause 6 of the leasing agreement provided, "that if upon the equipment being received into the lessor's possession at the end of the period of the lease it was disposed of for the best price that could be reasonably obtained and the net proceeds were less than the appraisal value, the lessee undertook to pay the lessor 'by the way of indemnity for the capital loss so sustained' the amount of such deficiency additionally to any rent or other moneys payable by the lessee". The lessee defaulted in payment of part of one instalment and in payment of the whole of two other instalments and thereafter the lessor repossessed the equipment. In an action by the

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91. (1703) 2 Ld Raym 909; [1558-1774] All E.R. Rep. 1.

92. (1915) 31 TLR 209; 3 Digest (Repl). 69.

93. Blackmore v. Bristol and Exeter Rail Co. (1858) 8 E. & B. 1035; 27 L.J.Q.B. 167.

94. Sutton v. Temple (1843) 12 H. & W 52 at p. 60; 152 E.R. 1108. See also Hopkins v. Great-Eastern Railway, (1895) 12 TLR 25; 60 J.P. 86.

95. [1972] 46 A.L.J.R, 106.

lessor to recover the unpaid balance of rent instalments, the repossession costs and the loss on resale, the lessee alleged that the terms of the agreement upon which the claim was based were unenforceable as a penalty and also because they were harsh and unconscionable. The court held inter alia:

(a) That the lessee had undertaken an obligation which was described in the agreement to be by way of indemnity for a capital loss; there was no reason to hold that statement to be a sham or pretence nor any basis for concluding that the provision was intended simply as a sanction against breach of contract.

(b) That the question whether the provision for making up the deficiency in value was a penalty or was a genuine pre-estimate of damages did not really arise.

(c) That there is no principle of law which precludes the parties from making an enforceable agreement that the hirer and not the owner should run the risk of the occurrence of a greater amount of depreciation than was estimated, whether this should occur as a result of the actual use of the equipment by the hirer or as a result of changes in the market value of goods of that description.

5.68 Though the lessee may not be bound to repair the equipment nor incur any extra-ordinary expenses in the use of the equipment, where there is a maintenance agreement with the manufacturers or suppliers of the equipment, which agreement is made part of the leasing contract, or where the lessee elects either expressly or by necessary implication to maintain the equipment, then he is bound by such an obligation. Thus in the case of Hadley v. Droitwich Construction Co. Ltd.[96] where the owner of a mobile crane by an oral agreement let it to the hirer (builder) in November 1960, and in confirming the agreement by letter wrote to the hirer: "We thank you for your promise to put a competent man in charge of this machine who will operate it carefully and carry out the servicing properly. This is very much in your interests as well as our own as the machine is working a long way from our depot here and considerable time will elapse in dealing with a breakdown". Due to a defect in the mechanism of the

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96. [1967] 3 All E. R. 911; 111 Sol. Jo. 849, C.A.

equipment, the uppermost part of the crane fell in February 1961, and injured a workman employed by the hirer. In an action by the workman both the owner and the hirer were held liable in damages for negligence, the owner because he had negligently handed the crane over to the hirer with clearance incorrectly adjusted, and the hirer because he had negligently failed to have it serviced properly and to provide a competent driver for it, and so the defect remained undetected. On a claim by the hirer against the owner for indemnity against his liability to the workman, the Court of Appeal held that the hirer was not entitled to indemnity because -

(a) the owner's letter showed that the owner was giving no warranty that he would service and maintain the crane and accordingly there was no warranty on which the hirer could maintain that he had relied for the discharging of his duty of care towards the workman;

(b) any implied warranty by the owner that the crane was fit for its purpose was qualified by the conditions set out in the letter, namely, that the hirer would put a competent man in charge of the crane and would service it properly, and as neither condition was fulfilled, any such warranty was nullified.

5.69 The Court of Appeal emphasised that, were it not for the qualifying conditions in the letter, there would have been liability. As Lord Justice Sellers remarked:

> "... there is no doubt that there is an implied term that reasonable care should be taken, in handing over for use a machine like this, to see that it is reasonably fit for its purpose".

5.70 Where, however, equipment is lost or destroyed or stolen without any negligence on the part of the lessee he would not be liable, and where the destruction was caused by a third party while the lessee is still in possession, he (lessee) is entitled to sue the

third party. Thus in the case of Isaac v. Jabara,[97] the hirer successfully claimed against the third party, not just to the extent of his interest in the destroyed lorry, but for its full value.[98] But the court added, that although the hirer is entitled to recover full value from the negligent third party as far as damages are concerned under this situation, he (hirer) can only keep to himself that part as represents the value of his interest in the goods,[99] that is, the amount of hire rental so far paid. The surplus, like in a sale of a mortgaged property, he must pay over to the lessor.

5.71 Although the lessee has a duty to reasonably take care of the equipment and to adequately maintain it, it is only fair and reasonable that he should not be unduly restricted. The equipment leasing contract should, for example, contain a provision which allows the lessee the right to substitute or upgrade components of equipment in order to maximise its operating capabilities in view of the rapid technological developments so long as the lessor obtains title to the replaced part unencumbered and the replacement does not reduce the value of the equipment.

8. Sale Of The Leased Equipment By The Lessee.

5.72 It is a general principle of common law that only the owner of a thing or a person acting with the authority or consent of the owner can transfer good title to the purchaser. This principle of law is expressed in latin as nemo dat quod non habet, which literally

97. [1969] N.C.L.R 314. This is a case where a hired lorry was damaged beyond repairs by the defendant's driver. While the plaintiff argued that he was entitled to recover full damages as a person in possession, the defendant contended that damages must be limited to his rights and interests as a hirer. See also the Scottish case of Jacksons (Edinburgh) Ltd. v. Constructors John Brown Ltd. [1965] SLT 37 - where hired equipment was destroyed by fire. The court held that the hirers were not liable as the fire was not caused by their negligence.

98. The Winkfield [1902] p.42; [1900-3] All E.R. Rep. 346. See also Swire v. Leach (1865) 18 C.B.N.S. 479; [1861-73] All E.R. Rep. 768.

99. The Winkfield, op cit. See also Eastern Construction Co. Ltd. v. National Trust Co. Ltd. [1914] A.C. 197; 83 L.J.P.C. 122.

means, no one can give that which he has not. Accordingly where the lessee purports to sell the leased equipment in his possession to a third party, that sale would generally be null and void, since he (lessee) is not vested with the ownership right, and the lessor may sue him (lessee) for conversion.[100] Where the lessor has an immediate right of possession of the equipment, as in a situation where the lease contract provides for automatic termination of the contract where the lessee purports to sell the equipment, the lessor may repossess the equipment without an action (that is by recaption[101]) or bring an action for the delivery of the equipment to him (that is by replevin[102]) or for damages. Thus in the case of Olamitan v. C.F.A.O,[103] where a hire-purchase agreement was made between C.F.A.O (Ghana) and one David Ogunbayo in respect of a lorry. Mr Ogunbayo while still owing rentals, fraudulently removed the lorry from Ghana to Nigeria and sold it to the plaintiff. On the instructions of C.F.A.O Ghana to their agent in Nigeria, the lorry was seized from the plaintiff who sued for damages and conversion. The court presided over by Coker J (as he then was) dismissed the action of the plaintiff on the ground that the hirer (ie David Ogunbayo) had acquired no title to the lorry and so could not transfer any good title to the plaintiff purchaser.[104]

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100. Sachs v. Miklos [1948] 2 K.B 23; [1948] 1 All E.R 67. See also Munro v. Willmot [1949] 1 K.B 295; [1948] 2 All E.R 983.

101. This is an action that enables one deprived of his property, or wife or child or servant to recover same. In doing so the injured party may use some reasonable force and may enter the premises or land where his property or wife or child or servant is without being liable for trespass, though he may not use force to gain entry - see Mozley And Whiteley's Law Dictionary, op cit, p. 382. See also Adams, op cit, p. 106.

102. This is a cause of action open to a 'replevisor', (that is a person who seeks to take back his goods), which enables him to obtain an interim order for the return of this goods without immediate proof of his right to possession upon a security that he will prosecute the action of replevin against the person who distrained. Replevin is not limited to goods wrongfully seized in distress for rent but also affects seizure amounting to trespass - See Adams, op cit, p. 106 and Mozley And Whitely, Law Dictionary, op cit, p. 395.

103. (1959) L.L.R 42.

104. Ezejiofor, Okonkwo, Ilegbune, Nigerian Business Law, (1986) (Sweet & Maxwell), p. 217.

5.73 There are, however, exceptions to the nemo dat quod non habet principle and consequently where any of the exceptions applies, the lessor would most probably lose his title to the purchaser of the leased equipment as the purchaser would have acquired good title. These circumstances are:

(a) Sale Under The Order of a Law Court of Competent Jurisdiction

5.74 A purchaser who buys leased equipment from a bailiff acting under the order of a law court of competent jurisdiction would acquire good title. Thus in the case of Mbanugo v. U.A.C[105] where a bailiff in execution of a writ of fieri-facias seized and sold by public auction a Bedford tipper lorry in possession of a judgment debtor after the sale was duly advertised, but no one had come forward to claim it. The court, presided over by Justice Lambo, held that under Section 16 of the Sheriff and Civil Process Act 1958, the purchaser acquired good title when he bought the lorry from the bailiff and therefore he held the defendants were liable for conversion.

(b) Estoppel

5.75 Where the lessor has by his conduct either expressly or by necessary implication represented that the lessee has authority to sell and an innocent third party relies on that representation, the lessor would by his conduct be precluded from denying the seller's authority to sell. In practice, and as Professor Adams had pointed out, an express representation is improbable and it is,

> "... more likely the estoppel will arise through negligence, as by failing to assert rights when bailor became, or ought to have become, aware that a sale was being negotiated".

It must be noted that for the principle to apply there must not be any ambiguity regarding the lessor's authority to the lessee to dispose of the goods. The lessee might be able to prove his authority to sell if in the past he had sold goods belonging to the

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105. (1961) L.L.R 162. In this case, the defendants (UAC) seized the lorry from the plaintiff on the grounds that it was a subject of a hire-purchase between them and the judgment debtor and consequently the plaintiff sued them for conversion.

lessor and conferred title unchallenged by the lessor or where title documents of the equipment which are supposed to be kept by the lessor have been delivered to the purchaser through the lessee.

(c) Sale under Market Overt / Voidable Title

5.76 Where a purchaser buys leased equipment in a market overt[106] or where the lessee has a voidable title but his title has not be avoided at the time of sale of the equipment, the purchaser acquires good title provided he (purchaser) was not aware of the defect in the lessee's title and buys in good faith. It follows therefore that if the lessee by means of fraud obtains title from the lessor, any purchaser from the lessee, as long as the purchase was in good faith and without the notice of the lessor's rights in the equipment, would have an unencumbered title. A highly reputed legal authority has condemned the continued existence of this rule under the English Law.[107] One shares this view especially when viewed against the historical background. The sooner Nigeria abolishes this rule which is part of the body of the Statutes of General Application the better.

(d) Sale Under The Factors Act 1889

5.77 As indicated earlier in this chapter, the Factors Act 1889 being a pre-1990 statute in England is applicable in Nigeria as a Statute of General Application. Under the Act, a person who is a 'mercantile agent'[108] may give good title to a third party purchaser (who, in good faith, has no notice of the seller's lack of actual authority from the owner

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106. "Market Overt", may be defined as an open, public and legally constituted market and may include a supermarket. It is an expression applied to the open sale of goods as opposed to a clandestine or irregular sale - see Mozley And Whiteley, Law Dictionary, op cit, p. 286.

107. See Goode, op cit, p. 401. See also Adams, op cit, p. 113, where he stated, "This archaic exception to the nemo dat rule enables a buyer in market overt ... to acquire a good title even though a thief ... Reform is long overdue."

108. Section 1 of the Factors Act 1889 defines a 'Mercantile Agent' as "a merchantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of the goods".

to make the sale) where the seller is in possession of the goods with the consent of the owner and where he disposes of the goods when acting in the ordinary course of business as a mechantile agent. This may be possible in a situation where the lessee (qualifying as a merchantile agent) and in possession of the leased equipment, has the general authority to sell the leased equipment the purchaser could obtain good title even where the lessee has not obtained the specific authority of the lessor to the sale of the specific goods.[109]

(e) Sale By Seller In Possession

5.78 Of all the exceptions to the nemo dat quod non habet rule, the one that poses greatest danger is the exception of sale by seller in possession. This exception provides that where a person having sold goods continues in possession of them, the delivery or transfer by that person (or by a mercantile agent acting for him) of the goods under any sale to any person who receives them in good faith, and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the sale. In effect, where a lessee leases equipment under a sale and lease-back scheme (and where there is no break in possession between the sale and then the lease-back) any purchaser of the equipment from the lessee in good faith and without knowledge of the lessor's title to the equipment, would acquire a good title to the equipment as against the lessor.[110]

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109. Even though one believes in the possibility of this type of situation existing, one shares Professor Adams's opinion that it may not be common in practice - see Adams, op cit, p. 113.

110. Adams, op cit, p. 112.

9. Annexation Of Leased Equipment To Real Property

5.79 To discuss this topic meaningfully, it may be necessary to dwell a little on the basic principles of real property law particularly on the latin maxim quicquid plantatur solo solo cedit.

5.80 The term 'real property' is defined as immovable thing such as land and buildings which could be recovered by a real action.[111] On the other hand 'land' per se has been defined as "land of any tenure, buildings or parts of building (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege or benefits in, over or derived from land".[111(a)]

5.81 The combined effect of the above two definitions is that real property includes land, and land is not limited to the physical ground and its subsoil and things growing naturally on it, but includes artificial things like buildings, and fixtures (for example curtain boxes, water heaters, security electric poles mounted outside the building, boundary walls [fences], economic and ornamental trees planted) and other structures. This general principle of English law is expressed as quicquid plantatur solo solo cedit, which simply means whatever is affixed to the soil belongs to the soil.[112] Thus in the famous case of Ezeani v. Njidike,[113] in which the parties agreed that English law should govern their case, the defendants/appellants, natives of Umuori village in Eastern Nigeria, had obtained a declaration of title to a piece of land against the people of Oraukwu village. The plaintiff/respondent, a native of Oraukwu, was among those who

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111. Burke. J, Osborn's Concise Law Dictionary (1976) (Sweet and Maxwell) p. 279.

111(a) See s. 2, Property And Conveyancing Law of Western Nigeria, 1959.

112. Whether a thing or a fixture affixed to the soil or building automatically becomes part of the land and consequently the asset or property of the landowner is a difficult legal issue which is determined largely (but not exclusively) by the intention of the parties involved, particularly that of the party affixing the object.

113. (1965) N.M.L.R. 95.

had already built houses on the land in question. By an agreement reached between him and the Umuori village representatives, he was allowed to continue to occupy his house for five years from the date of the agreement on payment of ten shillings a year rent. When the five years were up, he was either to move to another piece of land which the Umuori people might offer him or leave the village. The five years were up on January 31, 1960, and the respondent remained in occupation of his house without paying rent. On January 9, 1961, the people of Umuori caused their solicitor to send to the respondent a letter which read in part: "This is to give you notice that you are required to remove from the site you occupy and to remove and pack out all your belongings therefrom". The respondent agreed this was a valid notice and instructed a contractor to demolish the house and remove the materials. On February 4, 1961, a number of people from Umuori village, including the appellants, forcibly prevented the respondent's servants and agents from removing the materials taken from the demolished house as well as certain other materials which the respondent had stored on the site for use in a new house which he intended to build elsewhere. Having reported the matter to the police who, however, refused to intervene, the respondent sued claiming £407 7s. as damages for the conversion of the materials taken from the house, £60 as damages for the conversion of the other building materials, and £132 13s. as general damages.

5.82 At the trial in the High Court, one of the issues for determination was whether the respondent could maintain an action against the appellants for conversion of the component parts of his house after they had been detached from the house. It was submitted on the respondent's behalf that the terms of the notice to quit conferred on him the licence to demolish the house and remove the materials. This submission the court accepted but did not make it clear whether it was on the basis that there was a licence as contended by the respondent or on the basis that the materials were tenant's fixtures. The court, however, proceeded to grant the respondent's claim in full.

5.83 On appeal the Supreme Court held inter alia that, since the respondent had agreed that the articles were not tenant's fixtures, the "demand that the respondent should remove and pack out all your belongings" is not apt for the purpose of conferring a licence to remove what belongs to someone else".[114] Accordingly, the £407 7s. damages awarded in respect of the removal by the appellants of the component parts of the house after they had been detached therefrom were set aside on the principle that the house errected by the respondent on the appellants' land without initial authorisation belonged to the land on which it was build.

5.84 The Supreme Court, however, allowed the respondent £50, which he agreed was the real value of the building material stored on the site, as damages for their conversion.

5.85 Similarly in Francis v. Ibitoye,[115] the plaintiff in furtherance of a proposed contract of sale of land paid the sum of £26 to the defendant vendor, but the contract was, after a consent judgment, abandoned. The plaintiff nevertheless went ahead and built a house worth £120 on the land without the defendant's knowledge, leave or licence.

5.86 In an action that arose the court held:

(a) that the plaintiff could recover the sum of £26 being a consideration that had totally failed because the contract of sale of the land was never carried out;

(b) that the principle of quicquid plantatur solo solo cedit applied to bar the plaintiff's claim to the cost of the building on the defendant's land without the latter's authority or ratification.

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114. Ibid, at p. 97.

115. (1936) 13 N.L.R. 11. See also Oso v. Olayioye (1966) N.M.L.R. 329. See also U.A.C. v. Apaw (1936) 3 W.A.C.A. 114 at p. 117 where the court held "by reason of the principle of the English law expressed in the legal maxim quicquid plantatur solo solo cedit, the new building became annexed to and formed part of the freehold".

5.87 It should, however, be noted that this principle of English land law appears at variance with the customary land law systems in Nigeria.[116] The customary land law of most parts of Nigeria recognises that a person or group of persons may own a piece of land while another has the right to build[117] or farm on the land and yet a third person has the right to harvest the economic trees growing on the land.[118] These are separate legal rights very well recognised. In this connection Professor Elias states:

> "It is, however, important to bear in mind that all the known customary systems of land tenure in Nigeria make a clear distinction between the ownership of land and the ownership of things either attached to or built on it or otherwise growing on it. The land may be owned by a whole community or by a family or by an individual, while 'strangers' to the land or even a member of the land-owning group may be permitted to build a house or grow crops on it".[119]

Thus in the case of Santeng v. Darkwa,[120] where it was claimed that a house built on family land by one of its members became family property along with the land, the West African Court of Appeal while reversing the decision of the lower court had observed;

> "No custom was proved that when a house is built on the site of the ruins of a family house it becomes family property, and I know of no such custom ... I can find no authority for the proposition that the mere using of the site brands the house with the stamp of family property; although, of course, the site on which the house is built remains family land".

5.88 A similar decision was reached in the case of Moore v. Jones,[121] where the court held that even though the plaintiff built the house on the defendant's land, he (plaintiff) was nevertheless entitled to the ownership of the house.

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116. Nwabueze. B.O, Nigerian Land Law (1972) (Nwamife) pp. 3 and 5.

117. Cole v. Begho (1959) 4 F.S.C. 75. See also Omolowun v. Olokude (1958) W.R.N.L.R. 130.

118. Etim v. Eke (1941) 16 N.L.R. 43. See also Okoh v. Olotu (1953) 30 N.L.R. 123.

119. Elias. T.O., Nigerian Land Law, (1971) (Sweet & Maxwell) p. 177.

120. (1940) 6 W.A.C.A. 52.

121. (1926) 7 N.L.R. 84.

5.89 Tangible articles, as we know, may be in the form of immovable property such as land or moveable property (chattels) such as roofing sheets, but the legal nature may change due to the use made of it. For example the roofing sheets used in building a house are immediately converted from chattels into land and so pass out of the ownership of the person who owned them as chattels and become the property of the owner of the land to which they are attached to. On the other hand, where the house is dismantled, the breaking of the materials into different components amounts to theoretical conversion of land into chattels. Blackburn J, clearly explained the above principle of real property law in the case of Holland v. Hodgson[122] when he said inter alia:

> "When the article in question is no further attached to the land, than by its own weight it is generally considered to be a mere chattel. But even in such a case, if the intention is apparent to make the articles part of the land, they then become part of the land. Thus blocks of stone placed on top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in the builder's yard and for convenience's sake stack on top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly affixed to the land and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly affixed in the ground in order to bear the strain of the cable, yet no one could suppose that it becomes part of the land. ... An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land ..."

5.90 In deciding whether an object has become part of land, that is a fixture, or a chattel, the law courts apply either the 'Degree of Annexation Test' or the 'Purpose of Annexation Test'.[123]

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122. (1872) L.R. 7CP 328; [1861-73] All E.R. Rep 237.

123. See Megarry R. And Wade H.W.R., The Law of Real Property, (1984) (Stevens) pp. 730-738 for a detailed discussion on the distinction between (i) fixtures and chattels, and (ii) degree of annexation test and purpose of annexation test.

5.91 The degree of annexation test regards an object prima facie to be a fixture if that object has some strong connection with the land or a building. Thus an object attached to the land or a building in some solid manner, for example using nails or screws to fix a school blackboard, will prima facie qualify as a fixture even though the removal of the blackboard would not be a difficult thing to do. Conversely, an object which merely rests on the ground by its own weight, for example a chair or music equipment is, prima facie, not a fixture but a chattel.

5.92 The purpose of annexation test, on the other hand regards the degree of annexation as being principally of importance as evidence of the purpose of annexation. This contemporary approach is of course in contrast to the common law position which looked only to the degree of annexation and held everything substantially attached to the land to be the property of the owner of the land. The test of purpose of annexation appears to be twofold, namely:

(a) objects whose enjoyment cannot be realised without being permanently affixed, and

(b) objects whose owner has the power to sever and remove.

5.93 Regarding (a) above, the principle is that regardless of the degree of annexation certain objects do not become fixtures but remain chattels in the eyes of the law if the purpose of annexation was not to effect a permanent improvement on the land but merely to enable the owner of the chattel to enjoy it as an object of personal property. Thus if the only way in which the chattel would be properly enjoyed was to attach it to the house, building or land in some substantial way the law court may infer that the intention, ab initio, was for a better enjoyment of the object as a chattel and not as a permanent improvement of the house, building or land.

5.94 As regards (b) above, the principle is that although an object may be permanently affixed to a building or house or land thereby becoming part of the structure and so

qualify to be a fixture, the owner of the object, for example a tenant, is legally allowed or has the right to cut and remove it if he had earlier attached it for certain purposes.

5.95 Although the distinction between (a) and (b) theoretically exists, practically the two classes seem to blend into each other. Thus in Leigh v. Taylor,[124] where the issue at stake was whether the tapestries fixed on the wall by the deceased tenant for life were to be regarded as his personal estate or passed with the settled land, the Court of Appeal held that the tapestries were personal estate of the deceased tenant for life and the House of Lords upheld the decision, but on a different ratio decidendi. While the Court of Appeal arrived at its decision on the basis of the fact that even though the tapestries amounted to fixtures, the tenant for life or the successor-in-title had the power to remove them (that is, applying the principle enunciated in class [b] above), the House of Lords, on the other hand arrived at its own decision on the grounds that the tapestries never ceased to be chattels since fixing them to the walls was not more than was necessary to facilitate their enjoyment as objects of personal property (that is, applying the principle enunciated in class [a] above).

5.96 Similarly Blackburn. J, had further stated in Holland v. Hodgson (supra) that:

> " ... perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land. The onus of showing that they were so intended lie on those who claim that they had ceased to be chattels and that on the contrary, an article which is affixed to land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue as chattel, the onus lying on those who contend that it was a chattel ..."

5.97 As has been shown from the above cases, where an object is not a fixture but merely a chattel it can be removed by the person bringing it unto the land or by such person's successor-in-title. If, however, the object is a fixture, the presumption is that

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124. [1902] A.C. 157; [1900-3] All E.R. Rep. 520.

it cannot be removed from the land but must be left to the ultimate landlord. To this general legal position one must quickly add that there are circumstances where an object which has undeniably been a fixture may still be removed by the person who affixed it for certain purpose and accordingly has the power to sever and remove it. Fixtures which come under this exception are known as Tenant Fixtures.

5.98 The law allows a tenant to sever and remove tenant fixtures, however, it must be pointed out that the legal title to the fixtures remains in the landlord until the tenant chooses to exercise the power. Whether an object has become a tenant fixture or not may not be altogether an easy question to answer as much depends, as previously indicated, on the aim and purpose of annexation. Be that as it may, tenant fixtures are generally chattels annexed to land or building which land or building does not belong to the person who annexed them. They are not distrainable for rent, but may be seized in execution.[125] These would include:

(a) Trade Fixtures - a trade fixture is a fixture errected for the purpose of carrying on some trade, business or manufacture, such as ceiling fans, air-conditioners, welding machines, safes, etc. And because they are tenant fixtures, they may be removed although damaging the fabric together with covering erections. Thus in the case of Crossley Brothers Ltd v. Lee,[126] a gas engine was let out on hire by the plaintiff. The engine was affixed to the floor of the premises of which the hirer was the defendant's tenant by bolts and screws, and was used by the hirer for the purpose of this trade. When the hirer failed to pay his house rent, the landlord seized the engine under a purported right of distress. In an action that arose, the court held that the engine had become a trade fixture and could not be taken on distress. It is perhaps essential to point out that where a tenant seeks to exercise his rights to cut and remove the tenant fixtures, he must do so during the currency of the tenancy or such reasonable time thereafter as may be properly attributed to his possission as tenant, and not unreasonably long after tenancy

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125. Burke J. Osborn's Concise Law Dictionary, op cit, p. 148.

126. [1908] 1 K.B. 86; [1914-7] All E.R. Rep. 1042.

had come to an end, otherwise the trade fixture may pass as part of the assets of the landlord. Thus in the case of Smith v. City Petroleum Co. Ltd.,[127] the defendant owned petrol pumps affixed to tanks embedded in the ground. At the end of this tenancy, he did not immediately remove them. The court held that though the items were trade fixtures in which case the defendant had a right to remove them, he unduly delayed thereby passing the items over to the plaintiff (that is, the landlord).

(b) Ornamental or Domestic Fixtures - these include such items as mirrors, wall clocks, window and door blinds, pictures and paintings etc. Thus in the case of Leigh and others v. Taylor and others (supra), the House of Lords held:

> " ... that the tapestries put up with the purpose and attached in that manner, did not pass with the freehold to the remainderman, but formed part of the personal estate of the teneant for life and were removable by the executor"

In fact Lord Lindley succiently stated:

> " ... I cannot bring myself to believe that Mandame de Falbe when she put up these tapestries intended so to fix them as to make them part of the mansion for the benefit of the remainderman. They remained chattels from first to last ..."

5.99 Having seen the operations of the maxim, quiquid plantatur solo solo cedit, and the exceptions, the question that usually arises in relation to the subject matter of this thesis is: would a leased equipment annexed to a real property, for example land or building, of a third party become part of the land or building to which it is annexed so that it is taken as part of the assets of the landlord or the owner of the real property? With all due respect to the view of Clark that "once affixed, a chattel may be claimed as part of the real estate by a third party such as a landlord or mortgagee of the realty", one would rather submit that the lessor's claim in at least three circumstances would defeat the claim of the third party. These situations are:

(a) Where the chattel though a fixture by virtue of being annexed to a real property is found to be annexed for the purpose of the lessee carrying on some trade, business

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127. [1940] 1 All E.R. 260; 31 Digest (Repl.) 215.

or manufacture thereby becoming a trade fixture, case in point Crossley Brothers Ltd. v. Lee (supra).[128] Consequently where a lessee installs an electric generator for the purpose of his business on the premises belonging to his landlord which generator he obtained on lease, the landlord cannot claim such a generator on the basis of the operation of the maxim quicquid plantatur solo solo cedit.

(b) Similarly where the leased equipment in question is or found to be an ornamental fixture, the landlord or mortgagee's claim cannot defeat that of the lessor, case in point Leigh and others v. Taylor and others (supra).

(c) It is submitted that where the lessee at the time of installing or affixing the equipment obtains the permission of the landlord or mortgagee to the effect that the chattel shall be capable of being removed by the lessee or lessor or their nominees, and that in no circumstance whatsoever shall title to the equipment pass over to the landlord or mortgagee, it would be impossible for the owner of the real property to claim the affixed equipment on the grounds of the maxim, quicquid plantatur solo solo cedit. However, it must be pointed out that any such permission obtained from the landlord or mortgagee does not bind any subsequent landlord or mortgagee who takes the premises as a bona fide purchaser without notice of the lessor's interest. Supporting my submission above, Clark himself states:

> "where, therefore it is believed that the equipment will or may become a fixture, a lessor may request that the lessee obtain a waiver from his landlord or existing mortgagee acknowledging the lessor's interest in the equipment and his right to remove it (and require that no further mortgage be created unless a similar acknowledgement be obtained). However, such a waiver does not bind any subsequent landlord or mortgagee who had no notice of the lessor's ownership of the article concerned ..."[129]

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128. See also Stokes v. Costain Property Investments, [1984] 1 All E.R. 849; [1984] 1 W.L.R. 763, where the court presided over by Harman. J, stated inter alia, that " ... a machine tool which is fixed down for better use of it as a machine tool, and not as an improvement to the premises, which machine tool could be removed by the tenant at the expiry of his term and then disposed of by him, may well be said to belong to that tenant ...".

129. Clark, op cit, 89.

10. Sub-leasing/Assignment By The Lessee

5.100 Generally equipment leasing agreements usually provide that the lessee cannot sub-lease or assign the leased equipment to another person without the consent and approval of the lessor first sought and obtained, and in the event that that happens, the lessor is entitled to determine the contract, repossess the equipment and ask for damages etc. Where therefore the lessee fails or neglects to seek and obtain the neccessary permission before sub-leasing or assigning the equipment, it would amount to a breach of the contract which entitles the lessor to invoke the relevant clause of the agreement for enforcement provided it is not a penalty clause.[130]

5.101 Though there may be a breach of the agreement if the lessee should assign his interest in the hiring to a third party, it seems that as between the two of them (that is lessee and sub-lessee/assignee) the assignment would be valid in law and not void.[131] This legal position would certainly be unpleasant to the lessor but he is comforted by the fact that the law still allows him to determine the contract by reason of the breach and recover his equipment and this right as Professor Goode had pointed out " ... is exercisable against the assignee in just the same way as it is against the hirer".[132] It is

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130. See the case of Ballet v. Mingay [1943] 1 K.B. 281; [1943] 1 All E.R. 143. Here an infant obtained on loan, an amplifier and a microphone from the respondent and lent it to a chapman (trader) against the provisions that the goods must not be parted with by the appellant. When the plaintiff / respondent demanded the return of the goods, the defendant / appellant could not produce them and he was sued in detinue and the court of first instance (county court) gave judgment in favour of the plaintiff. The defendant appealed and contended that the respondent was seeking to make him liable in tort (detinue) for an action which was in reality a breach of contract for which the infant was not liable. The Court of Appeal held that the infant was properly sued in detinue in that, "on receiving a demand for the return of the goods, he refused or neglected to return them and failed to prove that in parting with the goods he had not stepped outside the bailment altogether".

131. Re Turcan (1888) 40 Ch. D 5; 58 L.J. Ch. 101.

132. Goode. R.M, Hire-Purchase Law And Practice (1970) (Butterworths) pp. 532 - 533.

therefore left for the third party (assignee) to pursue the hirer (assignor) for the money received from him for which he (assignor) offered no consideration.

5.102 The issue which often arises in sub-leasing agreements is: What will be the fate of a sub-lessee where the lessee in breach of the convenant not to sub-lease, sub-leases or sub-lets the leased equipment? Would such a breach by the lessee bring to an end the possessory right of the sub-lessee over the equipment? Like most legal issues concerning equipment leasing, there seems not to be any judicial pronouncement in Nigeria on this (not even in hire-purchase matters), but analysing the issue from a point of view of principles of law of contract and by mere parity of reasoning, one would submit that the problem could be resolved by reference to the provisions of the sub-lease agreement. If the relevant provision of the sub-lease agreement is made to depend strictly subject to the terms of the head-lease, the sub-lessee's possessory right being one derivable from the lessee's right of possession, would cease co-terminously with that of the lessee.

5.103 On the other hand, where the sub-lease agreement provides that in the event of a breach by the lessee which breach terminates the relationship between the lessor and the lessee, that the sub-lessee would have a direct relationship with the lessor, then the lessor would automatically be subrogated to the rights of the lessee under the sub-lease, thereby preserving the legal rights of possession of the sub-lessee.

5.104 Similarly in some trades, sub-leasing is common, (for example sub-letting of tractors, cranes etc) where the approval of the lessor is usually implied, the sub-lessee might on the basis of the lessee's apparent authority to grant a sub-lease, be allowed to retain possession of the equipment even though the head-lease had come to an end. This situation is a difficult one and so the courts are very likely to consider each case on its own facts before allowing the sub-lessee to keep possession despite a provision in the head-lease to the contrary. But it is submitted that where in the past the lessee

had parted with possession and was not challenged by the lessor, the courts may infer that as between the particular lessor and lessee a practice or convention had been established and so they (that is the courts) are not likely to deny the sub-lessee's right to possession.

11. Payment of Rentals

5.105 As earlier shown in the case of National Cash Register Co. v. Stanley (supra), leasing or hiring of equipment does not commence until delivery (whether it is actual or constructive) but once delivery has taken place the lessee must pay the agreed rental in accordance with the agreement. In the absence of an express agreement as to the amount of the rentals or lease charges, there is an implied undertaking that the lessee shall pay to the lessor some reasonable price for the use of his equipment.[133]

5.106 Payment of rental is as far as the lessor is concerned the most important aspect of the contract and consequently great care is usually taken in drafting rental provisions. It is in fact the very essence (legal consideration) of the leasing contract and the lessee is bound to pay the full rental even if he elects during the currency of the lease to return the equipment before the period expires unless there are frustrating events.[134] And as was held in the case of Ajayi v. R. T. Briscoe (Nigeria) Ltd.,[135] the fact that repairs have been carried out on the hired goods does not absolve the lessee (hirer) from paying the instalments due. Where therefore the lessee fails to pay the rentals he will be liable in damages and the lessor may on account of that default be entitled to terminate the contract and repossess the equipment. Thus in the case of Financings Ltd. v.

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133. Intra Motors (Nigeria) Ltd. v. Wiedemann And Walters (Nigeria) Ltd. (1968) N.C.L.R. 220. The same applies where the lessee holds over or detains the goods. See also the case of Strand Elect. Eng. Co. Ltd. v. Brisford Entertainments Ltd, [1952] 2 Q.B 246; [1952] 1 All E.R. 796.

134. Wright v. Melville (1828) 3 C & P 542.

135. [1964] 3 All E.R. 556; 108 Sol. Jo. 857, P.C. See also Bentworth Finance Nigeria Ltd. v. De Bank Transport Ltd. [1968] N.C.L.R. 232.

Baldock,[136] where the defendant hirer defaulted in the payment of two instalments, the plaintiff sent a notice to the defendant the day after the second instalment was due terminating the agreement and subsequently repossessing the five-ton Bedford lorry the subject of the agreement, the Court of Appeal held inter alia that the plaintiffs were perfectly within their rights in exercising the power of termination expressly conferred on them by the agreement.

5.107 In view of the importance of rentals to lessors, some leasing agreements make separate and additional provision for what is generally referred as "Hell or High Water"[137] provision (so called because it requires payments to be made by the lessee come hell or high water). This provision is usually very wide and it is basically meant to ensure the lessee paying the full amount of the rentals agreed and on the dates specified come what may. As far as the clause is concerned, it is immaterial that the equipment is defective, confiscated or appropriated, or that the lessor lacks title to the equipment, or that the equipment constantly breaks down or unfit for the purpose for which it was leased, or any changes in the status of the lessor or lessee, or any illegality, invalidity or other constraint on the enforceability of the agreement, or for any other unforseen reasons whatsoever. The clause even goes further to provide that even where the lessee might have another claim against the lessor as a result of some other contractual relationship or other dealings or even under the subsisting lease agreement, he (the lessee) cannot counter-claim or deduct or set-off any amount against the rentals.

5.108 Even though the term of "Hell or High Water" provision has not specifically come before the Nigerian courts for interpretation, it is very doubtful that the courts would enforce all the terms of this provision. Where for example the equipment is destroyed or stolen[138] and there was no negligence on the part of the lessee, or where the terms

136. [1963] 2 K.B. 104; [1963] 1 All E.R. 443.

137. It is believed that this clause originated from the Phoenician ship chartering agreement - see Chapter 3. It is also sometimes called "Net Lease Provision".

138. See Salami v. Bentworth Finance (Nig) Ltd. [1968] N.C.L.R. 102. See also Bentworth Finance (Nig.) Ltd. v. Alhaji Sani Bakori [1973] N.C.L.R. 426.

destroy the very root of the contract,[139] the courts are very likely to refuse its enforcement.

5.109 The time of payment must be stated in the agreement and where it is for any reason not so stated, the implication is that time is not of the essence of the agreement. It has been held that a provision for "punctual payment" means payment on the stipulated day, and not payment within a reasonable time, and so where the lessee pays a day after the date provided for, he would be in default of the agreement[140] as the courts would view time as an essence of the contract in this situation. However, default in punctual payment, though may entitle the owner to terminate the agreement, does not necessarily, as Professor Goode had stated, constitute a repudiation of the agreement by the hirer for the purpose of assessing damages.[141]

5.110 Time for payment, though it may be expressly stipulated in the agreement, may by agreement with the lessor be varied or waived, so that it does not become an essence of the contract. However, it has to be noted that the lessor can, on giving reasonable notice to the lessee, again insist on making time an essence of the agreement,[142] provided the lessee has not irretrievably altered his position based on the new understanding. Where he (lessee) does so alter his position, the lessor's undertaking would be irrevocable.[143]

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139. Nigerian Tools And Die Co. Ltd. v. Dare, [1968] N.C.L.R. 226.

140. See MacLaine v. Gatty, [1921] 1 A.C. 376; [1920] All E.R. Rep. 70. See also Bentworth Finance (Nig.) Ltd. v. De Bank Transport Ltd [1968] N.C.L.R 232, and also Bentworth Finance (Nig.) Ltd v. Lawrence [1963] L.L.R 87.

141. Goode, op cit, p. 265. See also the case of Financings Ltd. v. Baldock [1963] 2 Q.B, 104, [1963] 1 All E.R. 443.

142. Ajayi v. R. T. Briscoe (Nigeria) Ltd. [1964] 3 All E.R. 556; 108 Sol. Jo. 857, P.C.

143. Ibid. See also Birmingham And District Land Co. v. London And North Western Rail Co. (1888), 40 Ch. D 268; [1886-90] All E.R. Rep 620.

5.111 It is usual to find in a rental payment clause some right conferred on the lessor to vary and adjust the rental from time to time except perhaps in 'small market leases',[144] where because of the level of operation the rental is fixed throughout the period of the primary period. In 'middle market leases' and 'big-ticket or large market leases', the lessor would have agreed with the lessee that rentals under the agreement would be a certain percentage above the lessor's prime lending rate (in the case of banks and other financial institutions), or a certain percentage above the lessor's cost of funds or borrowing. The provision would go further to state what the current lending rate or cost of funds is, so that there is no ambiguity as to the exact percentage intended. This is particularly of importance in a country like Nigeria where there is deregulation of interest rate with the attendant erratic cost of funds in the money market operations.

5.112 Different structures of rental payments have been developed by lessors to assist the lessees taking into consideration the nature of business activity the lessees are involved in. These include:

(a) Initial Payment - This is primarily designed for credit and marketing reasons. Here the lessor may require a certain number of rental payments paid up-front (that is in advance) at the commencement of the lease. In the alternative, the lessor may insist on a reduced number of initial payments and a security deposit.[145]

(b) Stepped Rentals - Here the lessee's rental payment is designed to match his anticipated cash flow, increasing for example to take into account income generated by the leased equipment and/or inflation, or descending through the term of the lease if the anticipated return on the leased equipment is highest in the early stages.

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144. See the definitions of 'Small Market Leases'; 'Middle Market Leases'; and 'Big-ticket or Large Market Leases' in Chapter 4.

145. There is no consensus among the operators of equipment leasing in Nigeria whether or not security in whatever form should be demanded from lessees. Some insist that security from the lessee destroys the idea of leasing while others argue that it is highly risky not to seek for additional support in case of default by the lessee. There is yet no judicial pronouncement on the matter.

(c) Ballon and Tadpole Rentals - The rental payment here is structured to ascend and descend in the same leasing facility based the working life of the equipment.

(d) Bell Rentals - This is structured, as the name suggests, to increase to a peak in the middle of the lease term and then decrease. It has been found to be a good rental payment structure where the lease is subject to seasonal income.

5.113 In making the rental payment, the lessee must make the payments in the place specified in the agreement, and in the absence of a specified place, he is enjoined to seek for the lessor wherever he may be found.[146] It is only reasonable to expect that where a leasing agreement is entered, say in Lagos, the lessee shall not be required to fly to London to make the rental payments unless it was previously agreed.

12. Insolvency / Bankruptcy Of The Lessee

5.114 Equipment leasing agreements usual provide for the protection of the lessor in the event of insolvency or bankruptcy of the lessee. What then is "insolvency"? Insolvency may be defined as "the inability to pay debts in full".[147] In this thesis, it is used to cover both a lessee who is a corporate body winding up its affairs by whatever means, and bankruptcy of a lessee who is an individual.

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146. Fowler v. Midland Electricity Corporation for Power Distribution Ltd. [1917] 1 Ch. 656; [1916-17] All E.R. Rep 608.

147. Burke. J, Osborn's Concise Law Dictionary, op cit, p. 1180. See also s. 409 of the Nigerian Companies And Allied Matters Decree 1990 for the definition of "the inability to pay debts" (insolvency). It provides:
" A company shall be deemed to be unable to pay its debts if -
(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2,000 then due has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the creditor; or
(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
(c) the court, after taking into account any contingent or prospecitve liability of the company is satisfied that the company is unable to pay its debts".

5.115 The Nigerian Bankruptcy Act 1979 section 55 provides that, immediately upon adjudication, the property of the bankrupt shall vest in a trustee. The property of a bankrupt includes those things of which he is a reputed owner. The assets which come under the term 'reputed ownership' are set out in Section 41(1)(c) of the Bankruptcy Act. These include:

> "all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner therof"[148]

5.116 The above definition of reputed ownership includes equipment held under leases, since the subject matter of such leases (that is leased equipment) are in the bankrupt's possession "by the consent and permission of the true owner". Under this situation the lessor is left as an unsecured creditor who has the burden of having to prove as a general creditor in the bankruptcy of the lessee. And because of section 41(1)(c) of the Act, long and often tortuous clauses are usually provided in the leasing agreement aimed primarily at circumventing the effect of the section.

5.117 Much as the anxiety and concern of lessors are understandable and justified in view of the wordings of the section, it is believed that the provisions in the agreement which provide that upon such an event happening (that is bankruptcy) such leases shall automatically be terminated may not generally give full protection when viewed against the background of the definition of "reputed ownership". Thorpe has suggested that a possible way round the problem would be to insert clauses in the leasing agreement whereby the lessee's bank is authorized to provide a regular status report on the lessee's finances or to enjoin the lessee to provide regularly (as may be agreed) his financial status report. This clause, if inserted, would enable the lessor to monitor the financial strength of the lessee and consequently would be put on notice if the lessee is getting

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148. Section 41(1)(c)of the Bankruptcy Act 1979. This provision only applies to individuals - sole traders and partnerships. It does not affect corporate lessees. See also, Wood P., Law And Practice of International Finance, (1980) (Sweet & Maxwell) p. 351.

into any financial difficulties.[149] As soon as the lessor has notice of the dwindling fortunes of the lessee, it would be judicious for him to terminate the lease, provided that it is in conformity with the lease agreement, and then repossess the equipment.

5.118 It must, however, be noted that in certain circumstances the lessor may be able to rebut the reputation of ownership derived from possession. Thus "where by trade usage, goods of the particular description are notoriously known to be in possession of persons who are not the owners, then there is no reputation of ownership".[150]

5.119 The position of the lessor where a corporate lessee of an equipment is in liquidation is a better one though not completely free from danger. For example Section 415 (2) of the Nigerian Companies And Allied Matters Decree provides:

(1) "where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken"

And in sub-section (2) of the same section it provides:

(2) "In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up"[151]

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149. Thorpe. G. C, International Financial Leasing (1983) being a seminar paper presented at the Commercial Law Summer School, Queen Mary College, University of London, p. 26.

150. Ibid, p. 25. It is also submitted that the fact that the leased equipment is clearly marked with owner's name or some other distinguishing marks of the owner may well be sufficient to avoid the reputed ownership doctrine.

151. This is exactly the same wording as the now repealed 1968 Companies Act, s. 216 (1) and (2).

5.120 Similarly section 413 of the same Act provides:

> "In a winding up by the court, any disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up shall, unless the court otherwise orders, be void".

If therefore the "property of the company" in this section is construed to mean property actually owned by a company, then the position of the lessor is not in any way threatened by the commencement of the winding up of a company. On the other hand, if the term was to be interpreted to include property in the possession of the company then the lessors position is very much threatened.

5.121 In any event, it is generally better for the lessor to deal with a corporate lessee than a human person lessee who has been declared bankrupt, because he is very likely to get wind of impending liquidation and consequently take appropriate steps to protect himself.

13. Lessee's Acquisition of The Leased Equipment

5.122 As has been previously shown in Chapter 4 as well as in this chaper; the fundamental distinction between an equipment leasing contract and a hire-purchase contract in Nigeria, is that the hirer in a hire-purchase contract has the option to elect whether to purchase the equipment or not at the end of the last instalment, while the lessee in an equipment leasing transaction has no such right or option, but must return the lease goods, or sell same to a third party as an agent or nominee of the lessor, so that he (lessee) never acquires the ownership directly from the leasing contract.

5.123 As a result of this distinction and the fact that in some jurisdictions an equipment lease may contain the option to purchase, it is usual in Nigeria to provide in very clear terms that the property in the goods will never pass over to the lessee throughout the

duration of the lease. The agreement generally would state that the lessee must return the leased equipment at the expiration of the lease term, or it may give some other options such as the sale by the lessee of the equipment for and on behalf of the lessor to a third party. The agreement may also provide that the lessee is entitled to a percentage of the proceeds of sale, which sale he (lessee) must strictly account for in accordance with the agreement. The fact that a lessee is given an interest in, or percentage of the proceeds of sale of the equipment does not in itself render the transaction a hire-purchase one. Thus in the case of Broad Leases Ltd. v. Wooley,[152] where a car was leased with the provision that at the end of the lease the lessee should pay the unpaid rent and the residual value of the car as stated in the agreement less the sale price received by the lessor on sale at auction, the New Zealand court held that the mere fact that the lessee was entitled to be credited with the sale proceeds did not convert the agreement into a hire-purchase, but remained a true lease. This decision was also followed in another New Zealand case; Credit Services Investments Ltd. v. Quartel.[153]

5.124 It is sometimes observed that some equipment leasing agreements make provision to the effect that the lessee may continue to remain in possesion of the equipment without further payments after a specified amount of rentals would have been paid over a specified period of time. This type of undertaking by the lessor to refrain from exercising his proprietary right of ownership in respect of the leased equipment amounts to hire-purchase. Thus in the case of Domestic Electric Rentals v. Ridout[154] where the lessor undertook not to exercise any proprietary right of ownership after the lessee had paid a specific amount of rentals over an agreed period, the court held, in an action that arose from the transaction, that by the lessor undertaking not to exercise his

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152. [1969] 12 MCR 311.

153. [1970] NZLR 933.

154. [1941] LJN CCR 31.

proprietary right of ownersip, had transfered his ownership right to the lessee and the agreement therefore was legally a hire-purchase rather than an equipment lease.

5.125 Since most finance lessees would generally like to own the equipment at the expiration of the lease term, one would suggest that the current practice in the Nigerian leasing industry, whereby the lessor sells the equipment to a third party who in turn re-sells to the lessee, may be the best approach as it does recognise the ownership right of the lessor even after the duration of the lease period. The method also ensures that the lessee who for all intents and purposes has become more-or-less the economic owner of the equipment, and who has maintained it throughout the period of the lease, does not lose out.

5.126 In the alternative, where the lessor insists on his legal right of ownership and would not give up that until the equipment is scrap, the parties may agree that the lessee could continue indefinitely to be in possession of the equipment at a nominal (peppercorn) rental after the expiration of the lease period. This situation would appear not to violate the basic concept of equipment leasing as it does recognise the ownership right of the lessor. Thus in R. v. R.W. Proffit, Ltd.[155] a lessee was permitted under the terms of a leasing agreement to remain in possession of leased equipment at a peppercorn rent for an indefinite period. He was also granted an option to purchase the leased television set at the end of a two-year period for one shilling 'subject to the passing of the necessary legislation'. The Crown contended, relying exlusively on the existence of the option to purchase the leased television set, that the agreement was in essence a hire-purchase agreement. The court held that so long as there was no unconditional

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155. [1954] 2 Q.B. 35; [1954] 2 All E.R. 798. In order not to create any room for ambiguity and arguments which may lead to a different finding by the court, one would suggest that the agreement by the parties to the effect that the lessee may continue indefinitely to be in possession at a peppercorn rent should not be embodied in the main leasing agreement.

right for the lessee to buy the goods, the agreement constituted a lease rather than a hire-purchase.

14. Provisions For Termination Of Contract And Return Of Equipment

5.127 Equipment leasing contracts usually specify those events that will lead to the termination of the contract. Where any of those events occur, the general principles of law regarding termination of contract would apply, as in any other contract. The terminating events generally will include: non-payment of rental, effluxion of time, frustration, insolvency of lessee, failure to observe the terms of the agreement, failure of the lessee's guarantor to live up to his guarantee, the appointment of a receiver either of the lessee or his guarantor, seizure of the equipment by a third party, real or threatened steps to sell the equipment by lessee, real or threatened steps challenging the ownership right of the lessor, real or threatened steps to sell whole or part of the lessee's business, acquisition or amalgamation leading to the folding up of the lessee, default by lessee under any other leasing contract, default by lessee in respect of borrowed funds, subsequent agreement between lessor and lessee, poor credit appraisal of the lessee, failure to obtain / renew licences or insurances, etc.

5.128 In a properly-drawn leasing agreement the distinction is always made between events of default that will affect termination of the contract, and those that will only give rise to a claim in damages and not termination of the contract. In a strict legal sense, those events that would lead to termination are properly called "conditions" while those that will give rise to a claim in damages only are properly called "warranties". There are generally no rules laid down regarding what events should be conditions and which should be warranties, much depends on the nature of the transaction together with relevant other statutes and also the intention of the parties as it may be either expressed or implied. For example failure to renew the insurance of an electric generating set may be treated as a breach of a warranty, but failure to renew a motor car insurance would be treated as a breach of a condition since by virtue of the Insurance

Act 1976, the owner of a motor car put on the road without insurance licence is liable to criminal prosecution.[156]

5.129 Payment of rentals occupies a very prominent position as a condition of the contract. This is basically because the lessor's involvement is usually purely economic, and any failure by the lessee to pay the rental when due is an indication that his (lessor's) investment is in danger, and consequently he has to invoke the relevant default clause to enable him to bring to an end the relationship, before the liquidation commences.

5.130 It is not advisable to word the default provisions in such a way that every little breach constitutes a fundamental breach (that is a violation of a condition). It is equally not advisable to insist that the lessee must perform his obligation as per the agreement on the exact dates specified. A period of grace should be given after the date specified in the agreement to enable the offending party to remedy the situation. Typically a period of about fourteen days is usually allowed, but nothing stops the parties allowing up to thirty days. This should be so unless the breach is such that allowing the grace period would do harm, for example in cases of the lessee's insolvency or where there is notice of the lessee's intention to sell the leased equipment. It has been pointed out earlier (see Financing Ltd. v. Baldock, supra) that mere default in punctual payment, though it may entitle the lessor to terminate the contract as per the leasing agreement, may not amount to repudiation on the part of the lessee for purpose of assessing damages. In this case the defendant was in default of two instalments when the plaintiff served him with notice terminating the contract. The defendant requested ten days within which to remedy the situation, but this was declined and the five-ton Bedford lorry repossessed by the owner who held it for fourteen additional days before selling it. The court considered all these circumstances and found that even though the plaintiff's action terminating the contract was in conformity with the agreement, his action appeared unreasonable in the circumstance. Following this sound decision, it is

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156. Section 3 (2) of the Nigerian Insurance Act 1976.

therefore desirable that not only is opportunity given to remedy the default, but proper notice should also be given to the offending party.

5.131 Sometimes it is observed that the lessee for commercial reasons will want a voluntary termination clause inserted in the agreement to enable him terminate upon giving notice. The availability of such a provision is generally a matter of negotiation between the lessor and the lessee. The details are usually worked out providing for adequate notice to be given with the result that the termination usually takes effect from the next succeeding rent payment date following the issuance of the notice. This is principally aimed at ensuring that there are no broken funding costs. The termination fee in this circumstance is usually lower than that the lessee would have been expected to pay in case of default, and upon its payment and of other amounts then due, the termination then becomes effective.

5.132 When the leasing relationship terminates, the lessee is bound to return the leased equipment[157] to the lessor at an agreed place, unless the lessor had asked the lessee to keep it until he decides what he wants to do with it, for example either to sell it or to lease it out again etc. Banks frequently adopt this approach because they do not have places to warehouse the equipment. Note that unless the equipment is being kept by the permission of the lessor, any holding over or detention of the equipment after the expiration of lease period entitles the lessor to a reasonable fee.[158] Where the lessee fails to return the equipment at the expiration of the lease, he may be liable in damages for either a breach of contract or for detinue or for conversion.[159] This obligation to return the equipment would, however, not apply if the equipment had either been stolen

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157. Mills v. Graham (1804) 1 Bos & P.N.R, 140; 3 Digest (Repl.) 57.

158. Intra Motors Nigeria Ltd. v. Wiedemann And Walters Nigeria Ltd. (supra).

159. Plasycoed Collieries Co. Ltd. v. Partridge, Jones & Co. Ltd. [1912] 2 K.B. 345; 81 L.J.K.B 723. See also Alexander v. Railway Executive [1951] 2 K.B. 882; [1951] 2 All E.R. 442.

or destroyed without any negligence on the part of the lessee or the contract in any other way frustrated.[160]

5.133 It is advisable to provide for the lessor to have a right of entry into the premises or land where the equipment is placed or located. This is not only for the purpose of repossessing the equipment, but also for the purpose of periodic inspection of the equipment to ensure that it has not only been taken out of the agreed place/location but also to ensure that it is being kept in a fit and proper condition.[161] Where no such right is reserved, and the lessee has not consented, the lessor may be liable under the Criminal Code[162] if he uses force to gain entry into the premises or land.

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160. Bentworth Finance Nigeria Ltd. V. Bakori [1973] N.C.L.R 426. See also the Scottish Case of Jacksons (Edinburgh) Ltd. v. Constructors Jonh Brown Ltd. [1965] SLT 37.

161. Delor v. Foli (1952-55) 14 WACA 54. This is a case where such right was so conferred.

162. Section 81 of the Nigerian Criminal Code.

CHAPTER SIX

LEGAL ASPECTS OF INTERNATIONAL EQUIPMENT LEASING

Unidroit Convention On International Financial Leasing And Ratification By Nigeria

6.01 It is necessary to discuss international equipment leasing, though briefly, for two main reasons:

(a) Some big-ticket or large market leasing transactions in Nigeria today are international and there is a likelihood that a greater number of international leasing transactions will be seen in the future. It is important to note that equipment leasing started in Nigeria with international leasing (see Chapter 3).

(b) Nigeria not only attended the Diplomatic Conference held in Ottawa Canada in May 1988 for the purpose of adopting the Unidroit Convention On International Financial Leasing, but has since ratified the Convention and ipso facto agrees to be bound by the rules.[1]

6.02 Although the Convention has not effectively come into force, the minimum number of ratifications required, that is three, has been met and consequently its commencement is expected very soon. Thus Martin J. Stanford of the International Institute For The Unification of Private Law [UNIDROIT] Rome in his letter states:

> "France became the first Contracting Party when it deposited its instrument of approval on 23 September 1991. The conditions for the Convention's entry into force, that is, three Contracting Parties, are on the point of being met, Italy and Nigeria having completed all legislative and administrative formalities for ratification and it simply now being a matter of their respective Ambassadors depositing their instruments of ratification with the Canadian Department of External Affairs. The Italian statue implementing and authorizing ratification

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1. Nigeria signed the Convention on 28th May 1988 and ratified it on 23rd July 1993. France was the first nation to ratify the Convention on 23rd November 1991, having earlier on 7th November 1989 signed the Convention. Italy signed the Convention on 31st December 1990 and ratified it on 1st August 1993 - see Stanford M.J, Unidroit's Letter Reference Number V-A-1/2200, of 18th November 1993.

> of the Convention ... was brought into force in Italy on 1 August 1993. The President of Nigeria signed his country's instrument of ratification on 23 July 1993".[2] [*emphasis mine*]

The Term "International Leasing" And Problems of International Business Transactions Generally

6.03 The term "International Leasing"[3] is, as Clark had pointed out, a generic term which comprises of a situation where the lessee and the lessor are domiciled in different countries or in different jurisdictions (sometimes referred to as "cross-border" or "off-shore" leasing) as well as applying to a situation where leasing is carried on through the operation of overseas subsidiaries.

6.04 Doing business internationally has always posed a problem because of the potential conflict between the laws of the jurisdictions of each of the parties to the contract and that of the proper law of contract. These problems, which are not limited to leasing transactions, include the definition of the transaction and choice of governing law (for example a hire-purchase transaction in Nigeria would be seen as an equipment lease transaction in the United States of America), enforcement of judgments, arbitration, sovereign immunity etc. It was in recognition of the legal problems associated with international leasing transactions and the need to stream-line or unify the governing rules that the International Institute for Unification of Private Law [UNIDROIT] a former affiliate of the League of Nations which exists today as an independent International Institute located in Rome - Italy set up a study group of experts in the 1970's. The main objective of Unidroit therefore was to bestow a seperate legal structure on international finance leasing transactions which would have its own particular charac-

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2. Other countries that have signed the Convention but have not yet ratified it include: Belgium, 21st December 1990; Czechoslovakia, 16th May 1990; Finland, 30th November 1990; Ghana, 28th May 1988; Guinea, 28th May 1988; Morocco, 4th July 1988; Panama, 31st December 1990; Philippines, 28th May 1988; Tanzania, 28th May 1988; and United States of America, 28th December 1990 - see Stanford, op cit. See also Bowman M.J. And Harris D.J, Multilateral Treaties (1992) (University of Nottingham Treaty Centre) p. 62, for information up to the period of publication in 1992. Canada is the depositary country.

3. Clark T.M, Leasing, (1978) (McGraw-Hill), p. 31.

teristics and so remove elements of legal uncertainty. This avowed objective was clearly set out in the preamble to the Convention[4] which states:

> "The States Parties to this convention, recognising the importance of removing certain legal impediments to the international financial leasing of equipment, while maintaining a fair balance of interests between the different parties to the transaction, aware of the need to make international financial leasing more available, conscious of the fact that the rules of law governing the traditional contract of hire need to be adapted to the distinctive triangular relationship created by the financial leasing transaction, recognising therefore the desirability of formulating certain uniform rules relating primarily to the civil and commercial law aspects of international financial leasing, have agreed ..."

It was the work of this study group which was subsequently approved by the Governing Council of Unidroit and later presented to the Diplomatic Conference held in Ottawa in May 1988, which after necessary amendments was adopted, that is today known as the Unidroit Convention On International Financial Leasing.

6.05 At this juncture, it is proposed temporarily to break off discussion on Unidroit and its articles and return to it later. This is necessary because before the Unidroit's Diplomatic Conference of 1988, leasing transactions had been carried on internationally, and even after the Convention may have come into force it can only apply to nations that have ratified[5] it and have also agreed to be bound by it.[6] The question then is: what rules govern international leasing transaction at present and even when the Convention has effectively come into force what rules will govern parties where they are not bound by the Convention?

What Rules Govern International Leasing Transactions At Present?

6.06 As earlier pointed out there are bound to be issues touching on conflict of laws in international leasing, and determining the appropriate law to resolve the issue is an

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4. See Appendix 2, Unidroit Convention On International Financial Leasing.

5. Ibid, Article 3.

6. Ibid, Articles 21 and 24. By virtue of these articles mentioned a nation state that may have ratified the convention may decide to denounce the convention and opt out.

important aspect of the transaction. The usual conflict problems with regard to cross-border transactions are: the applicable law between the supplier and the lessor on the one hand, and the governing law between the lessor and the lessee on the other hand.

6.07 As regards the first problem, that is the applicable law between the supplier and the lessor, the position is that the conflict rules governing the sale of moveables will apply,[7] as what is generally involved here is the application of the proper law or centre of gravity doctrine. The proper law of a contract "means the system of law by which the parties intend the contract to be governed, or where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection".[8] Thus in the case of Mount Albert Borough Council v. Australasia Tempererance And General Mutual Life Assurance Society Ltd.,[9] the English court stated:

> " ... that law which the English ... Court is to apply in determining the obligations under the contract. English law ... has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts"

But identifying the proper law of contract in the event that there is no expressed or implied choice of governing law has not been an easy task and the courts have not helped the situation either as they have sometimes chosen the place of performance of a contract and at other times chosen the place of negotiation of a contract as the determining factor in identifying the proper law of a contract.[10] Be that as it may, it is

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7. Collins, L., Dicey and Morris On The Conflict of Laws (1987) (Stevens) vol. 2, p. 1260, where Rule 189 says "A contract for the sale, pledge, or hire of a moveable is generally governed by its proper law".

8. Ibid, Rule 180, pp. 1161 - 1162.

9. [1938] A.C. 224 at p. 240; [1937] 4 All E.R. 266, P.C.

10. Lando, O., International Encyclopedia of Comparative Law, (1976) (Buhr) vol. 3, Chap. 24, s. 239, pp. 128-129.

likely that where a contract for the sale of goods is made between two firms doing business in the same country, the courts would almost certainly regard the law of that country as the proper law of the contract although the goods may have to be delivered in another country. Thus in the case of Jacobs v. Credit Lyonnais,[11] where both the buyer and the seller were English companies carrying on business in London, and the negotiation for the contract was done in London, the court held that English law would govern the transaction even though the place of delivery was in another country; Algeria. Where on the other hand the goods are sold by a firm in one country to a firm in another country, the courts are likely to hold, as the Privy Council did in Benaim v. Debono,[12] that the law of the place of delivery should, in the absence of any evidence of a contrary intention (such as the inference that could be drawn from an arbitration clause[13]) be considered as the proper law of contract regardless of whether the goods are to be delivered in the seller's country, the buyer's country, or a third country.[14] But in a situation where the lessor and the lessee are in two different countries and in pursuance of a transaction, the lessor requests the seller of the equipment to supply/deliver the purchased equipment to the lessee in the lessee's own country, the court has held that the proper law of the contract would be, as in the case of Jacobs v. Credit Lyonnais (supra), the place of negotiation of the contract. Thus in the case of Pound And Co. Ltd. v. Hardy And Co. Inc.,[15] where a contract was negotiated in England

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11. (1884) 12 Q.B.D 589; 53 L.J.Q.B. 156.

12. [1924] A.C 514; 93 L.J.C.P. 133.

13. See N.V. Kiwk Hoo Tong v. Finlay [1927] A. C 604; 96 L.J.K.B. 902. See also Steel Authority of India Ltd. v. Hind Metals Inc. [1884] 1 Lloyd's Rep. 405; 134 New L.J. 204.

14. Lando, O., op cit, p. 129. See also Dicey And Morris, op cit, p. 1260.

15. [1956] A.C. 588; [1956] 2 W.L.R. 683. One would have thought that the court in this case would have ordinarily followed the earlier decision in Benaim v. Debone in which the Privy Council held that the place of delivery should be considered as the proper law of contract in the absence of any contrary intention. This depicts part of the problems which the courts have not been too helpful at resolving as earlier pointed out. See Dicey And Morris, op cit, p. 1243. See also Lando, O., op cit p. 129. Also see Mowbray And Robinson v. Rossor [1922] 91 L.J.K.B 524; 126 L.T. 748, which was decided in line with Pound And Co. Ltd. v. Hardy And Co. Inc. (supra).

between an English seller and an American buyer in which it was agreed that the seller would deliver the goods in the port of Lisbon Portugal for export to the former East Germany, the court held that the place of negotiation (England) should be the proper law of the contract, in other words, English law was held to be applicable.

6.08 With regard to the second problem which could arise in international leasing, that is the applicable law between the lessor and the lessee, the position is that the law chosen by the parties shall govern. If, however, the parties have not chosen any law, the courts of most countries would likely apply their own general rules or method of selecting the law of the contract and for those countries that show preference for rules to determine what law applies to specific types of contract, it is likely that they would have special rules governing leasing transactions.[16]

6.09 Despite the different approaches, Professors Goode and Drobing have advised English exporters of goods who rely upon the security of those goods for their protection,

> " ... to look exclusively to the country of importation and to create the most suitable security device available under the laws".[17]

This commendable advice should of course not be seen as meant for English exporters only but to all lessors irrespective of country of origin. Professor Adams had, in another but similar development cautioned parties to a leasing contract particularly in large market transactions where participants and/or equipment are usually in different countries or different jurisdictions that:

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16. Lando, O., op cit, p. 140.

17. Goode. R.M, And Simmonds. K.R, Commercial Operations in Europe, (1978) Edited, published for the Faculty of Laws Queen Mary College University of London by A.W Sijthoff, p. 369.

> "Advice must be obtained from lawyers practising in each of the different jurisdictions in order to identify any problems which may arise and which may impair the ability of any of the participants to realise its aim from the transaction or which may increase any participant's risk".[18]

Much as these pieces of advice by these legal luminaries seem sensible since in any case the lessor's ability to monitor and control his equipment in another's possession and in another jurisdiction or country is very limited, a school of thought has held a contrary view. It argues that in the absence of any agreed choice of law, the law of the place of business of the lessor should apply. Justifying its position it contends that:

> " ... financial leasing is a commercial transaction. It is the lessor who carries out the performance of the contract that characterises it as a leasing. The terms of the agreement will generally be framed by him. He will calculate the costs, the risk, and the price on the basis of a multitude of contracts with domestic and foreign lessees, and he will be interested in having its contracts governed by the same law irrespective of where the equipment is to be situated. Therefore it is submitted, the law of the place of business of the lessor should prima facie apply to the contractual aspects of leasing"[19]

There seems to be an important point raised in this school of thought's argument as stated above, but the issue of the protection of the lessor and his investment has not been settled. The pertinent question is: what has the lessor achieved if after the application of the law of his place of business as the proper law of contract he finds out that for certain legal or political or economic reasons the law does not protect him or cannot be enforced against the lessee who has his (lessor's) equipment which is domiciled in another country or jurisdiction. For this reason therefore, it is desirable to take Professor Adams's advice and seek the opinion of not only lawyers but other connected professionals in the lessee's country or jurisdiction and then use the information gathered in deciding whether or not to go on with the transaction. My humble submission on this would not be different even if both parties (lessor and lessee) have agreed previously on the governing law. In other words, the law of the place where the

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18. Adams. J.N, Commercial Hiring And Leasing, (1989) (Butterworths) p. 68.

19. Lando, O., op cit, p. 140.

goods would be situated which invariably would be the lessee's place of business is preferred for the most practical protection for the lessor, even though one recognises that parties are free to choose which law should govern their affairs.

6.10 Another problem associated with international leasing apart from the choice of law, as earlier indicated, is the question of where the contract would be enforced. Generally once judgment has been obtained in a selected forum it would be enforced in the jurisdiction where the asset or lessee is situated unless there are prohibiting circumstances.

6.11 In Nigeria the courts have jurisdiction to hear a case if the person, whether corporate or human [except that an action cannot be brought nor an execution levied against a foreign sovereign or diplomat unless the diplomatic immunity is waived][20] can be served with a writ of summons or he appears in an action other than for the purposes of contesting jurisdiction.[21] Also where the lessee or lessor as the case may be has a branch office within the territory of Nigeria, the Nigerian court would also have jurisdiction and the same position applies where the parties have agreed that the laws of Nigeria shall govern the transaction or that any claims or disputes shall be brought before a Nigerian court.

6.12 It is essential to expressly state the country whose courts would have jurisdiction, in order to avoid disputes that may arise as to whether or not a particular court has jurisdiction, and it is desirable that the stipulation is on a non-exclusive basis, so that there is an opportunity of bringing a similar action in another jurisdiction if the parties

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20. See s. 1(1) of the Diplomatic Immunities and Priviledges Act 1962.

21. See s. 8 the Nigerian High Court Law Cap. 44 (L/W). This is part of Her Majesty's High Court of Justice Rules in England that has been incorporated into the Nigerian Law. This is not surprising as Nigeria was a former British colony and largely adopted its laws and legal system. In France and Luxembourg, the nationality of plaintiff alone is sufficient to give jurisdiction, while in the Netherlands, the Dutch domicile of the plaintiff is sufficient to give jurisdiction.

fail to agree. It does not make much sense that the choice of forum should be different from the choice of the governing law as this could lead to greater complication and uncertainty. In other words, th choice of forum should naturally follow the choice of the governing law.

6.13 Before the Nigerian Courts would enforce a foreign judgment,[22] which in any case cannot be done without the Nigerian court's approval, certain conditions must be present. Generally these are: that the judgment was not obtained fraudulently, that the foreign country where the judgment was obtained enforces its own (Nigerian) judgments, that the trial was fair and the rules of natural justice applied, that the particular court that gave the judgment was a court of competent jurisdiction, that the judgment was final and conclusive (although the fact that there may be an appeal does not act as a barrier).

6.14 The enforcement of foreign arbitration awards in Nigeria, which is another problem of international leasing transaction, is easier than foreign judgments because Nigeria has ratified the New York Convention.[23] Arbitration clauses are generally provided in leasing agreements in order to avoid apparent jurisdictional problems

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22. Two statutes govern the enforcement in Nigeria of judgments obtained in foreign courts. They are (i) The Reciprocal Enforcement of Judgment Act 1922 which deals with commonwealth countries judgments and (ii) Foreign Jugdments Reciprocal Enforcemant Act 1960, which deals with foreign judgments other than commonwealth countries. In fact a judgment obtained in one state in Nigeria does not, by virtue of the federal structure of the country, apply automatically in another state, but must be registered in the state where it is being sought to be enforced in accordance with the Nigerian Sheriff And Civil Process Act 1945.

23. The New York Convention On The Recognition And Enforcement of Foreign Arbitral Awards 1958. This was ratified by Nigeria on 17th March 1970 - see Bowman M.J And Harris D.J, Multilateral Treaties (1984) (Butterworths) p. 230. This Convention applies to the arbitral awards made in the territory of a state other than the state where recognition and enforcement of such an award are sought and arising out of differences between persons, whether corporate or human. It applies also to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought - see Article I of the Convention.

which often arise in cross-border leasing transactions and because it sometimes said to be less expensive and less technical (its rules are less rigid) than resorting to pure litigation. It has also the advantage of being less time consuming and does not go with the usual feeling of victory or defeat which litigants experience at the end of litigation.

6.15 A number of approaches may be adopted in dealing with the rules governing arbitration. Most international leasing documents in Nigeria would generally provide that in case of a dispute arising from the transaction, the dispute would be submitted to arbitration. This type of arbitration is referred to an "Ad Hoc" arbitration. In this arrangement the lessor and the lessee would nominate one arbitrator each and jointly nominate the third one who may act as the chairman. They would in turn draw up their own arbitration rules or adopt, for example, the UNCITRAL Arbitration Rules. Another approach which may be adopted though not common in Nigeria is to refer the dispute to arbitration institutions. The three major ones are namely: the London Court of International Arbitration based in London,[24] the International Chamber of Commerce based in Paris, and the American Arbitration Association based in New York. The World Bank has also a part of its organisation; the International Centre For Settlement of Investment Disputes based in Washington,[25] which resolves disputes arising out of investments made in a contracting state by a national of another contracting state.

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24. It is more likely in the absence of a choice of an arbitrator that most Nigerians (whether State, or company or individual) would prefer the London Court of International Arbitration (LCIA) because of the long standing and close legal and political and economic relationship. Furthermore the LCIA rules incorporates the Arbitration Rules of the United Nations Commission On International Trade Law (UNCITRAL). Another arbitration institution Nigerians would be interested in is the London Maritime Arbitrators Association which handles maritime arbitrations. This association has its own specific rules and regulations.

25. Nigeria ratified this Convention, known as, the Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, on 23rd August 1965 - see Bowman And Harris, op cit, p. 292.

6.16 Another legal problem which is encountered in international leasing transaction is the doctrine of sovereign immunity. A lessee who is a sovereign state or its agency may deny liability under the doctrine. The doctrine essentially says that courts of a country will not implead a foreign sovereign whether the proceedings involve process against his person or seek to recover from him specific property or damages. Thus in the famous case of Compania Naviera Vascongado v. Steamship "Cristina" And Persons Claiming Interest Therein (known as Cristina Case),[26] where a ship called Cristina belonging to the appellants, a Spanish company, and registered at the port of Bilbao was requisitioned by a decree issued by the Spanish Government. The ship, at the time the Government of Spain issued a decree requisitioning all vessels registered at the port of Bilbao, was lying at the port of Cardiff. Pursuant to the decree the Spanish Counsul in Cardiff went on board the vessel stated that it had been requisitioned, dismissed the master and put a new one in charge. Thereupon the appellants took out a writ claiming possession of their propety. The Spanish Government made a conditional appearance and gave notice for an order to set aside the writ as it impleaded a foreign sovereign state. The court held, dismissing the appeal, that to grant the appellants their prayer:

> " ... would be an infraction of the rule well established in international law that a sovereign state cannot directly or indirectly be impleaded without its consent and therefore, that the writ and all subsequent proceedings must be set aside".

This doctrine allowing sovereign states absolute immunity from all activities whether governmental or commercial, was derived from public international law. But becasue of the increased involvement of states and its agencies in commercial activities and the ease with which sovereign state took cover under the doctrine, the theory of "restrictive sovereign immunity", was developed which confers limited immunity on states. Under this theory a state or its agency has immunity only for public or governmental acts,[27] and consequently where a sovereign or its agency enters into a pure commercial

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26. [1938] A. C. 485; [1938] 1 All E.R. 719.

27. See generally The United Kingdom State Immunity Act 1978, and the United States of America Foreign Sovereign Immunities Act 1976.

transaction it cannot invoke its own immunity. This issue came up for adjudication in the case of Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria.[28] In this case of the Central Bank of Nigeria (CBN) issued letters of credit for $14,280,000 in favour of the plaintiffs, a Swiss company, for the price of cement to be sold by the plaintiff to an English company which had a contract to supply cement to Nigerian Ministry of Defence. Because of seaport congestion, the plaintiff incurred demurrage. At the same time the government of Nigeria introdued various control measures including stoppage of delivery and payment. The plaintiffs therefore sued the CBN claiming demurrage, the price of the cement already shipped and damages for non-acceptance of the balance. The CBN then applied to set aside the writ on the ground that it (that is, CBN) was a department of the State of Nigeria and was therefore immune from the suit under the doctrine of sovereign immunity. The English Court of Appeal held that the CBN was not entitled to plead sovereign immunity. Lord Denning M.R in his judgment took time to review the history of the doctrine of sovereign immunity, distinguished between the "absolute immunity" and "restrictive immunity" and finally held while applying the restrictive immunity that:

> " ... It was suggested that the original contracts for cement were made by the Ministry of Defence of Nigeria, and that the cement was for the building of barracks for the army. On this account it was said that the contracts of purchase were acts of a governmental nature - jure imperrii - and not of a commercial nature - jure gestionis. They were like a contract of purchase of boots for the army. I do not think this should affect the question of immunity. If a government department goes into a market place of the world and buys boots or cement - as a commercial transaction - that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods"

He also pointed out that for absolute immunity to apply there must be proof that the CBN was either a foreign government or its department or anybody which can be regarded as the alter ego or organ of the government. After reviewing the instrument

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28. [1977] Q.B 529; [1977] 1 All E. R. 881. See also The Philippine Admiral [1977] A.C. 373; [1976] 2 W.L.R. 214. See also The Congreso Del Partido [1983] A.C. 244; [1983] 2 Lloyd's Rep. 171.

that created the CBN (the CBN is a legal entity) and its relationship with the government, he declared that the CBN was not a department of the government and was therefore not protected by absolute immunity.

6.17 It is in view of the serious nature of the legal problems mentioned and discussed above (that is, exact definition of transaction, choice of applicable law, arbitration provisions in leasing, and sovereign immunity) that some commercial men prefer to transact their international leasing business through their overseas subsidiaries[29] which tends to avoid some of the legal problems.

6.18 Even though leasing through overseas subsidiaries tends to remove some of the legal problems, it will be appreciated that only very few lessors have subsidiaries in the lessors' countries. This apart, the exact definition of a transaction and the extent of rights and obligations of the parties in a given legal system may not be clear due to lack of development of the law on the matter. It is against this background of legal difficulties that the Unidroit Convention was promulgated. Its main objective is basically to provide a framework of uniform rules governing the rights and liabilities of the parties to an international leasing transaction and their relationship with third parties.

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29. There could also be additional non-legal and less-serious reasons for avoiding cross-border method of transacting international leasing, for example currency exchange risks and withholding of tax.

Some Important Provisions Of The Unidroit Convention

6.19 It is necessary before concluding this Chapter to mention briefly some of the more important provisions of the Convention. The full text of the Convention is set out in Appendix 2.

1. The Convention applies only to international financial (finance) lease as opposed to operating leases and it is immaterial whether or not the lessee has or subsequently obtains the option to purchase the equipment. It does not apply to finance leasing transactions in which the leased equipment is to be used for the lessee's personal, family or household purposes - Article 1.

2. The Convention recognises the principle of freedom of contract. The Convention also allows parties to vary the effects of the non-mandatory provisions as well as permiting the participants to opt out of the Convention as long as there is a mutual agreement to that effect - Article 5.

3. The Convention provides that the applicable law, in the absence of an express provision in the agreement, shall be in accordance with the rules of private international law (also known as conflict of laws) - Article 6.

4. The Convention tries to settle what the applicable law in each case should be by reference to the nature of the equipment. It stipulates, for example, that the applicable law shall, except in cases of an aircraft and its engines, and ships, be the place where the goods are to be situated, which normally is the place of business of the lessee - Article 7.3 (d).

5. In cases of aircraft engines and other equipment that is usually moved from one locality to another, the same article provides that the applicable law shall be that

of the jurisdiction where the lessee has its principal place of business, which most times would be where the lessee would locate the equipment - Article 7.3 (c).

6. The Convention provides that for aircraft, the applicable law shall be the law of the state of registration pursuant to the Chicago Convention on International Civil Aviation of 7th December 1955 - Article 7.3 (b).

7. In the case of registered ships, it provides that the applicable law shall be the law of the state in which the ship is registered in the name of the owner. The sub-section clearly excludes a bareboat charterer[30] as an owner of a ship - Article 7.3 (a).

8. The Convention provides that the lessor's rights in the equipment are valid against the lessee's trustee in bankruptcy or other attaching or lien creditors. This is important for the lessor especially in a situation where the validity and enforcement of transaction in the lessee's jurisdiction is unclear or uncertain - Article 7.1 (b)

9. The Convention recognises the tri-partite nature of finance leasing transaction and also acknowledges that it is the lessee who selects the equipment from the supplier and that the lessor is merely brought in to purchase the equipment at the instance of the lessee. Pursuant to this, the Convention protects the lessor from liability from the quality of the equipment - Article 8.1 (a).

10. But in the same Article it goes on to state a proviso that "save to the extent that the lessee has suffered loss as a result of its reliance on the lessor's skill and judgment and of the lessor's intervention in the selection of the supplier or the

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30. Bareboat Charter (sometimes called Demised Charter-Party) is a charter-party under which the charterer puts his own stores, fuel, oil etc on board and hires the crew. Here the master of the vessel and the crew are the charterer's servants and possession and control of the vessel rests with him - See Mozley and Whitely Law Dictionary (1988) (Butterworths), p. 134.

specifications of the equipment". Most lessors are likely not to be comfortable with this rider. However, they would be glad to note, and in any case this is the position of the industry, that the effect of that rider may be varied so as to insulate the lessor from all liability arising from the equipment - Article 8.1 (a).

11. Again the same Article further provides that the lessor in his capacity as lessor is not liable to third parties for death, personal injury or damage to property caused by the equipment - Article 8.1 (b).

12. The Convention assures the lessee of the quiet possession against all adverse claims except those arising from the lessee's own act and omission. This effectively makes the lessor responsible for ensuring that there is no defect in the title of the equipment and by virtue of Article 5.2, this provision cannot be varied or derogated from by the parties - Article 8.2.

13. The Convention makes the lessee bound to take reasonable care of the equipment and to return same at the end of the lease unless he is exercising the right to purchase or to hold the equipment at a nominal rent. This Article recognises as a leasing transaction, an arrangement whereby a person who hires an equipment belonging to another for a consideration has (a) no option to purchase and (b) has an option to purchase - Article 9.

14. The Convention provides the lessee with a direct cause of action against the supplier for defects in the equipment or breaches in the supply agreement as if he is a party to the contract between supplier and lessor[31] - Article 10.

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31. This would appear to offend the doctrine of privity of contract. However, where there is an express warranty by the supplier to the lessee which warranty is intended to have contractual force, then a collateral contract can arise, on this point see the instructive case of Andrews v. Hopkinson [1957] 1 Q.B 229; [1956] 3 All E.R. 442.

15. The Convention confers on the lessee the right to reject the equipment if it is delivered late or does not conform to the specifications in the agreement. The lessee can also terminate the agreement in the event of the above stated events happening (that is late delivery and non-conformity of equipment) and in this regard withhold any rents payable and could also recover rents already paid in advance less a reasonable sum for any benefit the lessee may have derived from the equipment - Article 12.1 (a), 3, 4 etc. This provision causes some discomfort to bank lessors as in many cases money would have been paid to the seller/supplier before the equipment is delivered. But as a solution, most bank lessors in practice now insist on the supplier not being paid until the lessee has unconditionally accepted the equipment and a certificate of acceptance issued by the lessee in which he would clearly state that the equipment meets his specifications and is acceptable. In the alternative, the lessee may undertake that in the event of the transaction not going through as a result of his actions, he will be bound to reimburse the bank lessor all the expenses it may have incurred, including the purchase price of the equipment, in connection with the equipment.

16. The Convention allows the use of liquidated damages clauses in leases limited only by the provision that such damages should not be greater than "as will place the lessor in a position it would have been had the lessee performed the leasing agreement in accordance with its terms". Since most lessors use liquidated damages clauses to avoid the difficulties of having to prove actual damages, this is a welcome provision - Article 13.1 and 2 (b). The Article also recognises the use of accelerated payment as a vehicle for recovery of rentals provided the leasing agreement so permits and provided that they would not result in "damages substantially in excess of those which would place the lessor in a position it would have been in had the lessee performed its obligations under the contract".[32]

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32. But compare the courts decision in 1. Financing Ltd v. Baldock [1963] 2 Q.B 104; (1963) 1 All E. R. 443, and 2. Lombard North Central PLC v. Butterworth [1987] Q.B 527; [1987] 1 All E. R. 267. It would seem following the decisions in the two cases that unless the accelerated payments amounted to genuine pre-estimate of the lessor's losses, the provison's sub-section would if otherwise left within the jurisdiction of the English as well as Nigerian Courts, not be enforced - See Adams, op cit, p. 71.

17. Article 13 also goes further to provide that where the lessor has terminated the lease " ... it shall not be entitled to enforce a term of that agreement providing for acceleration of payment of future rentals, but the value of such rentals may be taken into account in computing damages ...". The parties, the Article also stipulates, " ... may not derogate from or vary the effect of the provisions of the present paragraph". This provision does certainly make lessors very uncomfortable as this sub-section appears to be a major check on their ability to terminate the leasing agreement - Article 13.4.

18. The Convention also indirectly places some responsibility on the lessor to ensure reasonable care is taken of the leased equipment, and not simply to fold his arms in the face of danger to the equipment and look forward to the damages he may claim - Article 13.6

6.20 Having discussed the Articles of the Convention considered important, it remains to commend the legal skill displayed by the experts in attempting to set up a legal framework for the international finance leasing operation. Whether or not the aims and objectives of the Convention will be achieved is a matter outside the scope of this work. But it may be of interest to note that the less developed or developing nations who either lack well developed laws on this commercial activity or have none at all, and who most times are the lessees and ipso facto the weaker bargaining party in the negotiation process, will welcome the Convention as it gives them some reasonable degree of equality and protection[33] in the transaction provided that they do not contract outside the coverage of the Convention. Similarly for the developed nations who are involved in international equipment leasing business, it may be a welcomed development because apart from the fact the "it moves towards the recognition of the legal

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33. See Adams, op cit p. 69, where he stated " ... its principal object is to remove legal impediments to international finance leasing of equipment, whilst maintaining a fair balance of interest between the parties to the transaction" (*emphasis mine*).

nature of leasing",[34] it will also boost international financial leasing having tried to remove the inequality between the parties.

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34. See the United Kingdom Equipment Leasing Association Annual Report 1990, p. 17.

CHAPTER SEVEN

LEGAL DOCUMENTATION OF EQUIPMENT LEASING

Need For Parties To Understand The Terms Of The Contract

7.01 In any given contract, it is highly desirable, if not mandatory that parties should make known and negotiate their often conflicting demands and expectations and express the resulting mutuality of understanding through as clear, cogent and unambiguous language as is feasible. An equipment leasing contract is not an exception and given the various leasing schemes in the market and their packaging flexibility, it is unlikely that one leasing transaction is going to be structured and consequently documented in the same way as another.[1] However, there are a number of features which are common to all types of leases and these are what I intend to discuss here.

7.02 Before proceeding to list and discuss the documents required, it is necessary to state the general procedure for booking leases. In Chapter 4, the factors which a prospective lessee would consider before requesting for a lease facility (discussed under the sub-heading - Lease or Buy Decision) and the issues the bank lessor would consider before approving or declining the lessee's request/application (discussed under the sub-heading - Information Necessary For Lessor To Determine Whether Or Not To Enter Into A Leasing Transaction) were fully discussed and need not be repeated here. Where therefore the bank lessor decides to approve and has approved the lessee's application, he would generally inform the lessee by means of an offer letter which would contain the key but minimum, terms or conditions of the contract. On receipt of this letter, the lessee is fully at liberty to accept or reject the offer within the stipulated

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1. Where the lessor and the lessee envisage that there would be series of leasing transactions up to an agreed limit, each of which will be on similar terms, it would be appropriate to enter into a Master Leasing Agreement.

period, if any. Where the lessee tries to introduce new terms or amend the terms of the offer, that would amount to a counter-offer,[2] which in law cancels the original offer by the lessor and leaves him (lessor) with the option to accept or reject the new terms now being made by the lessee. Thus in the (famous battle of forms) case of Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.,[3] where on 23rd May 1969, in response to an inquiry from the buyers, the sellers made an offer to sell a machine tool for £75,535, delivery ten months' forward. The seller's offer was made subject to certain terms one of which included a price variation clause which allowed for the goods to be charged at the price ruling on the delivery date. Four days later (27the May 1969) the buyers placed order but on their own terms which was materially different from the sellers and in particular made no provision for price variation. At the foot of the buyer's order there was a tear-off acknowledgement slip which stated "we accept your order on the terms and conditions stated theron". The sellers completed this form and returned it to the buyers on 5th of June 1969 with a covering letter saying that the buyers' order was being entered as per the sellers' quotation of 23rd May 1969. The machine was finally delivered and the sellers claimed a price variation which the buyers refused to pay. After reviewing the matter, the Court of Appeal found as a fact that the buyers' offer of 27th May 1969 was a counter-offer which destroyed the sellers' offer of 23rd May 1969 and that by the sellers completing the tear-off acknowledgment slip and returning it to the buyers on the 5th of June 1969 they had accepted the terms offered by the buyer, and so found in favour of the buyers.

7.03 It is only after the lessor's offer has been unconditionally accepted that the legal division of the bank lessor is then requested to prepare the lease agreement for signing by the parties. The offer letter (see Appendix 3 for a specimen of an offer letter) for

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2. See Peter Lind and Co. Ltd. v. Mersey Docks and Harbour Board (1972) 2 Lloyd's Rep. 235. See also Plastic Manufacturing Co. Ltd. v. Tower Aluminium (Nigeria) Ltd. [1973] N.C.L.R. 334.

3. [1979] 1 All E.R. 965; 121 Sol. Jo. 406, C.A. See also Hyde v. Wrench (1840) 3 Beav. 334.

an operating lease sometimes goes out together with an already prepared lease agreement and it is expressed to be subject to the provisions of the attached lease agreement (see Appendix 4 for a specimen of an operating lease agreement). The finance lease agreement (which is very similar to an operating lease but with some modifications and more elaborate) on the other hand, is not usually ready by the time the bank lessor sends out the offer letter, and consequently the offer letter is issued as a "provisional offer" or "temporary offer" subject to signing the lease agreement. By making the offer letter subject to the lease agreement, the provisions of the lease agreement will govern the contract and it is irrelevant that the lessee ignored or neglected to read it. Thus in the case of L'Estrange v. Graucob Ltd.[4] where a buyer sought to rely in her defence the fact that she did not read the clauses of an order form before signing it and that the clauses excluding warranties could not, in any case, be read because of the smallness of the print, the court while holding in favour of the sellers stated:

> " ... that as the buyer had signed the written contract and had not been induced to do so by any misrepresentation, it was wholly immaterial that she had not read it or did not know its contents ..."

But as was held in the case of Curtis v. Chemical Cleaning And Dyeing Co. Ltd.,[5] this would not be the case where there has been a misrepresentation to the hirer by or on the behalf of the owner whether innocently or otherwise, thus the court stated while finding the defendant liable that:

> " ... since the plaintiff had been induced to sign the document by an innocent misrepresentation as to the extent of the exception clauses, the exception never became part of the contract between the parties ...".

7.04 Incorporation of terms may also come about in the course of dealing as where parties have consistently contracted on certain terms, so that it may reasonably be assumed that the leasing transaction under consideration was intended to be governed

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4. [1934] 2 K.B. 394; [1934] All E.R. Rep. 16.

5. [1951] 1 K.B. 805; [1951] 1 All E.R. 631.

by the same terms.[6] Thus in the case of J. Spurling v. Bradshaw,[7] where the plaintiff habitually entrusted goods to the defendant who was a warehouseman. The defendant's practice was to send customers copies of the contract terms after receiving the goods. The court held that the repeated delivery of the terms to the plaintiff without objection on his part was sufficient to incorporate them into the contract.

7.05 Banks usually prefer to get involved in finance leases rather than operating leases though there are no legal prohibitions against them engaging in operating leases if they so wish. When the finance lease agreement is ready (see Appendix 5 for a specimen of a finance lease agreement) the lessor and the lessee and their lawyers, if any, would review the agreement and sign if found alright or amend as they may agree and subsequently sign.

7.06 The next step to take would be to inform the Inspectorate Division of the Federal Ministry of Industries in compliance with Industrial Inspectorate Act No.53 of 1970 which enjoins any person starting a new undertaking involving an expenditure of not less than twenty thousand naira to inform the office.

7.07 When all conditions in the offer letter have been met, the equipment can then be delivered to the lessee. In the case of an operating lease, the equipment is usually available and can be delivered immediately upon compliance with the conditions of the offer letter, or soon after. The very few banks who engage in operating lease usually insert in the offer letter a clause to the effect that the equipment can only be delivered "if it is available" in order to protect themselves. This is so because, as earlier shown,

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6. See Goode. R. M, Commercial Law (1982) (Penguin Books / Allen Lane) page 100. See also McCutcheon v. David Macbrayne Ltd. [1964] 1 All E.R. 430; [1964] 1 W.L.R 125. See also Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals [1971] 1 Q.B. 88; [1969] 3 All E.R. 1681.

7. [1956] 2 All E.R. 121; 100 Sol. Jo. 317.

the bank lessor is in law bound to deliver and therefore exposes itself to liability where it fails to deliver, or delivers late, where time is of the essence. In a finance lease, the lessor would at this stage request the supplier to deliver the equipment to the lessee. Some suppliers insist on payment for the equipment before delivery to the lessee while some would be prepared to receive payment after delivery. Where the supplier insists on payment for the equipment before delivery, the bank lessor would, as part of its protection ask the lessee to give it an undertaking that should the transaction fail to go through as a result of lessee's action or omission, it (bank lessor) would be reimbursed all expenses incurred, including the cost of the equipment, plus interest at a certain percentage. Where on the other hand the suppliers would be willing to receive payment after delivery, the bank lessor, would usually ask for and obtain from the lessee a certificate of acceptance of the equipment which would also state that the equipment is in perfect condition expected of it, before payment is then made to the supplier. This is also aimed at protecting the bank lessor from possible claims by the lessee, for example, if the equipment is not fit for the purpose for which it was leased.

Documents Needed For Documentation

7.08 The documents generally needed for documentation in a finance lease would include:[8]

1. A lease agreement which reflects the understanding of the parties (a Master Leasing Agreement is advisable where a series of similar leases on the same terms is being contemplated).

2. A renewal/sale option.

3. A delivery receipt/certificate of acceptance of delivery in good condition.

4. A purchase order.

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8. Operating leasing documentation as previously stated is usually in a standard form and does not require the above listed documents unless it is structured to look like a finance lease.

5. A waiver by the landlord of real property (or mortgagee) where the equipment is to be attached to real property.

6. Evidence of insurance.

7. A guaranty.

8. Tax indemnification.

9. State's Sales/Use Tax Exemption Certificate.

10. Corporate resolution where lessee is a corporate body.

11. Counsel's (lawyer's) opinion letter.

12. An interim lease.

13. Application/Request to lease

14. Commitment letter.

Having listed the numerous documents for full documentation, I shall now proceed to explain their purposes.

1. The Lease Agreement

7.09 This document contains the comprehensive terms of the leasing agreement between the lessor and the lessee and in the case of Master Leasing Agreement, it sets out further the governing terms for all subsequent equipment. It would generally make provision for: the offer; the commencement of the lease and duration; payment of rent; title/ownership of the equipment; certificate of acceptance/delivery receipt; loss/damage of equipment; events amounting to default by lessee; return of equipment; termination of the lease; exclusion of conditions and warranties; notices; jurisdiction and applicable law; use of equipment; maintenance/repairs; risk of loss; insurance and taxes; assignment of equipment/sub-leasing; alteration and additions to the equipment; identification and inspection of equipment; late changes; indemnification by lessee; schedule containing specific details; etc.

2. Renewal/Sale Option

7.10 This document basically provides the terms under which the renewal of the lease can take place or where sale is intended the terms of the sale. It must be pointed out here that the sale envisaged in this context is one which would take place after the lease period. Where the lessor does not intend to sell the equipment and desires still to leave the lessee in possession of the equipment, a renewal of the lease for a long period at peppercorn rent may be entered into. As I already pointed out, where the bank lessor intends to sell the equipment to the lessee at the end of the lease duration, it is not advisable to state so in the lease agreement otherwise it may be argued that it was never intended to be a lease. The lessee may be told in a separate letter that if and when the bank lessor decides to sell the equipment he would be given the first option. The current practice in the industry in which the lessors sell to a third party (who may in fact be nominated by the lessee) and who in turn sells to the lessee is the safest course.

3. A Delivery Receipt/Certificate of Acceptance of Delivery In Good Condition

7.11 This is a very important document which the lessee is expected to sign after the equipment has been delivered, installed and tested, certifying that the equipment is in a good working condition. The signing of the document also is taken as an admission that the lessor has satisfactorily performed all his duties under the lease agreement and that he can pay the supplier (that is where the supplier is willing to receive payment after delivery). It is highly desirable that the bank lessor must have in its possession a duly signed certificate of delivery and acceptance in good condition before paying the supplier of the equipment.

4. A Purchase Order

7.12 A purchase order should include all the customary information needed by the supplier, such as quantity, equipment description, model number, serial number, place of shipment etc.

7.13 The document should also inter alia state clearly that invoices will not be paid unless the bank lessor has received the following: the full description and price of the equipment; acceptance of the equipment by lessee; proof of payment by the lessee of all transportation, installation, insurance and incidental charges including any taxes which may be due. However, the lessee may negotiate to include all these costs in the total costs. The documentation should also contain a statement in writing that the lessor has no liability for any defect in the equipment chosen by the lessee; a statement in writing that the lessor is not the manufacturer or agent of the manufacturer; the supplier's warranty that title shall pass free and clear of all encumbrances and that all warranties are fully enforceable by the bank lessor or the lessee acting on behalf of the bank lessor; the supplier's warranty that the equipment is free from any defects and conforms to all specifications required etc.

5. Waiver By Landlord (Or Mortgagee) of Real Property

7.14 Where the equipment is to be installed in another person's premises, it is essential for the protection of the equipment that the landlord's or landowner's consent or approval is sought and obtained preferably in writing. By the landlord signing a document to this effect he agrees and acknowledges that the subject equipment may be installed on his premises and that the equipment will not be subject to any claim for rent or liable for any lien, interest or right of claim. Where the equipment is to be installed in a mortgaged premises, a waiver from the mortgagee would be required instead.

6. Evidence of Insurance

7.15 The lease equipment must be insured and by an insurance company acceptable to the bank lessor. The insurance letter would usually state the type of insurance required. It would also state that the bank lessor should be the beneficiary (that is loss payee); the amount the equipment is insured for; notice as to the cancellation of the insurance etc. It is the responsibility of the lessee to insure the leased equipment and furnish the bank lessor with evidence of insurance usually by means of an insurance certificate and policy.[9]

7. Guaranty (Optional)

7.16 This document is, where required by the lessor, expected to be signed and duly stamped by a third party called the guarantor stating essentially that he would be answerable for the debt/liability which arises from the leasing transaction where the lessee (who is the principal debtor) fails. It may be necessary to point out that the bank lessor is enjoined first to make its claim against the lessee in case of any claim arising before resorting to the guarantor. Where the lessee is a corporate body it is advisable to obtain a guaranty from all the directors in their personal capacities.

8. Tax Indemnification

7.17 It is obvious that the most beneficial aspect of leasing to both the bank lessor and the lessee is the tax benefits derivable. It is equally clear that those tax benefits are severely curtailed if the lease ends before the original term agreed upon and the equipment has to be disposed of or if the equipment has been previously used. Thus if an equipment lease were to terminate earlier than anticipated because of improper use by the lessee, for example where the equipment has become obsolete, naturally the

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9. See Chapter 8 for a detailed discussion on equipment leasing insurance.

lessor's yield would fall substantially. It is because of this type of situation that a tax indemnification agreement is entered into to protect the lessor.

7.18 Some tax indemnification agreements are complex and range from very restrictive to very liberal. The most stringent agreements would want the lessee to indemnify the lessor against any possible event which could affect negatively the tax portion of the yield. For example the lessee may be enjoined to compensate the bank lessor in case there is any change in the effective tax rate.

9. State's Sales/Use Tax Certificate

7.19 Where a particular state's law exempts the leased equipment from the state's or other sales taxes, the bank lessor should receive a statement to that effect. On the other hand, where there is no such exemption it is advisable that the lease agreement should provide clearly that the lessee should be responsible for the sales (or use) taxes and where the bank lessor carries out this function (like in the payment of insurance premium or any other expense expected of lessee) he should be fully reimbursed by the lessee.

10. Corporate Resolution (Where Lessee Is A Corporate Body)

7.20 This document identifies the authority under which the corporate body, for example, a limited liability company, enters into a lease transaction. It should list the names, titles and signatures of all persons authorized by the board of directors (or any other legally equivalent authority by whatever name called) to enter into the lease agreement. It should be executed under seal by the company secretary and one director or two directors or one director and any other official or person appointed by the board of directors to sign under seal.

11. Counsel's (lawyer's) Opinion

7.21 This document is required to be signed either jointly or severally by both the bank lessor's and the lessee's lawyers affirming the legality and enforceability of the lease transaction or agreement.

12. Interim Lease

7.22 This document is used when the leased equipment consists of several items requiring payment to different suppliers at different times. It is also used in leasing large equipment for whose construction the supplier requires progress payments. In both cases, the bank lessor is expected to make payments over an extended period of time and therefore needs a document laying out the method of compensation for these interim payments. The interim lease should also refer to the terms, conditions and date of the master lease agreement. It should also contain the following information: the provision for the maximum length of time for the interim lease status; the indemnification of the bank lessor against any action arising from such partial disbursement of funds; the daily rental factor to be applied against the outstanding balance as disbursements are made; etc.

13. Application/Request To Lease

7.23 In order for a prospective lessee to get a bank to be a lessor, it is customary for him to put up an application/request to lease. The lease application is not radically different from a typical loan or overdraft application, except that the lease application is tailored towards financing equipment.

7.24 The lease application should contain the following information: the full legal names and address of the prospective lessee; the full legal names and address of the guarantors; the full description of the equipment to be leased; the total selling price

plus or less any other charges or credits and the net price to be paid to the supplier; the location of the equipment, including city, state and country; terms of payment including the lease term, the amount of each lease payment, the amount of sales/use tax, the payment interval (monthly, quarterly etc), the number of payments, deposit or advance payment, the security deposit (if any); the legal status of the lessee, that is, whether a corporate body, partnership, sale-proprietorship or organ of the state or federal government.

14. Commitment Letter

7.25 The object of this document is to intimate to the lessee the likely major terms of the proposed lease transaction. The bank lessor normally sends the document after receiving and reviewing the lessee's complete financial information. This document, if utilized, precedes final documentation, and may or may not be subject to the lessor's credit approval. The letter, unlike an offer letter can be commented upon or amended by the lessee and returned to the bank lessor for a review. The letter helps in two major ways, firstly it expediates the packaging of the transaction and secondly it aids the lessee in comparing other types of financing or other bank lessors.

7.26 It generally contains the following information: the commitment fee (that is a fee required by the bank lessor, at the time a proposal or commitment is accepted by the lessee to lock in a specific lease rate and/or lease terms); the identification of the participants (that is lessor and lessee and supplier, if any); description of equipment; cost of equipment; date of delivery of equipment; explanation of the terms of payment; explanation of the mutually agreed purchase price (this may be expressed as a percentage of the original cost or as a "fair market value"); statement as to the renewal or sale (after lease) terms; explanation as to circumstances under which the commitment fee may or may not be refundable; explanation as to the exact nature of the transaction (that is whether it is a finance lease or an operating lease); the length of time the quotation

for the lease shall be held open; statement as to whose documentation should be used (usually that of the bank lessor). The letter would have adequate space at the end for the lessee to append his signature or authority for approval. The signing of the document is taken as an indication of the lessee's agreement to the terms / conditions specified in the commitment letter.

7.27 It must, however, be pointed out that in a leverage lease, additional documents will be needed. These include a trust agreement, a trust receipt, assignment agreement, security agreement, and the lessor's counsel's opinion letter. The documents would vary, depending on how the transaction is funded and the nature of the equipment involved. It is important to note that these additional documents required in a leveraged lease are exchanged between the bank lessor and the lender and that the lessee is not involved.

7.28 In a sale and lease-back transaction, the documentation is the same as in a normal leasing transaction, except that the lessee must deliver to the bank lessor an appraisal of the equipment (that is a complete valuation of the equipment by a competent and qualified person acceptable to the bank lessor), sale agreement for the equipment, and an affidavit of transfer of physical possession of the equipment.

7.29 As earlier shown, master leasing agreements are only useful for documentation when the bank lessor and the lessee expect that there will be a regular series of equipment leasing transactions. The master leasing agreements therefore set out the standard terms by which specific leasing transactions subsequently entered into are to be governed. It is facultative and consequently there is no obligation on either the bank lessor or the lessee to enter into future leasing transactions. As Professor Goode asserts, and I perfectly agree with him that:

> "... despite the signature by both parties the master leasing agreement does not as a rule have the status of a binding contract at the very time

> it is made. It is merely a set of terms subsequently incorporated into specific transactions, usually by signature of leasing schedules identifying the equipment to be purchased, the price and the rentals"[9]

Where therefore the lessee does not intend to use the bank lessor more than once or on regular basis, a single equipment leasing agreement would be most appropriate.

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9. Goode, op cit, p. 836.

CHAPTER EIGHT

LEGAL ASPECTS OF EQUIPMENT LEASING INSURANCE

Is There Any Statutory Requirement To Insure Leased Equipment In Nigeria?

8.01 There is no specific statutory obligation in Nigeria on the part of both the bank lessor or the lessee to insure the leased equipment. However, there is virtually no leasing transaction in which the equipment is not insured. The type of insurance protection to be taken out and the value depend largely on the parties, the nature of the equipment and the legislative provision, if any.

8.02 In the unlikely event that there is no insurance of the leased equipment and during the currency of the lease there is a total loss[1] of the leased equipment, the lease agreement generally terminates and the lessee is consequently enjoined to make a lump sum terminal value, or loss value, payment to the bank lessor. This obligation would be inherited by an insurance company and the lessee therefore discharged if there is an insurance policy covering the equipment against such occurrence, but the value of the insurance liability would generally be limited to the value for which the equipment was insured unless there is a further agreement between the parties to the insurance contract.[2] It should, however, be pointed out that in a circumstance where the insurance proceeds received by the bank lessor are not sufficient to cover the terminal value or the stipulated loss value, the lessee is bound to make up the difference.

8.03 Though there is no statutory requirement to insure leased equipment, it ought to be noted that sometimes the law requires that certain types of assets must not be

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1. The term "total loss" is used to describe all situations where the equipment has either been lost, or irrepairably damaged or incapable of use.

2. See "umbrella insurance" discussed later in this chapter.

operated or used without insurance protection, and so if those assets are to be subject of an equipment leasing transaction, then it invariably means that they have to be insured. By way of example, section 3 of the Nigerian Insurance Act 1976[3] enjoins the owner of a motor vehicle to be used on a highway to insure it, violation of which exposes him to liability.[4] The bank lessor may be able to avoid this liability by inserting a provision in the leasing agreement prohibiting the lessee from using the vehicle (or equipment) without necessary insurance cover which complies with the statutory requirement. If the lessee therefore uses the vehicle (or equipment) in disregard to this provision, he alone would most probably be liable.

8.04 Having seen that the industrial practice is to insure all leased equipment and that neither the bank lessor nor the lessee has any obligation to insure, the question then is: whose responsibility is it to insure and what type of contingencies does he insure against? In answering this question and for the purpose of convenience, one would want to handle the issue under two separate sub-headings namely:

1. responsibility to insure; and
2. leasing contingencies (risks) that generally require insurance protection.

I shall now proceed to discuss them briefly.

1. Responsibility To Insure

8.05 Generally most leasing agreements impose the responsibility of the insurance of the leased equipment or its renewal on the lessee though with a proviso to the effect

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3. By virtue of s. 3 of the Nigerian Insurance Act 1976, the owner of a motor vehicle has an obligation not "to use or cause or permit any person to use" motor vehicle on a highway unless there is a policy of insurance issued by an approved insurer. Section 2 of the said Act defines "highway" to mean a roadway to which the public has access.

4. Ibid, s. 3 (2). In the Australian case of Broad v. Parish [1941] C.L.R 588, the owner of a motor vehicle was held liable to pay damages awarded against a hirer who used a motor vehicle which was on hire-purchase without necessary insurance policy.

that where the lessee fails to do so, the bank lessor would carry out that duty and ask for reimbursement from the lessee or claim damages or even terminate the agreement (where the provision is a condition of the contract as opposed to a warranty). An issue that arises from this is: can the lessee insure the equipment in his name not being the owner of the equipment? It is trite law that what is legally required for a contract of insurance to be valid and enforceable is that the insured must have an insurable interest identifiable in the subject matter of the insurance. The term "insurable interest"[5] has been variously defined, but generally it is a term used to "describe the legal or equitable relationship in which the insured stands to the subject-matter insured in consequence of which he may benefit, by its safety or be prejudiced by its loss".[6] From the above definition, it is clear that even though legally the lessee is not the owner of the leased equipment he has in law an insurable interest as "he may benefit by its safety or be prejudiced by its loss". In fact Professor Goode succiently puts it his way:

> "The hirer, by virtue of his right to enjoyment of possession, his proprietary interest in the goods and his prospective liability to the owner for the loss or damage, is regarded as having an insurable interest...".[7]

If therefore a hirer or lessee as well as the owner or lessor has insurable interest in the leased equipment, and if what the law requires for a contract of insurance to be valid and enforceable is for the party to have an insurable interest, then a hirer or lessee can

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5. In the case of Lucena v. Craufurd (1806) 2 Bos & P.N.R 269, cited in the Casebook On Insurance Law, by E.R. Hardy Ivamy (1977) (Butterworths) page 1, "a person has an insurable interest in a thing if he will be prejudiced by its loss". See also generally E.R. Hardy Ivamy, General Principles of Insurance Law, (1986) (Butterworths) pp. 19 - 20. Again see MacGillivray & Parkington, Insurance Law, (1975) (Sweet & Maxwell), p. 39, where the term was defined as "where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognised by law or in any legal liability, there is an insurable interest in the happening of that event to the extent of the possible loss or liability".

6. Mozley And Whiteley, Law Dictionary, (1988) (Butterworths), p. 242.

7. Goode R.M, Hire-Purchase Law And Practice, (1970) (Butterworths) pp. 789 - 790.

insure the leased equipment in his name or in the name of the owner since the owner also has insurable interest or in the joint names of himself and the owner, or in his own name for the benefit of the owner (that is the owner being the beneficiary). The owner can also insure in his name for the beneficial interest of the lessee (though this is not usually the case).

8.06 It is a common practice by bank lessors in Nigeria to request that the leased equipment should be insured for an amount greater than the stipulated loss value[8] or replacement (market) value of the equipment, this is so to enable the bank lessor to be able to recover the unamortized cost at the date of the loss of the equipment. There is nothing basically wrong with this except that the lessee may have to pay higher premiums. A lessee is, however, entitled to resist this request although he might be wiser to agree to it as a matter of prudence. In the event that the leased equipment has to be replaced, it is important to note that the lessee or the insurer, as the case may be, is not required to replace the leased equipment as new but rather the replacement cost of an equipment of the same type, age and value as the one lost.

8.07 In a situation where the lessee insures the leased equipment in his name, the bank lessor must ensure that his interest is original and not derivative and this can be achieved by ensuring that he (bank lessor) is named in the insurance contract as either a joint insured or additional insured with the lessee. This way the insurance policy cannot be discharged as far as the bank lessor's interest is concerned without his knowledge and approval. Alternatively the lessee may assign all the insurance policies to the bank lessor. This approach may not necessarily protect the bank/lessor if notice is not given to the insurance company to this effect and the insurance company's approval by way of appropriate endorsement obtained. The third and most common option is for the

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8. The stipulated amount is most commonly determined by discounting future rentals at a specified rate. Alternatively, a schedule of amounts or percentages of total cost applying or percentages of total cost applying at each stage of the primary lease period is appended to the lease.

lessee to insure in his name, while the interest of the bank lessor is noted as a beneficiary or loss payee. As Professor Adams has rightly pointed out:

> "merely noting the interest of the lessor on the policy would appear to have no legal effect. In order to be absolutely safe, the policy shall be effected in the names of both parties with a proviso that moneys received under policy be paid directly to the lessor".[9]

It is rather curious that this option is the most common despite its legal weakness. Most bank lessors asked why they prefer this option could not give any satisfactory reply. What one gets generally as an answer is, "this is the way we have been doing it". It is gratifying though to note that some of the bank lessors who have realised the weakness of such an option as opposed to the other two alternatives have started amending their insurance clauses in the lease agreement.

8.08 It would appear unwise to allow the lessee to insure the equipment in his own name alone as in law he alone can claim on the policy leaving the bank lessor only with the claim of indemnity provided indemnity is provided for in the lease agreement.[10] Professor Adams has therefore cautioned that this may be dangerous as the lessee may go bankrupt before he hands over the insurance proceeds to the lessor and where this happens the lessor would be left ranking in this respect with other unsecured creditors.[11] Though this situation would make the bank lessor very uncomfortable, the situation is not all together a hopeless one as most equipment leasing agreements usually provide for the protection of the bank lessor in the event of the insolvency or

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9. Adams, J.N, Commercial Hiring And Leasing (1989) (Butterworths) p. 63.

10. Ibid.

11. Ibid. Except that section 1 of this English Third Parties (Rights Against Insurers) Act 1930, not applicable to Nigeria, provides that in the event of the insured's insolvency, any rights he may have against his insurers in respect of liability incurred to the lessor or other third party become vested in the party to whom such liability was incurred. This provision is quite commendable as it protects the bank lessor.

bankruptcy of the lessee.[12] Apart from the usual provisions in the lease agreement on insolvency or bankruptcy, in favour of the bank lessor, an insurance cover can also, at a price, be taken to cover such contingency.

8.09 Where the bank lessor insures the equipment in his own name alone (even though the lessee pays the premium and, as earlier seen, has insurable interest) he alone can claim on the policy for loss or damage. But where the bank lessor insures in its own name and effectively insures for the lessee as well (that is by way of either joint or additional insured) both of them by virtue of the nature of the insurance contract can claim directly from the insurance company to the extent of their respective interests or exposures.

8.10 The extent of the bank lessor's exposure in the event of a total loss or destruction of the equipment "is the full value of the goods less the value (if any) to be attributed to the hirer's right to possession..."[13] which is generally measured by the stipulated loss value or termination value which the lessee is required to pay upon the occurence of a total loss. To avoid disputes as to how the insurance money should be paid or shared in the event of a total loss, it is advisable that a "loss payable" clause should be endorsed on the policy stating clearly how the proceeds should be paid and who should first be paid (generally the bank lessor gets paid first since in relation to it what is involved primarily is the recovery of its investment from the insurance proceeds).

8.11 It is equally a good idea to provide in the insurance clause that the lessee should in the event of a total loss pay over immediately or within a reasonable time (say

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12. This topic had earlier been treated generally in Chapter 5 under the sub-heading "Insolvency / Bankruptcy of the Lessee". See also generally Appendix 2, Article 7 of the Unidroit Convention On International Financial Leasing.

13. Goode, op cit, p. 892. This is unlike the owner's interest in a hire-purchase transaction where he is merely entitled to the unpaid balance of the hire-purchase price.

maximum of sixty days) the stipulated loss value or termination value, and that the balance of the insurance proceeds when received after payment in full of the stipulated loss value or termination value will be paid over to the lessee. This is basically aimed at avoiding the very long delays experienced with insurance claims in Nigeria which today tends to make people feel that the insurance business is a sham. If this type of provision is in the insurance clause of the lease agreement, the bank lessor would be bound to pay over to the lessee the insurance proceeds as it is effectively a trustee for the lessee in respect of the insurance proceeds. In the alternative, the lessee on full payment of the stipulated loss value or termination value, may with the consent of the insurer be assigned the bank lessor's interest in the insurance money directly, in which case the money is paid to him (that is the lessee).

8.12 Similarly, where equipment is insured for an amount greater than the stipulated loss value or termination value and a total loss occurs, the bank lessor is enjoined on receiving the insurance proceeds to appropriate only the full value of its interest or exposure, the excess it must pay over to the lessee.

8.13 In a situation other than a total loss, for example repairable damage, the general provision, especially in a finance lease, is that the lessee shall be responsible for the repairs. Where therefore there is insurance against this type of risk, the insurer is bound to repair the damage. But in practice, because of the delays by insurers, it is usually agreed, and it does in fact make a lot of sense, that the lessee should immediately repair the damage and then claim the insurance proceeds which are usually paid directly to the bank lessor unless there is an arrangement contrary to this. Under this situation the bank lessor is bound to pay over the proceeds to the lessee, provided it is satisfied that its equipment has been repaired, or the damaged part of the equipment replaced with a suitable one.

2. Leasing Contingencies (Risks) That Generally Require Insurance Protection.

8.14 Equipment leasing offer letters usually state contingencies to be insured against during the period of the lease and, as I earlier pointed out, there are no hard and fast rules on this. It is more often than not a matter of negotiation between the parties taking into consideration the nature of the equipment and the statutory regulations, if any. No matter what type of risk is to be covered, the bank lessor should ensure that there are enough safeguards in the policy to protect against the invalidation of the insurance contact. It is for example highly desirable to include in the policy that notice of any alteration in the terms of, or cancellation of the policy must be given to the bank lessor. This is to enable the bank lessor to have the opportunity of knowing the state of affairs of the contract of insurance at any given time. For example where the bank lessor is unaware that the lessee has not paid the premium, or renewed the policy, and the damage insured against occurs after the policy has been cancelled or lapsed, the bank lessor loses out.

8.15 Insurance companies can also justifiably deny liability even where the bank lessor has an original, as opposed to derivative, interest in the insurance contract. This happens when the lessee has breached a condition (warranty) of the insurance such as using the leased equipment for an illegal purpose, or employing unqualified personnel to handle the equipment or stating incorrect information/facts or inaccurately completing the forms. To guard against this, it is advisable for the bank lessor to have a breach of condition (generally referred to as a breach of warranty) endorsement in his favour on the policy, so that no breach other than its own (bank lessor) would invalidate the policy.

8.16 The name of the insurer or insurance company is not usually known by the parties at the stage of signing the lease agreement and usually the relevant clause only makes provision to the effect that the equipment can only be insured by an insurer acceptable to the bank lessor. The fact that a particular insurer insured the equipment for a given period does not mean that it cannot be changed if the bank lessor so desires, but it is

only fair that he should take into consideration the financial impact on the lessee. Where for example the lessee has a car fleet insurance policy with an insurance company, it would be more economical for him on leasing cars from the bank lessor to include the leased cars in the existing fleet policy. But the bank lessor must ensure that in allowing this, the leased cars must be seperately insured and that it is named as joint or additional insured or loss payee on the policy in respect of the cars.

8.17 It is sometimes observed that big companies who lease assets insist on their subsiduary insurance companies insuring the leased equipment. This is primarily aimed at reducing the cost of the insurance they would have to bear if they are to insure with other insurance companies. This type of insurance amounts to self-insurance, even if the captive subsidiary arranges a re-insurance contract since in any case the re-insurer would generally accept the liability to reimburse the insurer (that is the captive insurance subsidiary). But a solution can be found if the bank lessor wishes to accept the captive insurance subsidiary. This could be done by obtaining an undertaking from the re-insurer that in the event of any of the risks insurred against occuring, they would pay the money directly to the bank lessor, who of course would have been named as either a joint or additional or loss payee in the re-insurance contract.

8.18 The risks normally insured against in respect of leased equipment include:

(a) loss/damage to equipment

(b) breakdown of equipment/business interruption

(c) premature termination of lease

(d) liability to third parties/workmen's compensation

(e) seizure of equipment by prior charge/insolvency of the lessee

(f) other areas necessary for fuller protection.

I shall now proceed to discuss them briefly.

(a) Loss/Damage To Equipment

8.19 As previously shown, equipment leasing agreements generally provide that in the event of a total loss occuring the lessee will have the responsibility of paying the stipulated loss value or termination value of the equipment to the bank lessor. This obligation the insurer will bear if the equipment is insured. Some agreements further provide that such a total loss or damage shall not affect the continuance of the lease or the lessee's liability for the payment of the rentals. The ordinary effects of this for the lessee are that not only will he have to pay the bank lessor the value of the equipment (less any depreciation in value) but also he would have to pay the bank lessor the total value of the rentals that would have accrued but for the loss or destruction of the equipment.[14] This type of "Hell or High Water" provision was discussed in Chapter 5 under the sub-heading "Payment of Rentals". Even though such a provision would seem unfair, the bank's peculiar position ought to be fully appreciated. It is in business primarily to recoup its investment together with a reasonable profit. It is not rendering a social service. Consequently if what the bank lessor gets in the event of destruction or loss of its equipment is the depreciated value of the equipment it loses the expected profit (by way of the rentals) on its investment. It is for this reason therefore that it is necessary to ensure that there is insurance protection for this type of contingency. The policy should cover loss or destruction by fire, accident, theft and other risks usually covered by insurance in the type of business for which the equipment is being used. It must be noted that the insurer cannot be liable for a risk not covered.

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14. Except that this would not be enforced by the courts if the leasing contract is frustrated, for example, if lost or destroyed without any negligence on the part of the lessee. See Salami v. Bentworth Finance Nigeria Ltd. (1968) ALR Comm. 304. See also Bentworth Finance Nigeria Ltd v. Alhaji Sani Bakori Suit no. NCH/46/1971 Kaduna High Court Unreported Judgment dated 12/02/73. See again Cricklewood Property v. Leighton's Trust, [1945] A. C. 221 at p.228; [1945] 1 All E.R. 252.

8.20 Where the lease agreement does not make provision for an indemnity by the lessee in the event of a loss or destruction, or where the agreement does not impose any obligation for the continued payment of the rental in the event of loss or destruction, it would be judicious for the bank lessor to ensure that there is insurance protection against loss of rental income in its favour.

(b) Breakdown Of Equipment/Business Interruption.

8.21 In the event of a breakdown of the leased equipment the lessee is generally bound by the provisions of the lease to repair the equipment at his own expense except in an operating lease where it is the obligation of the bank lessor. The practical consequences for the lessee in this regard can be quite unfortunate. This is because apart from the costs of repairing the equipment, he may also sustain great financial losses during the period of the breakdown as his business activity is interrupted.

8.22 Where the breakdown is caused by a defect in the equipment the lessee might be able to claim from the manufacturer/supplier based on their warranty, if any, and provided that there exists a collateral contract between the manufacturer/supplier and the lessee.[15] In practice, however, the sale contract is usually between the manufacturer/supplier on the one hand and the bank lessor on the other, which means that there is no privity of contract between the manufacturer/supplier and the lessee. As a way of solving the problems posed by the doctrine of privity of contract, the bank lessor and the lessee with the approval of the manufacturer/supplier can insert a provision in the sale contract, as well as in the lease agreement, to the effect that the lessee can either claim on the warranty through the bank lessor (who usually accepts no liability for any defects in equipment) or claim directly from the manufacturer/supplier. In the alternative, and this is the most common industry practice, the bank lessor assigns the manufacturer's warranty to the lessee with the knowledge and approval of the manufacturer/supplier who, in any case, is very much aware that what is involved is a leasing

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15. Andrew v. Hopkinson [1957] 1 Q.B. 229; [1956] 3 All E.R. 422.

transaction as the lessee in most cases would have made contact with him before inviting the financier (bank lessor) to purchase the equipment. Even where the lessee can claim based on the manufacturer's warranty the benefits would generally not fully compensate him for the repairs or replaced parts of the equipment, loss of finance during the period of the breakdown and rentals he is also bound to pay to the bank lessor (as usually breakdown of equipment would not exonerate the lessee from his obligation on rental payments). It is for this reasons therefore that it is most advisable for lessee to insure against this risk.

8.23 Business interruption protection, though very beneficial to the lessee, is also a very sensible business practice for the bank lessor as well. This is especially so if the lessee is a particularly poor credit risk or when the equipment is to be used in pure project financing. The proceeds of that insurance are the only means of ensuring the lessee's cash-flow in the event of disabling damage to the equipment.

(c) Premature Termination Of The Leasing Contract

8.24 Sometimes the leasing agreement provides for a voluntary termination of the agreement by the lessee by notice, and upon payment of an agreed sum of money (this matter was fully discussed in Chapter 5 under the sub-heading "Provision For The Termination Of Contract And Return of Equipment". Usually under this arrangement no disputes will arise as the bank lessor and the lessee will have agreed on the amount of the termination payment.

8.25 But it is equally observed that most leasing agreements provide that in the event that the bank lessor suffers any loss as a result of being unable to re-lease or re-let the equipment following the premature termination of the contract, the lessee will be liable to pay the bank lessor the full amount of the rentals under the lease, or that the bank lessor should be entitled to recover to the full extent any loss suffered as a result of such premature termination. The effect of this, prima facie, is that where the lessee for any

reason does terminate the lease prematurely, he will be liable to pay compensation to the bank lessor. However, as already shown (in Chapter 5 particularly under the sub-heading "Penalty or Genuine Pre-estimate") where such a provision amounts to a penalty rather than a genuine pre-estimate of loss, the courts are likely to refuse its enforcement,[16] but, if it is a fair estimate of actual loss sustained then it is enforceable as a genuine pre-estimate of loss.[17] The line of distinction between a penalty clause and a genuine pre-estimate is sometimes blurred and consequently where a bank lessor is unlucky with his calculations and/or drafting of the clause resulting in the court's interpreting the provision as a penalty, he stands the risk of the provision not being enforced. To guard against this event the bank lessor would be wiser to have in place an insurance policy to cover such contingency. On the part of the lessee such an insurance policy is also a reasonable one as he would be protected in the event that, for circumstances beyond his control, he has to terminate the lease agreement prematurely and may be liable to paying damages where the courts interpret the provision as enforceable.

(d) Liability To Third Parties/Workmen's Compensation.

8.26 The leased equipment may by its nature be such that there is a likelihood of its causing injury or damage to third parties and their property, or to the workmen employed by the lessee. The lessee may be held liable where there is an injury or damage to a third party within his premises under the doctrine of occupier's liability, or an injury to one of his workmen under the Workmen's Compensation Decree,[18] and

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16. Bridge v. Campbell Discount Co. Ltd. [1962] A.C. 600; [1962] 1 All E.R. 385. See also Amusan v. Bentworth Finance Nigeria Ltd. [1965] 1 All NLR 382.

17. Robophone Facilities Ltd. v. Blank [1966] 3 All E.R. 128; 110 Sol. Jo. 544, C.A.

18. Workmen's Compensation Decree (No.17) of 1987. This is the statute that governs the issue of payment of compensation for industrial injury sustained by a workman while carrying out his contractual obligations. The Decree repealed and replaced the Workmen's Compensation Act 1942 whose remote ancestor was the Workmen's Compensation Act 1897 - once a statute of general application. The type of risk generally insured under this Decree is personal injury by accident arising out of and in the course of employment caused to the workman or incapacity certified as caused by any disease specified provided the disease so specified was a personal injury by accident arising out of and in the course of employment.

consequently it would be prudent for him to insure against such contingency. For the Decree, however, to be applicable, it must be shown that (a) the injury was not due to the workman's negligence; and (b) that the injury was in the cause of his employment. Thus in case of U.A.C. Ltd. v. Joseph Orekyen[19] an employee of the company was placed in charge of a petrol station which the company operated. One morning while he was checking the overnight sales in the sales room of the station a stranger walked in and asked for change for a one-pound note. The stranger was told by one of the petrol attendants that there was no change. The stranger, enraged by the reply, attempted to pick a fight with the attendant. Mr. Orekyen intervened and took a position between them in order to prevent the fight, but in the struggle between the attendant and the stranger, the stranger struck Mr. Orekyen in the eye which he eventually lost. In an action for compensation under the workmen's compensation, the lower court held that Mr. Orekyen was entitled to it. But U.A.C. appealed on the ground that the workman (that is the plaintiff/respondent) was not acting in the course of his employment when the injury occured. In dismissing the appeal De Lestang C.J, held that when an officer is put in charge of an office by his employer it is part of his duty to maintain order in that office and to protect his subordinates in the course of his (the officer's) duty from molestation by strangers. If the officer is injured in the process of maintaining such order, the injury has arisen out of and in the course of the workman's employment.

8.27 In the event that the equipment can reasonably be forseen to be used by other people apart from the lesssee's workmen it would equally be prudent for the bank lessor to insure against liability to such persons. Thus in the case of Griffiths v. Arch Engineering Co. (Newport) Ltd. And Another,[20] the plaintiff, an employee of a main contractor, was allowed to use a portable grinding machine on hire to their sub-contractors from the owner. The equipment was regulated at a too great a speed for the

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19. [1961] 1 All N.L.R 719.

20. [1968] 3 All E.R. 217. See also Hadley v. Droitwich Construction Co. Ltd. [1967] 3 All E.R. 911; 111 Sol. Jo. 849, C.A.

diameter of the wheel with the result that while being used by the plaintiff the wheel disintegrated and severly injured the employee's hand. In an action brought by the plaintiff, both the sub-contractor as well as the owner of the equipment were held liable on the following grounds:

(i) for the sub-contractor, that there was a reasonably forseeable risk of injury against which the sub-contractor should have warned the plaintiff of the dangers; and

(ii) for the owner, that the owner of the equipment who let it out on hire should have forseen that the machine would be used by employees of other contractors and, in the circumstance had a duty to ensure that reasonable precaution against risk of injury to persons into whose hand the machine might forseeably come, and since no such precautions were taken they were equally liable.

(e) Seizure Of Equipment By Prior Charge Holder/Insolvency Of Lessee.

8.28 A corporate entity may in its normal business operation charge its assets to a bank or other creditor as security for a facility. The charge may be on a specific and existing assets of the company (known as a fixed charge) or on a general charge over the entity's assets (known as a floating charge). In some cases the instrument creating the floating charge may include all the company's after acquired or future property as part of the assets covered by the charge. In such a situation any equipment bought by the company would upon purchase be subject to the floating charge. This would be the case, for example, in a situation where the company having earlier purchased equipment with its own funds, subsequently sold it to a bank lessor and took it back on lease (sale and lease-back). This is so because if there had been a prior floating charge on the assets of the company, on purchase of the new equipment, the new equipment is by virtue of the floating charge automatically appropriated to the subsisting charge. It is therefore advisable that where the bank lessor wishes to get involved in a sale and lease-back transaction it must ensure that a search is conducted at the Companies Registry Abuja (formerly Lagos) to determine whether there is a charge registered against the company's assets. Where such a charge is known to exist, the bank lessor may still advance

the money for the purchase of the equipment, but will need to insure against the risk of seizure by the prior charge holder.[21] As it is to be expected, the disclosure of the existence of the prior charge, which infomation the insured is obliged to give to the insurer, will usually increase the premium payable on the insurance cover.

8.29 Apart from the risk of seizure of equipment by a prior charge holder, there is also the risk of seizure and sale of equipment by a judgment creditor which the bank lessor may not be aware of. To guard against this the bank lessor may well ensure that the equipment is insured against all risks or events that may render the equipment liable to seizure by third parties.

(f) Other Areas Necessary For Fuller Protection.

(i) Multiple Line or All Risk Insurance.

8.30 It should be noted that the various risks discussed above call for varying types of insurance policies or types of insurance. It may therefore not be convenient for a party to take out a series of policies to cover various risks. For purposes of convenience both to the insured and the insurer, some insurance institutions offer what is known as "multiple line" or "all line" insurance. This type of insurance policy could combine more than one type of insurance in a single insurance contract. For example there can be a policy which combines both property and third party liability insurance, or one that covers property, third party liability and accident insurance. Under this type of policy, the bank lessor and the lessee can insure against loss or damage to the equipment, loss arising from premature termination of the lease and the risk of seizure and sale of the equipment.

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21. Another approach to avoiding seizure of equipment by the prior charge holder, as earlier shown in Chapter 5, is for the bank lessor or the lessee as the case may be, to obtain a waiver from the prior chargee.

8.31 As regards particular type of insurance, there is also what is known as the "all risk" policy. Under an all risk provision, the insurer is liable for any loss from a fortuitious happening unless it is clearly excluded in the policy.

(ii) Umbrella Insurance

8.32 The insurer, as earlier shown, is only bound to indemnify the insured to the extent of the value specified in the policy. Sometimes where a party has insured against risks up to a certain value, it is possible that when the event or events occur, the damage suffered far exceeds the value of what is recoverable under the policy. This might be as a result of some gaps or omissions in the policy regarding the risks or perils insured against. To guard against this some insurance institutions provide what is known as "umbrella insurance". Under this type of insurance the insured is entitled to the difference between the amount recoverable under the policy actually taken out and the actual value of the loss suffered subject to the limits of the umbrella cover. It is a condition precedent, however, that the insured must have taken out a primary cover for the risk intended to be covered before asking for the "umbrella cover" for that particular risk. The umbrella cover like any other policy may exclude some types of contingencies such as loss resulting from civil war, riots, etc.

CHAPTER NINE

LEGAL ASPECTS OF EQUIPMENT LEASING TAXATION

9.01 It is necessary to state from the outset that Nigeria has no specific legislation which deals exclusively with the taxation of equipment leasing. But the absence of any specific statute on this commercial activity should not be understood to mean that there are no tax laws governing its operation. Some exist, namely The Companies Income Tax Act (CITA)[1] and The Capital Gains Tax Act (CGTA).[2]

9.02 In my discussion of this chapter, I shall begin by examining the various aspects of the concept of capital allowances. This is necessary for two main reasons. Firstly, a capital allowance is the main consideration in determining what assets should be financed by banks through leasing. Secondly, the incidence of capital allowances is of central importance to the lessee and the decision whether to lease or buy an equipment may well depend on it. I shall thereafter proceed to examine the impact of the relevant provisions of the Companies Income Tax Act (CITA) from the point of view of the bank lessor and the lessee respectively, examine the effects of the Capital Gains Tax Act and conclude the discussion with the tax effects of a Syndicated Lease Scheme.

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1. The Companies Income Act 1979.

2. The Capital Gains Tax Act 1967.

Capital Allowances: General Concept and Existing Rules

9.03 The term "Capital Allowance" in Nigeria may be defined as the amount of depreciation allowed by the government (The Federal Board of Inland Revenue) to be offset against the taxable profits. Capital allowances are provided for in the tax laws basically to encourage investment. The grant by the government essentially amounts to writing off the cost of the equipment against profits at specified rates so that it provides a tax cushion for the tax payer. He (the tax payer) pays less tax in the years when actual capital outlays are made and in a graduated and systematic manner pays more tax as the asset involved is gradually written off.

9.04 It is stating the obvious to say that under generally accepted financial practice, net income cannot be said to have been determined without adequate provision being made for the value of the capital asset consumed in producing that income. Through the provision for depreciation, the finance executive systematically charges the cost of a fixed asset against the periodic income over the estimated useful life of the asset. The amount charged each year depends on the company's estimate of the fixed asset's useful life, estimated scrap value, fixed asset cost, etc. Although banks, as other companies, tend to accept a standard life span for certain classes of assets, experience shows that depreciation charges on like classes of assets vary greatly among them. It is in the attempt to bring about uniformity that these varying depreciation charges by companies are disallowed for tax purposes and in their place the government has introduced the regulated depreciation charges, otherwise known as capital allowances. The effect of the government imposition of this regulated alternative to depreciation of assets is that the rates of depreciation charges are no longer left at the discretion of the bank lessor in whose interest it is to have the cost of the equipment written off as rapidly as possible.

9.05 Capital allowances being a creature of the government, are used as economic and political tools to effect changes. This explains the frequent amendments/modifications in the rules governing the rates and qualifications for the entitlement. They can be manipulated to encourage or discourage investment in new areas rather than old ones, in equipment located in certain areas, in equipment of certain types or in certain industries such as the ten per cent investment allowance due in respect of equipment in use in the agricultural sector.[3]

9.06 Capital allowances are normally granted on depreciable tangible assets, consequently an asset that is not liable to wear and tear or obsolescence or is intangible may not qualify for a capital allowance. Similarly, by virtue of paragraph 22, Schedule 2 of the Companies Income Tax Act 1979, capital allowances cannot be granted to any company unless that company has applied for them for that year, or where the Board is of the view that it would be just and reasonable to do so.

9.07 In order that a company should qualify for capital allowances, the asset must, among other conditions stipulated by CITA, be in use in a trade or business recognised by the Act. For the avoidance of doubt 'trade or business' as used in the Act is defined in paragraph 1(1)(d) of Schedule 2 of CITA as "a trade or business or that part of a trade or business the profits of which are assessable under this Decree". The Department of Police Affairs, for example, cannot be said to be carrying on trade or business as it is neither an incorporated company so as to be governed by the provisions of the Companies Income Tax Act, nor has it any profit for the purpose of assessment under the Act, nor does the Act recognise its (the Police's) trade or business. Consequently where the bank lessor or any leasing company leases equipment to the Police Department, it should not expect to claim any capital allowances. But it could be argued that given the second limb of paragraph 22 of Schedule 2 of CITA which provides

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3. See para. 18(4), sch. 2 of The Companies Income Tax Act 1979.

" ... or where the Board is of the opinion that it would be reasonable and just so to do",[4] the Federal Board of Inland Revenue has the discretionary power to grant capital allowances to companies that lease equipment to establishments like the Police Department. However, one would caution here that the powers of the Federal Board of Inland Revenue in this regard being discretionary such leasing companies should seek and obtain a written commitment from the Board on or before the leasing negotiations are completely packaged.

9.08 Where an asset is used for both personal and business purposes, the Act provides for the granting of proportionate allowances.[5] Similarly proportionate capital allowances can be granted to a part-owner of a leased equipment[6] even though many lenders seem to be unaware of this.[7]

Types of Capital Allowances.

9.09 There are four classes of capital allowances applicable in Nigeria today. These are:

1. Initial Allowances.

9.10 An initial allowance is an allowance which is granted to the bank lessor in the year of expenditure at a specified rate, provided that it has incurred the qualifying expenditure wholly and exclusively for the purpose of his trade or business in respect of any

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4. Para. 22, sch. 2 of CITA, op cit, whole paragraph: "No allowances shall be made to any company for any year of assessment under the provisions of this schedule unless claimed by it for that year or where the Board is of the opinion that it would be reasonable and just so to do".

5. Para. 19, sch. 2 of CITA, op cit.

6. Para. 15, sch. 2 of CITA, op cit.

7. See further discussion on the subject under the heading "Synicated Loan Scheme" later in this Chapter.

tangible asset. The current rates of initial allowances which became operative in 1989 are stated against each qualifying expenditure class in the table below.[8]

Qualifying Expenditure	**Initial Allowance**	**Annual Allowance**
Non-industrial Building Expenditure	5%	10%
Industrial Building Expenditure	10%	10%
Mining Expenditure	20%	10%
Plant Expenditure (excluding Furniture & Fittings)	25%	10%
Motor Vehicle Expenditure	25%	20%
Plantation Equipment Expenditure	20%	33%
Housing Estate Expenditure	20%	10%
Ranching & Plantation Expenditure	30%	15%
Furniture & Fittings Expenditure	15%	10%
Research & Development Expenditure[8a]	25%	12%

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8. Source: The Federal Board of Inland Revenue Lagos. Note that these current rates of Initial and Annual Allowances have more qualifying expenditure areas and in some cases higher rates than that provided by the Companies Income Tax Act 1979. This is as a result of amendments that have taken place between 1979 and 1989. Appendix 6 shows in detail the changes that have taken place.

8a. This relates to expenditure incurred on equipment and facilities, patents, licences, secret formula or process or for information concerning industrial, commercial or scientific process; technical feasibility or products or process and purchase, searching for and discovering and testing products for future market or use and such other similar cost which has not brought into existence any asset - see Federal Board of Inland Revenue, Explanatory Notes on Qualifying Expenditure (1987) (Government Printer Lagos) p. 1.

2. Annual Allowances.

9.11 An annual allowance is granted to the bank lessor for each year of assessment in its "basis period"[9] for which the asset was used for the purpose of trade or business at the specified rate shown in the table above. For an annual allowance to be granted it must be shown that the qualifying expenditure was wholly, exclusively, necessarily and reasonably incurred by the bank lessor for the purpose of his trade or business. The claim for an annual allowance would not be refused by the Federal Board of Inland Revenue on the grounds that the asset did not qualify for an initial allowance. In other words, an annual allowance is claimable whether or not the asset in question qualifies for an initial allowance. Where the asset is in use for less than one year, the annual allowance is proportionately reduced. This is referred to by the Federal Board of Inland Revenue as "Wear and Tear Allowance".

9.12 Annual allowances are calculated on a straight line basis after deducting the initial allowance and a notional residue value. See below for a typical example of the computation of annual allowance.

	N	**N**
Motor Vehicle Bought During 1990		
costing say		80,000.00
Initial Allowance - 25%	20,000.00	
Notional Residual Value	10.00	
		20,010.00
		59,990.00
Annual Allowance for each		
assessment year from 1991 - 20%		11,998.00

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9. Basis Period: A capital allowance is granted for a period which the company reports its profit or loss. Thus for a normal period, the basis period is the same for both assessable profits and capital allowances - see generally para. I, sch. 2 of CITA, op cit.

3. Investment Allowances.

9.13 This allowance is granted to the bank lessor as an extra incentive over and above the initial and annual allowances. The allowance is granted on the qualified expenditure in the basis period for which the asset was first used for the purpose of trade or business. An example of investment allowance is the 10% due to any company which has incurred expenditure on plant and equipment used in agricultural production other than in marketing and processing.[10]

4. Balancing Allowances.

9.14 This allowance arises where an asset on which capital allowance has been claimed is disposed of and the amount of sale is lower than the residue of the expenditure.[11] The difference is a loss to the claimant and so he is given a further claim for the loss as a balancing allowance.[12]

9.15 If on the other hand the proceeds realised on disposal of the asset are higher than the residue of expenditure, the difference is a gain to the claimant and it is regarded as profit and added to the assessable profits. This is called a Balancing Charge.[13]

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10. This investment allowance has now been extended to new production machinery by the 1990 Federal Military Government of Nigeria Budget Statement.

11. Residue of Qualifying Expenditure: A residue of a qualifying expenditure in respect of any asset, at any date, shall be the total qualifying expenditure incurred on or before that date by the owner of the asset less the total of the Initial and Annual Allowances made to such an owner in respect of the asset before that date. Note that the CITA deems the Initial or Annual Allowance should have been made at the end of the basis period for the year of assessment for which any such allowance is made - see generally para. 11, sch. 2 of CITA, op cit.

12. See para. 9, sch. 2 of CITA, op cit.

13. See para. 10, sch. 2 of CITA, op cit.

The Impact of Tax from the Bank Lessor's Point of View

9.16 In claiming capital allowances the Federal Board of Inland Revenue requires the claimant to show:[14]

1. that the qualifying expenditure is one recognised by the tax laws and claimable;

2. that the qualifying expenditure has been incurred wholly, exclusively, necessarily and reasonably for the purpose of trade or business;

3. that the ownership of the equipment or asset is not in dispute;

4. that the equipment or asset had been in use at the end of the basis period in the claimant's business. In practice, the expression 'in use' is given an extended meaning so that where a bank lessor or any other company incurs expenditure during the basis period for the acquisition of a fixed asset, the company may still claim capital allowances on the expenditure even though the asset is not immediately in use. This extended meaning of the words (ie 'in use') presupposes, however, that the equipment or asset will in future be put into actual use or operation;

5. that the equipment or asset must have been used for the purposes of a trade or business carried on by the owner.

9.17 It appears from the foregoing that a bank lessor would face a difficult task in making a claim for capital allowances in view of the 5th condition above, which requires that the equipment must have been used for the purpose of the owner's trade or business. This is particularly so in a finance lease where the bank lessor is merely brought into the transaction to acquire the equipment and expects to recoup its capital and profit from that single transaction. But it could, on the other hand, be argued on behalf of the bank lessor in an operating lease, that as owner of the equipment it uses it for the purpose of its trade or business in the sense that it lets out the equipment from one lessee to another and does not expect to recoup its total capital outlay and profits from just one lessee.

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14. Para. 18, sch, 2 of CITA, op cit.

9.18 In spite of the problem the 5th condition may pose to a bank lessor in a finance lease, it is submitted that it should be able to claim capital allowances since it remains the owner of the equipment throughout the duration of the lease notwithstanding the fact that possession and use rests with the lessee, if it can take advantage of paragraph 18 of Schedule 2 of CITA which makes the following provisions:

> "**1.** where a company owning any assets
> a) has incurred capital expenditure in respect thereof for the purposes of leasing that asset for use wholly, exclusively, necessarily and reasonably for the purpose of trade or business carried on or about to be carried on by a person, and
> b) leases the asset to such person, and
> c) during the whole, or part, of the term of the lease, the asset is used wholly and exclusively by such person in such trade or business; the provisions of this Schedule shall apply with such necessary modifications as the Board may direct, as though such expenditure were incurred wholly, exclusively, necessarily and reasonably for the purposes of a trade or business carried on by the owner from the date when such expenditure was incurred and as though the owner were using the asset for the purpose of such last-mentioned trade or business in the way in which and for the period or periods during which the asset is in fact in the first-mentioned trade or business,
> **2.** for the purposes of this paragraph in relation to the trade or business which an owner is to be treated as carrying on, his basis period for any year of assessment shall be taken to be the year immediately preceding that year of assessment,
> **3.** where a company owning an equipment has incurred capital expenditure in respect thereof for the purpose of leasing that equipment for the use wholly, exclusively, necessarily and reasonably for the purposes of a trade or business carried on or about to be carried on by a person, the provisions of this Schedule shall apply to all such leases,
> **4.** subject to the provisions of this Schedule where a company has incurred expenditure wholly, exclusively, necessarily and reasonably for the purposes of agricultural plant and equipment, there shall be due to that company an investment allowance of ten per cent of such expenditure."

9.19 The Companies Income Tax Act 1979 has not made any distinction between a finance lease and an operating lease. The effect of this is that in Nigeria only lessors are entitled to the capital allowances despite the fact that in a finance lease the lessor recoups his total cost of equipment plus profits and charges from a single lessee as

opposed to successive leases in an operating lease. Thus Mr Okeke writing in the Business Concord stated:

> "under the current tax laws (Companies and Income Tax Act, CITA, 1979), only lessors make capital allowance claims on leased assets. But the proposed standard, produced by the Nigerian Accounting Standards Board (NASB) provides for the lessee to claim capital allowances under certain classes of leases (eg finance lease) which confer 'substantial' ownership of the leased asset on the lessee. This provision by the NASB among others, has been seriously contested by members of the Equipment Leasing Association of Nigeria (ELAN); a situation which has led to several consultations to resolve the issue but to no avail".[15]

9.20 As at the end of December 1992 the total amount of capital allowances to be enjoyed in any given year of assessment is restricted to 75% of the assessable profit in case of the manufacturing companies and 662/3% in the case of other companies, except that companies in the agricultural and allied industries are not affected by this restriction. That is, if the leased equipment is used in an agricultural or allied company, the full capital allowances will be granted.

The Acceptance Certificate for Capital Expenditure

9.21 Apart from meeting the conditions of the Companies Income Tax Act 1979 as provided in paragraph 18 of Schedule 2, properly titled "Application of Lessors", the Federal Board of Inland Revenue in addition enjoins the lessor under the Industrial

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15. See The Business Concord Newspaper of Tuesday 11th day of December 1990, pp. 1 and 17. However, in March 1991, the Nigerian Accounting Standards Board issued the Statement of Accounting Standard (SAS) 11 which is meant to be operative on 1st January 1992. The SAS 11 classified banks' leases as finance leases and further directed that lessors in finance leases should not be entitled to capital allowances. The government has accepted SAS 11 but no law has been promulgated to that effect nor the subsisting CITA 1979 repealed. As would be expected ELAN is unimpressed by this development and has since mounted a campaign to ensure that SAS 11 does not have legal backing. See ELAN's Newsletter vol. 3 no. 6 of September 1992 pp. 3-6. See also The Guardian Newspaper of February 27th 1993 p. 6.

Inspectorate Act[16] to produce an Acceptance Certificate issued by the Inspectorate Division of the Federal Ministry of Industries where the value of the investment is from twenty thousand naira (N20,000.00). The demand by the FBIR for the Acceptance Certificate is backed up by Section 3(1) of the Industrial Inspectorate Act, No 53 of 1970 which provides:

> **1.**"Any person proposing -
> a) to start a new undertaking involving the expenditure of not less than N20,000.00, or
> b) to incur additional capital expenditure of not less than N20,000.00 in respect of an existing undertaking shall give to the Director, notice of intention in the form specified in Schedule 1 of the Decree" (ie Form I).

9.22 The purchase of equipment for leasing as per the above provision of the Industrial Inspectorate Act is a form of capital undertaking. Consequently the lessor who engages in the undertaking involving equipment of not less than N20,000.00 in value should notify the Director, Industrial Inspectorate Department, by filing the prescribed form before the lease agreement is packaged or structured with the lessee. Failure to notify the Director is an infringement of section 3(1) and by virtue of section 3(4) of the same Act, the lessor is liable to a penalty of N1,000.00.

9.23 When the particular lease transaction has been fully executed, returns on the actual capital expenditure incurred should be rendered using the Department's Project Completion Forms (PLF) and the Returns Summary Form (RSF). This procedural requirement must be complied with before the processing of the supporting documents and eventual issuance of the Certificate if approved. Cases abound where the Department has refused to grant or issue the Certificate. In this regard it is necessary to state the relevant documents which must accompany the returns in order to qualify for the Acceptance Certificate. These are:

1. For Finance and Operating Leases

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16. The Industrial Inspectorate Act No.53 1970.

a) Purchase Invoice

b) All shipping documents in case of imported assets

c) Evidence of payment for the assets

d) Lease Agreement.

2. For Sale and Lease-Back Transactions

a) Purchase or commercial invoices for the assets

b) All shipping documents from the lessee to establish the cost of the assets

c) Lease Agreement

d) Sale Agreement

e) Evidence of payment for the assets.

3. For Syndicated Leases

a) The Lease Agreement which must spell out the respective contributions of the co-operating lessors or lenders

b) Descriptions with values of the assets belonging to the respective co-operating lessors or lenders

c) All other documents listed in 1 or 2 above (ie Finance/Operating Lease and Sale and Lease-Back Transactions respectively) depending on which type of lease is applicable.

9.24 In the event that the lessor is unable to produce the Acceptance Certificate, the FBIR may withdraw all the capital allowances previously claimed in respect of such capital expenditure. This type of situation generally arises where the FBIR has inadvertently allowed the lessor to claim capital allowances without seeking to satisfy itself that the lessor has obtained the Acceptance Certificate (fraudulent practices by some corrupt officials of the FBIR may not be completely ruled out here). The situation could also arise where the lessor has stated to the FBIR that he had for a long time adequately complied with the requirement for the issuance of the Certificate and that his inability to produce the Certificate was caused by the time-consuming bureaucracy of the Industrial Inspectorate Department. This reason is generally accepted by the

FBIR as delays of up to six months or more by the Industrial Inspectorate Department are common. The unnecessary delays being experienced by lessors in receiving their capital allowances are frequently caused by the slow pace at which the papers submitted for the issuance of the Acceptance Certificate are being processed. Sometimes this makes one wonder about the actual relevance of such a document. Be that as it may, one believes that where the FBIR is seriously and genuinely interested in avoiding this second situation, it should be able to ask for and obtain a letter of confirmation or any other form of evidence from the Industrial Inspectorate Department to the effect that a particular lessor has met all their requirements and that his papers are in order and being processed. Where it turns out that the papers are no longer in order and so no Certificate can be issued, the officer who gave the confirmation should be held responsible. The first situation (ie where FBIR inadvertently allowed a claim for a capital allowance) should never arise as there is usually a properly identifiable Acceptance Certificate from the Industrial Inspectorate Department with a covering letter. Where, however, the lessor is granted the capital allowances under this circumstance, the officer who processed the papers should similarly be held accountable.

The Impact of Tax from the Lessee's Point of View

9.25 Equipment leasing taxation, as earlier shown in this Chapter, is not only advantageous to the lessor bank but also beneficial to the lessee in that it enables the lessee to write off the rentals against the profits.

9.26 Any sum paid or payable by the lessee by way of rental during a given period is an allowable deduction in arriving at the taxable profit provided it can be shown that the rental was wholly, exclusively, necessarily and reasonably incurred for the production of profit.

9.27 Additional tax benefits to the lessee come in the form of interest on loans, rents, insurance costs, maintenance and repair costs, bad and doubtful debts, etc. These are all tax deductible and allowable against the profits of the lessee under the Companies Income Tax Act 1979. Thus Section 20 of the CITA provides:

> "Save where the provisions of subsection (2) or (3) of Section 12 or of Section 14 apply, for the purpose of ascertaining the profits, or loss, of any company of any period from any source chargeable with tax under this Decree there shall be deducted all expenses for that period by that company wholly, exclusively, necessarily and reasonably incurred in the production of those profits including, but without otherwise expanding or limiting the generality of the foregoing -
>
> a) any sum payable by way of interest on any money borrowed and employed as capital in acquiring the profits;
>
> b) rent for that period, and premiums, the liability for which was incurred during that period, in respect of land or building occupied for the purposes of acquiring the profits, subject, in the case of residential accommodation occupied by employees of the company, to a maximum of
>
> i) N28,000.00 per annum for each flat in the Lagos area, and
>
> ii) N20,000.00 per annum for each building and N5,000.00 per annum for each flat in any other part of Nigeria; and the provisions of this paragraph shall be deemed to have come into effect on 1 April 1976;
>
> c) any expenses incurred for repairs of premises, plant, machinery, or fixtures employed in acquiring the profit or for the renewals, repairs or alteration of any implement, utensil or articles so employed;
>
> d) bad debts incurred in the course of a trade or business proved to become bad during the period for which the profits are being ascertained, and doubtful debts to the extent that they are respectively estimated to the satisfaction of the Board to have become bad during the said period notwithstanding that such bad and doubtful debts were due and payable before the commencement of the said period."

The Capital Gains Tax Act 1967

9.28 The Capital Gains Tax, as the name suggests, is a tax on profits or gains made in the course of capital transactions, that is, on the buying and selling of assets. It became

operative with effect from 1st April 1967 with the rate of tax being 20% on the chargeable gains.[17]

9.29 Capital gains accruing to a bank lessor on disposal of business assets are normally liable to capital gains tax,[18] but a bank lessor may take advantage of the roll-over relief provided by Section 32(1) and (b) of the Capital Gains Tax Act and defer the payment provided he proves to the Federal Board of Inland Revenue that the sale proceeds of the old asset[19] must be reinvested in an identical asset twelve months before or after the disposal of the old asset. But where it is shown that the total proceeds of the old asset are not reinvested, the chargeable gain attributable to the amount which has not been reinvested will become assessable as it cannot be deferred.[20] In this regard Section 32(1) and (6) of the Act provides:

> "If the consideration which a person carrying on a trade obtains for the disposal of, or of interest in, asset (in this section referred to as 'the old assets') used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets (in this section referred to as 'the new assets') which on acquisition are taken into use, and used only for the purposes of the trade and the old assets and the new assets are within one, and the same one, of the classes of assets listed in this section then the person carrying on the trade shall on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Decree;
>
> a) As if the consideration for the disposal of, or of the interest in, the old asset were (if otherwise of a greater amount or value) of such amount as would secure that on the disposal neither a loss nor a gain accrues to him, and
>
> b)As if the amount or value of the consideration for the acquisition of, or of the interest in, the new assets were reduced by the excess of the amount or value of the actual consideration for the disposal of, or

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17. Sections 1(1) and 2(1) of the Capital Gains Tax Act 1967.

18. Section 1(2) of the Capital Gains Tax Act, op cit.

19. Section 32(3) of the Capital Gains Tax Act, op cit.

20. Section 32(2) of the Capital Gains Tax Act, op cit.

of the interest in, the old assets over the amount of the consideration which he is treated as receiving under paragraph a) above, but neither paragraph a) nor paragraph b) above shall affect the treatment for the purposes of this Decree of the other party to the transaction involving the old assets or of the other party to the new assets."

9.30 Section 32(6) provides:

"The classes of assets for the purpose of this section are as follows:
Class 1. Assets within heads A and B below:

A. Except where the trade is a trade of dealing in or developing land, or of providing services for the occupier of land in which the person carrying on the trade has an estate or interest -
a) any building or part of a building and any permanent or semi-permanent structure in the nature of a building occupied (as well as used) only for the purposes of the trade, and
b) any land occupied (as well as used) only for the purposes of the trade.

B. Fixed plant or machinery which does not form part of a building or of a permanent or semi-permanent structure in the nature of a building.
Class 2 Ships
Class 3 Aircraft
Class 4 Goodwill."

Assets Leased Under a Syndicated Lease Scheme

9.31 The practice in Nigeria today regarding the taxation of syndicated leases[21] is that the Federal Board of Inland Revenue treats all lenders in a syndicated equipment leasing transaction as mere loan participants, who as far as leasing is concerned should not be entitled to capital allowances. This has led to a situation where lenders who cannot be joined as co-lessors (for example commercial banks prior to January 1990) charge very high interest rates in any syndicated lease transaction they participate in. It is submitted that nothing stops these lenders from insisting that they be recognised in the syndicated lease as part-owners of the equipment or asset thereby acquiring an

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21. The general nature of syndicated leases (also called consortium leases) was discussed in Chapter 4.

interest therein. Where this is done (as it ought to be done since there are no known legal or other obstacles to this arrangement) then the FBIR has no legal grounds to refuse the grant of capital allowances, where the application is made under paragraph 15 Schedule 2 of the CITA which provides thus:

> "Any reference in this Schedule to any asset shall be construed whenever necessary as including a reference to a part of any asset (including an individual part of the asset in the case of joint interest therein) and when so construed any necessary apportionment shall be made as may, in the opinion of the Board, be just and reasonable."

CHAPTER TEN

FUTURE DEVELOPMENT OF EQUIPMENT LEASING AND CONCLUSION

10.01 In Chapter 4, the enormous benefits accuring from equipment leasing as on alternative means of asset financing were shown. That is not to say that there are no limitations or problems associated with this mode of asset financing in Nigeria. A discussion therefore on the future development of equipment leasing would essentially be a discussion on the identification of these limitations or problems and how to remove or find solutions to them. The industry is bound to achieve higher growth if the problems facing it are removed, which include:

1. absence of any specific legislation on equipment leasing;
2. the effect of Statement of Accounting Standard 11 (SAS) by the Nigerian Accounting Standards Board;
3. frequent changes in the government's fiscal and monetary policies;
4. classification of equipment leasing as lending by the Central Bank of Nigeria;
5. dearth of trained and experienced personnel in the industry;
6. poor capital allowances and restriction on total allowance claimable; and
7. effect of the Industrial Inspectorate Act No.53 of 1970.

I shall now briefly discuss them and also attempt to proffer solutions.

1. Absence Of Any Specific Legislation On Equipment Leasing.

10.02 It has been shown in Chapter 5 that there is no specific legislation on equipment leasing in Nigeria, and this has been largely responsible for some confusions in the

industry which ultimately works in a way counter-productive to the growth. In this regard, the President of ELAN had this to say:

> "The leasing industry is still pretty much in its infancy in this country. We do not appear to have any consensus on anything yet as to the future of the industry. Accountants, lawyers and tax authorities disagree on virtually everything. The lessor bankers are confused. Some lawyers argue with apparent potency that lessors are not allowed to take security for leasing transactions. Others argue that there is no such law. The former stresses the danger of having a leasing transaction confused with direct bank borrowing in the case of litigation. They warn that under litigation the lessor could lose out in court if the court gets to know of any other security outside the leased asset. But some others feel differently. To them, leasing is like any other form of financing requiring security. In both schools there is no experience to go by. The out-growth of this is that the confused banker lessors now do what the please - additional security for their leasing exposures while others keep to the conservative approach of not taking any other security outside their leased assets. And the mushrooming of leasing activities goes on in various directions. There can be no more auspicious time for bringing sanity into the practice of leasing in this country and attaining some measure of uniformity than now".1

Suggested Solution:

10.03 The above statement of the President of ELAN clearly undescores the need to have a clearly defined legislative framework if the industry is to grow in an orderly and rapid manner. Some have, however, argued that Nigeria does not need any specific laws on equipment leasing.[2] I do not share this view at all. On the contrary it is my submission that:

(a) in order to encourage an orderly and rapid growth of the equipment leasing industry in Nigeria, there is need now more than ever before to have a specific set of

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1. See the Equipment Leasing Association Of Nigeria (ELAN) Newsletter, vol. 1 no.3 of November 1991, p. 7.

2. See ELAN's Newsletter, vol. 2. no. 2 of March 1990 where the Chairman of the Federal Board of Inland Revenue Lagos doubted (his personal opinion) whether ELAN needed any decree for the successful operation of the equipment leasing industry. He, however, promised to seek the expert view of the Federal Ministy of Justice on the issue. Note that the chariman of FBIR was responding to the request by the President of ELAN to assist them (ELAN) to obtain a decree regulating equipment leasing business in Nigeria.

laws. It is common knowledge that one of the most important catalysts to the development of any industry is the certainty of the law or laws relating to such industry. People would be more prepared to take business risks when they know the extent to which they have rights and are protected under the law.

(b) the former Federal Justice Minister and Attorney-General and his ministry realising the need to regulate the Equipment leasing industry had said:

> "A law to regulate the practice of equipment leasing is very necessary in view of the massive increase in the business since the advent of the Structural Adjustment Programme (SAP)".[3]

(c) the call for a specific legislation on equipment leasing in Nigeria is not unique. Nigeria has for a similar but legally different commercial activity; hire-purchase, the Hire-Purchase Act 1965 as amended up to 1970. It is also known that the United States of America which is leading the rest of the world in equipment leasing business has a law which governs the operations of the business (the Uniform Commercial Code). In France the Crédit-bail law regulates equipment leasing activities. Other countries with specific legislation include Spain[4] and Greece,[5] etc.

(d) if Nigeria had a set of laws specifically on equipment leasing defining the rights and obligations of the parties in an equipment leasing contract, the confusions highlighted in the ELAN's President statement quoted above would not have arisen.

Need For Specific Equipment Leasing Law: Areas To Be Regulated

10.04 If Nigeria were to have a specific equipment leasing law which areas should it regulate? The major areas which should be properly dealt with in the proposed law should include but not limited to:

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3. See The Daily Times Newspaper of Tuesday, May 8 1990 p. 3. The Federal Justice Minister And Attorney-General, Prince Bola Ajibola (currently Judge, the World Court at Hague) was answering question on whether or not he supported law on equipment leasing. It is remarkable to note that Prince Ajibola's ministry is the establishment the Chairman of Federal Board of Inland Revenue promised seeking expert view from - see footnote 2 above.

4. See the Discipline And Intervention of Credit Entities.

5. See the Leasing Law No.1665

(i) Definition of Transaction

10.05 A clear definition of the nature of equipment leasing transaction is essential so as to protect the rights (and conversely enforce the obligations) of both the lessor and the lessee. As already seen in Chapter 4, there is a fine distinction between equipment leasing, hire-purchase and conditional sale transactions. If therefore equipment leasing is not clearly defined, it may be mistaken for other similar commercial transactions. Even where the parties to the transaction understand that what they are involved in is an equipment leasing transaction, it is still necessary to clearly define what type of equipment lease it is that is intended, that is, whether it is a finance lease or an operating lease.

(ii) Lease Equipment And Minimum Duration

10.06 In keeping with the Nigerian aspiration for rapid economic and technological development, provision has to be made in the new law for the type of equipment that would qualify for leasing and the duration of the lease. The idea here being to reduce, as much as possible, the inclusion of equipment that has no ready second-hand value market and to restrict the benefit of leasing equipment to more productive sectors of the economy rather than personal/consumer goods. The minimum lease period should naturally be graduated, depending on the estimated useful life of the equipment. Where, for example, a "special purpose lease" or "custom-made lease" is to be booked which generally does not have a second-hand value market, the law could provide the minimum duration should be ninety percent of the equipment's useful life.

(iii) Tax Law

10.07 There should be specific reference and adequate provision about tax obligations and credits which the parties to an equipment leasing contracts can expect to incur including depreciation. This enables the lessee to evaluate the cost of a lease vis-a-vis other sources of equipment financing such as direct bank borrowing.

(iv) Lessor's Rights And Obligations

10.08 The proposed comprehensive law on equipment leasing should make it easy for the lessor to recover his equipment on default by the lessee such as non-payment of rentals, lack of maintenance and reasonable care, refusal to insure and/or renew insurance policies, insolvency/bankruptcy of lessee, etc. The present situation where generally the lessees resist the lessor having access into their premises for the purpose of inspecting and/or removing the leased equipment in accordance with the provisions of the lease agreement and in spite of the clause in the agreement allowing them (lessors) access for this purpose is far from being perfect. The writer has in the course of his job witnessed a situation where a lessee entered into a finance lease with a bank lessor for the financing of twenty-four million naira earth-moving machines for construction purposes, for a lease period of six years, and at a quarterly rental of one million naira excluding other charges such as legal and management fees. A clause of the agreement allowed the bank lessor the right to enter the premises of the lessee to repossess the equipment in the event of non-payment of rental, among other breaches. The lessee payed for only two quarters, and thereafter was in default for the next twelve months (that is four quarters). The bank lessor kept reminding it of its obligation to pay and each time there were some excuses from the lessee ranging from the sudden travel of their Chief Executive to the non-receipt of payments due to them from their clients. At the end of the fourth quarter and after three months notice was served on the lessee the lessor tried to reposses his equipment, but this was resisted by the employees of the lessee on the directive of their Chief Executive. The security department of the bank lessor later same day mobilised people and went back to the lessee's premises to recover the equipment, but was met by a more forceful resistance by the lessee's workers. At this point a breach of peace was therefore being threatened. A meeting by the management of both the bank lessor and the lessee was therefore called to resolve the issue. This was finally resolved by allowing the lessee to purchase the equipment (though through a third party) which meant a total loss of three and half million naira to the bank lessor.

10.09 The above type of event clearly depicts the frustrating situation an investor (bank lessor) can find itself in. It is true it has the right to enter the premises and retake its equipment, but it is equally true that an average Nigerian lessee would not fold his hands and watch the lessor carry away the equipment. In this situation therefore a gap exists and there must be a more effective method of assisting the lessor to recover the equipment. The option left for the lessor was to go to court to seek for an order of the court for the return of the equipment. Unfortunately the delays being experienced in the Nigerian court system do not encourage banks, businessmen and others resorting to it. In the circumstance, a faster and adequate alternative must be found.

10.10 Since the prevention of breach of peace is within the jurisdiction of the police the envisaged law could provide that each equipment leasing contract entered into should be registrable with the police department and that the assistance of the police could be asked for where the need arises. The lessee in the new law may be given about fourteen to thirty days after the lessor's application to the police for assistance to make good the default after which the police may then give the necessary assistance to recover the equipment. A further provision could be made whereby any resistance by the lessee to allow the police and the lessor to repossess the equipment would become a criminal offence.

10.11 The recommendations to use the police where the need arises would not stop the lessor from finally going to court to enforce his rights, as per the lease agreement, nor does it prohibit the lessee from suing the lessor if it believes that there had been a breach of the agreement. What is basically achieved in this recommendation is that in recovering the equipment there is no breach of peace and likely bloodshed, the procedure is faster than applying to the courts, the lessor who has invested huge amounts of money in purchasing the equipment has at least a feeling of satisfaction that its equipment has been recovered and the lessee is thereby prevented from the

continued use and operation of the equipment which may require maintenance and repair thereby agravating the situation.

10.12 The envisaged law should also respect the basic principles of freedom of contract and not intervene unnecessarily. The striking down of a clause as a penalty and therefore making it unenforceable should as much as possible be limited to situations where there is clear oppression in the contract. It must be remembered that the parties have freely entered into an agreement and are ordinarily supposed to know what they are agreeing to do. Where any party is not fully aware, he is free to suspend the negotiations and seek for professional advice on the issue. If at the end, a contract is entered into the court must respect the intentions of the parties provided it is not against public policy or illegal or clearly oppressive. In this connection I share the position of the Supreme Court of Canada in Elsey v. J.G. Collins Insurance Agencies Ltd[6] where it said:

> "... the power to strike down a penalty clause is a blatant interference with the freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression".

(v) Lessees' Rights And Obligations

10.13 The envisaged law should be able to give the lessee adequate protection under the equipment leasing contract. The present situation whereby the law gives better protection to the lessor because of the high risk his equipment in another's exclusive possession (lessee) is exposed to, is understandable, but that should not be used to oppress the lessee provided the fears of the lessors are allayed. This could be achieved by the law insisting on having in place all safety and precautionary measures necessary, while at the same time maintaining a fair and reasonable balance of interest between

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6. [1978] 83 DLR 1, 15. See also Philips Hong Kong Ltd v. Attorney-General of Hong Kong reported in the Times Newspaper of 15th Feb. 1993, p. 28.

the parties. The Unidroit Convention On International Financial Leasing is a good example.

10.14 The new law should make it possible and mandatory for the lessee to enjoy the benefits of the manufacturer's warranty since he is the actual user of the equipment rather than what is sometimes obtainable, that is, the lessor enjoying the benefits or the lessee being at the mercy of the lessor in order to enjoy the benefits. Although devices are often used to get round the problem, it would be better to regulate the situation by statute. It is gratifying to note that some informed lessees have started insisting on having in the lease agreement provision to the effect that they must enjoy the benefits of the warranty of the manufacturer. This is ususally done by the lessor assigning his rights on the warranty, with the blessing of the manufacturer/supplier to the lessee. In the alternative, it is provided that the lessee though not a party to the sale contract between lessor and manufacturer/supplier should enjoy the benefits of the warranty through the lessor. For this to be effective as held in the case of Andrew v. Hopkinson[7] there must be a collateral contract between the manufacturer and the lessee.

10.15 The law should also make it possible that in the event of the bankruptcy of the lessor, the lessee should be able to continue in the quiet enjoyment of the leased equipment and not be affected by the provision of the Bankruptcy Act which stipulates that the property of a bankrupt shall be vested in the trustee.[8] This recommendation equally applies to corporate insolvency of the lessor.

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7. [1957] 1 Q.B. 229; [1956] 3 All E.R. 422.

8. Section 55 of the Bankruptcy Act 1979 applies to non-corporate entities. For corporate entities, see similarly s. 423 of the Companies And Allied Matters Decree (CAMD) 1990 which provides that in a winding up by the court the liquidator shall take into his custody or under his control, all the property and choses in action to which the company is or appears to be entitled. By virtue of s. 408(d) of CAMD 1990, the court is allowed to wind up a company if it is insolvent (that is unable to pay its debt).

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(vi) Disclosure Of Information And Registration

10.16 The envisaged law on equipment leasing should provide that all equipment leases entered into must be disclosed by way of footnotes in the lessees' financial statement. The practice today whereby lessees hide their equipment leasing obligations is, to say the least, unsatisfactory.

10.17 The law should also provide that all leased equipment must be registered with either the Companies Registry or any other federal authority like the Federal Ministry of Industries. This requirement would prevent a lessee from giving a false claim to a potential lender that leased equipment belongs to him. The writer has experienced a number of cases where equipment leased by a bank was re-financed through a sale and lease-back arrangement by another bank without the knowledge of the previous lessor and this fact was only made known when the lessee became insolvent. Even though by virtue of the Industrial Inspectorate Act 1970, a person who intends to incur an expenditure of not less than twenty thousand naira in purchase of capital goods must notify the Ministry of Industry, such a requirement only enables the person to obtain the Certificate of Acceptance for the purposes of claiming capital allowances, and it is limited to purchases of not less than twenty-thousand naira.

10.18 It is gratifying that the above recommendation has actually been taken up for all aircraft leases, as it is now mandatory that particulars of the aircraft with the names and particulars of the owner/lessor must be registered with the Air Registration Department of the Federal Ministry of Aviation Lagos. Similar registration is required by the Nigerian Shipping Board of Control Lagos for ships.

10.19 The registration requirement should, as earlier indicated, extend to all types of leased goods and not be limited to aircraft and ships. By this registration the lessor is adequately protected as he would naturally conduct a search at the appropriate ministry before getting involved in any equipment leasing. He is further protected in that the

lessee would hardly be able to assign, sub-let, sell, or transfer ownership of leased equipment without recourse to the owner/lessor. In this connection the law should abolish the "Market Overt Rule" which enables a purchaser who buys in good faith a leased equipment in an open, public and legally constituted market without knowledge of the defect in the lessee's title to acquire title. This rule if not abolished would enable a fraudulent lessee to deprive the lessor of the leased equipment. Professor Goode has said and I perfectly share his view that:

> "... market overt rule has little to commend it, and should be abolished at the earliest opportunity".[9]

(vii) Insurance Of Leased Equipment

10.20 The envisaged law should provide that all leased equipment should be insured at least against total loss. This is necessary because the lessor stands to lose all his investment in a situation where the total loss was caused by a frustrating event in which the equipment is destroyed. Similarly the law should provide that notice of default in payment of premium and/or renewal must be given to the lessor and reasonable time (say thirty days) allowed for him to make good the lessee's default before the insurance policy is cancelled or terminated.

10.21 It may also be necessary to include some other areas of risk such as third parties's liability/workmens's compensation, seizure of the equipment by prior charge / insolvency of the lessee etc. This is necessary because these contingencies are events the lessor can hardly control yet their consequences affect him negatively. A provision similar to section 1 of the English Third Parties (Rights Against Insurers) Act 1930, which stipulates that in the event of the lessee's insolvency, any rights he may have against the insurers in respect of liability incurred to the lessor or other third party become vested in the party to whom such liability was incurred, should be included in

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9. Goode R.M, Commercial Law, (1982) (Penguin Books / Allen Lane) p. 410.

the new law as it protects the lessor's interest in the insurance policy should the lessee become bankrupt or insolvent.

(viii) Legal Status Of The Lessee

10.22 The proposed law on equipment leasing should provide that the lessee must be a corporate entity. This is necessary because as indicated earlier (in Chapter 5 under "Insolvency/Bankruptcy Of The Lessee") the lessor is likely to be aware of an impending liquidation of a corporate lessee and take appropriate steps to protect himself than in a human person lessee's bankruptcy.

10.23 The corporate legal status of the lessee is equally important because The Companies And Allied Matters Decree 1990 enjoins all corporate entities that have borrowed[10] money and mortgaged or charged its property to register[11] the same with the Companies Registry. Where therefore a corporate lessee has charged its property for a facility, the lessor could easily discover this by conducting a search at the Companies Registry. This is not so with sole-proprietorships and partnerships.

10.24 Additionally, corporate status has another advantage in that its reporting and disclosure standards typically provide for more transparency which in the banking/financial system operation, not only facilitates monitoring but also has a positive effect on public confidence.

(ix) The Doctrine of "Quidquic Plantatur Solo Solo Cedit"

10.25 The envisaged law should abolish the doctrine of quidquid plantatur solo solo cedit (which means that whatever is affixed to the soil, belongs to the owner of the soil) in relation to leased equipment whether or not the lessee obtained a waiver from the original landlord or subsequent landlord. This way the issue of waiver which affects

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10. Section 166 of the Companies And Allied Matters Decree 1990.

11. Section 197 of the Companies And Allied Matters Decree 1990.

only the party giving it would have been solved. In the event that the lessee is owning any rent or any land fees, notice and opportunity should be given to the lessor to make good the lessee's default.

2. Effect Of Statement Of Accounting Standard 11 (SAS) By The Nigerian Accounting Standards Board (NASB)

10.26 In March 1991, the Nigerian Accounting Standards Board issued the Statement of Accounting Standard (SAS) II which was supposed to come into effect on 1st January 1992. The SAS II classified leases booked by banks as finance leases (this is a misleading classification as some banks in addition to booking finance leases also book operating leases though this is not popular) and went further to direct that all finance lessors should not be entitled to capital allowances. The government has accepted the SAS II, but no law has been promulagated to that effect nor has the existing Companies Income Tax Act 1979 which allows finance lessors to claim the capital allowances been repealed. The letter to the Chariman of Federal Board of Inland Revenue Lagos by the Chairman of Board of Directors / President of Equipment Leasing Association of Nigeria (ELAN) clearly depicts the position of ELAN, banks, and other lessors on the SAS II. It reads:

> "We at ELAN commend the efforts of the Nigerian Accounting Standards Board in coming up with a standard, but we do think that any standard that would adversely affect the industial growth, and the economic development of the country should be done away with. We must not simply adopt rules and regulations of international bodies without recognising the peculiarities of the environment in which we operate. We warned about this, we were assured publicly by the efforts of the Inland Revenue Department that SAS II will not necessarily influence the views of the Department. The recent white paper on taxes simply adopted the provisions of SAS. While ELAN hopes that our tax administrators will review its position on this matter, we would humbly request the Department to conduct a survey to determine the usefulness or otherwise of the new rule. Indeed we would request the Government to examine the impact of the new rule on leasing business.
>
> We do not have any doubts that if lessors and indeed lessees are not allowed the flexibility of claiming or not claiming capital allowance on leased assets, the leasing industry will collapse sooner than later, the decline has started already. It is our view that the interest of the tax

> authority should be that the capital allowance policy on equipment to encourage investments is not abused. The interest of the Government should be that lessees should continue to have access to lease financing, as it is known that leased equipment are overwhelmingly used in the production of taxable revenue. The Revenue Dept. of Government must see the former incentives now being withdrawn from finance lessors as the major impetus that made these lessors to in the first place invest several millions of Naira in equipment for production. We should not because of short terms gains that come from taxes from banks and finance lessors that seem to be doing well today throw off a good Government Policy that has encouraged real long term growth. It has been documented world wide that leasing could be very useful in the implementation of industrial and fiscal policies".[12]

On being asked what he felt would be the fate of the equipment leasing industry in Nigeria with the withdrawal of capital allowance from lessors in a finance lease as per the provisions of the SAS II, the General Manager of a major merchant bank; Triumph Merchant Bank of Nigeria Lagos, (Mr. Adbul Azeez Aakare) said:

> "We would have to resort to booking operating leases only. The capital allowance that used to be the major incentive in our industry is being removed now so we have no other alternative than to stop writing finance leases but operating. This is not going to be healthy for the industry but for we lessors to stay afloat, to provide lease facilities and other services, we have to write only operating leases, where we can claim capital allowance".[13]

10.27 What is rather strange in the recommendation of the Nigerian Accounting Standards Board (NASB) and its adoption by the government is the rationale behind the idea. On investigation the writer was informed that the decision to re-classify finance leases and grant capital allowance to lessees rather than lessors was based on:

(i) the fact that the lessors in a finance lease do not bear any equipment risk and that some lessors have allowed the lessees to buy the equipment at the end of the lease period. Moreover that a finance lease is structured in such a way that the lessor recovers his capital within the initial (primary) lease period while transfering all the risks of ownership to the lessee.

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12. See ELAN's Newsletter vol.3 no.6 of September 1992, p. 6.

13. Ibid p. 7.

(ii) that since the leased assets/liabilities are not reflected in the lessee's balance sheet, the obligations of the enterprise would be understated and financial information distorted.

(iii) that the profit of banks in recent years is high and this was due to equipment leasing activities.

10.28 All these arguments for the introduction of SAS II taken against the background of what equipment leasing stood for in the overall economic and industrial development of the country do not make any real sense. In the first place (NASB) was wrong in thinking that a lessor cannot dispose of the equipment at the end of the lease period whether it is primary or secondary. The lessor as an owner of an asset can sell same to any person it so desires. What should worry NASB and the Government is the mode of acquisition of the equipment by the lessee. If the lessor in the equipment leasing contract confers on the lessee the right or option to purchase the equipment (as in France and the United States of America) that would be in breach of the Nigerian standard definition of equipment leasing. But in a situation where the equipment is sold to a person who re-sells to another and who finally sells to the original lessee, one does not see how that goes contrary to the definition of equipment leasing. The fact that the lessee bears all the risks of ownership is simply due to the nature of the commercial transaction. The truth of the matter is that the lessor still remains the owner of the leased equipment. Usage of a piece of an equipment and responsibility for the risks arising therefrom should not be used to override the legal form, which is what SAS II impliedly (whether deliberately or otherwise) is trying to achieve. In other words, SAS II is saying that since the lessee bears all the risk of ownership and the lessor recoups his cost of equipment plus some profit, the lessee in a finance lease is the owner of the equipment. This is conceptually and fundamentally wrong and if allowed would also destroy the equipment leasing industry in Nigeria.

10.29 In the second place, the contention that if leased equipment is not reflected in the lessee's balance sheet, the financial information and obligations of the lessee would be distorted, does not also make much sense as the issue at stake is the removal of capital allowances claimable by lessors, and not financial reporting. Financial reporting standards could be provided by NASB and insisted upon without necessarily removing the very dynamic force behind the equipment leasing industry in Nigeria. In fact under the recommendation for a leasing law in Nigeria [see the paragraph on "Disclosure of Information And Registration"] I suggested that lessees should reflect all equipment leasing contracts they are involved by way of footnotes in their financial statements.[14] That should be sufficient to explain the equipment leasing transaction.

10.30 Thirdly, the argument that banks have been making huge profits, like the earlier contentions by NASB, equally cannot be a justification for the removal of capital allowances from lessors. NASB is not placed in authority over banks and cannot supervise the activities of banks. It is left for the Central Bank of Nigeria working probably with the Federal Ministry of Finance to come up with measures to reduce the profitability of banks if they feel that it is so high, and this can easily be done by regulating the interest rate. Furthermore, NASB should have noted that even though a very large percentage of finance lessors come from the banking industry, there are a number of finance lessors that are not banks such as insurance companies and other investment companies. By recommending that capital allowances should now be enjoyed by lessees in a finance lease, these other institutions are equally affected.

Suggested Solution

10.31 The government should reject the recommendation of NASB to transfer capital allowances from lessor to lessee in a finance lease. It is comforting to note that due to pressure mounted by interested groups, the government has suspended the promulgation of a decree to give legal backing to the recommendation. The government has also

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14. See ante para. 10.16.

requested interested groups to submit memoranda on the issue to enable it review its earlier stand. This is what it ought to have done earlier. From all indications, both parties to the leasing business are quite happy and contented with the arrangement in which the lessor owns the equipment and enjoys the capital allowance, while the lessee uses the equipment and enjoys lower rental payments. There is no good reason, at least at the moment, to disturb this. After all if lessors are discouraged from booking leasing business, the lessee will not get their equipment and the issue of who claims the capital allowance would never arise.

3. Frequent Changes In The Government Fiscal And Monetary Policies.

10.32 Frequent changes in the government fiscal and monetary policies also create problems for the equipment leasing industry, and have been largely responsible for the inability of most indegenous companies to take advantage of equipment leasing. These changes (for example Interest Rate Deregulation and Foreign Exchange Market) tend to make investors (lessors) apprehensive as they cannot project with some degree of certainty the returns on their investments. In this situation of uncertainty, they would generally prefer to put their money into investments where it would be recouped immediately, rather than for example equipment leasing where it would have to be recouped over a period of time.

Suggested Solution

10.33 The sooner the government realises that these frequent changes, though said to be responding to the economic situations in the country, are working in a way counter-productive to the industrial growth of the nation, the better. The government should recognise the very useful contribution equipment leasing business is making towards industrial growth of Nigeria and from this angle study carefully and formulate policies aimed at aiding the growth and development of equipment leasing business in the overall interest of the country's economic well-being.

4. Classification Of Equipment Leasing As Lending By The Central Bank Of Nigeria

10.34 The Central Bank of Nigeria as part of its monetary control policy announces Banks' credit ceilings. In 1990, by a circular titled "Federal Military Government of Nigeria Monetary Policy Circular No.24 1990" generally known in banking/financial circle as the Credit Policy Guidelines, the CBN announced that equipment leasing was henceforth to be seen and treated as lending and consequently would be regulated under the credit expansion ceiling of banks. The circular stipulated that not more than 15 percent of banks total assets should be in equipment leasing. The effect of this circular, which the CBN introduced in order to reduce the rate of inflation, is that equipment leasing activities have been drastically reduced.

Suggested Solution

10.35 Since equipment leasing would not generally induce inflation as it cannot be put to other uses save for the purpose for which it was orignally meant, although some fraudulent parties might deviate from the intended purpose, the CBN should introduce measures aimed at effectively monitoring the operation of equipment leasing. To classify it as lending, is, as has been seen, destroying the equipment leasing industry since it greatly reduces the ability of banks to create leasing facilities. The CBN should therefore remove leasing from its present classification as lending.

5. Dearth Of Trained And Experienced Personnel In The Industry

10.36 It has been shown from a careful reading of equipment leasing appraisals, structuring and documentation that most of the lessor institutions merely try to copy the format and provisions of an already prepared equipment leasing transaction without paying special attention to the unique nature of the transaction before them. This is worse in the newly established banks who are in a hurry to take off with equipment leasing business and yet lack the staff properly to package leasing deals. Commenting on the need to have properly trained staff in the banks to handle equipment leasing

among other services, the Deputy Governor of the Central Bank of Nigeria, Mr Victor Odozi said:

> "The Financial Services Sector Industry of which the banking sector is a key component, is on the threshold of a revolution in Nigeria. Some of the features of the revolution which would come within the next few years are full service banking; increased competition; wide variety of products designed to service customer needs more fully and adequately; and of course, increased sophistication in terms of skills, expertise, equipment, process and corporate style.
> Arising from the last point, the challenges of the banking industry are enormous and in no area is it more manifest than in manpower of the right size and quality. Indeed, the shortage of personnel with adequate skills and experience has in recent times been used by some analysts to justify their calls for the suspension of issuance of more banking licences.
> While one would like to resist the temptation to go into the controversy generated by such calls, one cannot but underscore the priority of training of bank personnel. Banks which lack knowledgeable, skilled and competent staff would lose out in the increasing competitive environment that is emerging".[15]

Suggested Solution

10.37 Lessors whether banks or other institutions should ensure that their staff handling equipment leasing business are properly trained, and as Mr Odozi had pointed out, where they fail to do this they will not only lose out in the aggressive competition in the industry, they will also slow down the pace of development and may in fact create confusion and problems for the industry due to their unawareness.

6. Poor Capital Allowances And Restriction On Total Allowances Claimable

10.38 One of the major complaints of lessors involved in equipment leasing is the poor percentage of capital and other allowances claimable. They are of the view that if the government is willing to encourage the growth of the industry it should increase the current rates of capital and other claimable allowances (see Appendix 6 for the current rate of claimable allowances).

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15. See the Vanguard Newspaper (Business Section) of March 4, 1990 p. 14.

Suggested Solution

10.39 There is need to change the whole system of capital and other claimable allowances. While it is true that the government requires revenue in order to operate and manage the economy it must not be forgotten that there is great need to sustain the few industrial establishments and to attract new ones from both within and outside the country. Consequently one would recommend as follows:

(a) An increase on all qualifying expenditure heads especially in the Structural Adjustment Programme's (SAP) priority areas, namely:

(i) Agricultural and agro-applied industries;

(ii) Export-oriented industries;

(iii) Local raw materials industries;

(iv) Research and development concerns;

of up to fifty percent in the first/initial year allowance and minimum of twenty-five percent in the annual allowances.

(b) The capital allowance on these priority areas should be excluded from Section 36(7) of the Finance (Miscellaneous Taxation Provisions) Decree No.4 of 1985, which provides:

> "In giving effect to the provisions of sub-paragraph 2, the amount of capital allowances to be deducted from assessable profits in any year of assessment shall not exceed 75 percent of such assessable profit in the case of a manufacturing company and 662/3 percent in the case of any other company. Any company in the agro-allied industry shall not be affected by this restriction".

In effect, one is recommending that for investment in these priority areas, capital allowances on leased equipment should not be affected by the restriction imposed by Decree No.4 of 1985.

(c) An investment allowance of up to twenty percent should be granted to lessors financing equipment leases in order to encourage more investment in this area especially now that profitability margins are thinner.

10.40 Investors (lessors) need the concessions recommended above if they are to be encouraged to continue investing in this area of business. The government should encourage them because in the long term, it will stand to benefit from all the revenues arising from these new insvestments which can only come about where the incentives exist. To do otherwise would likely lead to the collapse of the already existing industries as investors would not only avoid investing in the business but may also abandon their existing investments. Where the incentives exist as recommeded, the benefits would not be limited to lessors but would also extend to lessees by way of reduced rentals. At the end of the day, the government is gaining because of greater investment, the lessors (investors) are happy to invest because it is condusive and profitable, and the lessees are happy because of low rentals paid and ultimately the consumers are happy because they pay low prices for the goods and services.

7. Effects Of The Industrial Inspectorate Act No. 53 of 1970

10.41 One of the operational difficulties facing the equipment leasing industry in Nigeria is the effect of the Industrial Inspectorate Act. Section 3 of the said Act provides:

(1) "As from the commencement of this Decree, any person proposing -
(a) To start a new undertaking involving the expenditure of not less than Ten Thousand Pounds in respect of an existing undertaking - shall give to the Director notice of his intention in the form specified in Schedule I of this decree.

(2) The Director shall on receipt of the notice sent pursuant to subsection (1) above verify the information contained therein and may -
(a) Demand and make use of any document relating to the purchase (whether locally or abroad) of any plant or machinery or parts thereof;
(b) In the case of second-hand equipment demand and make use of information relating to the history of the equipment;

(c) Carry out physical checks on the site of any undertaking and inspect any building, plant or machinery.

(3) On being satisfied with the investment valuation as determined pursuant to the foregoing provisions of this Decree, the Director shall prepare and forward to the person carrying on the undertaking a certificate of acceptance which shall be in the form specified in schedule I of this Decree.

(4) Any person who fails to comply with subsection (1) above shall, unless he proves that he had reasonable excuse for the failure, be guilty of an offence and liable on conviction to a fine of five hundred pounds".

10.42 Relying on the above provisions of the Industrial Inspectorate Act, the Federal Board of Inland Revenue had made it a condition precedent that in order to qualify to claim capital allowances on equipment whose value exceeds N20,000.00, the claimant must submit its capital expenditure to the Inspectorate Division of the Federal Ministry of Industries and thereafter present to it (FBIR) the Acceptance Certificate. No distinction is made under the said Act between companies acquiring plant and equipment for their own use, and leasing companies who own the equipment but do not use them themselves.

10.43 Much as the intention of the Federal Government in enacting the Act is a laudable one in that the mischief it was intended to stop was the practice of unscrupulous industrialists and machinery importers bringing into the country industrial plant and machinery which was not what they claimed it to be (i.e. it was either over-valued, or out-of-date or otherwise unsuitable) and thereafter remitting overseas funds in excess of the true value of the machinery to the detriment of the country's foreign exchange reserves, its mode of implementation by the Inspectorate Division of the Federal Ministry of Industries appears to retard the much needed industrial development of the country. This is so because the physical inspection of the equipment which must be done by the Inspectorate Division does not take place until after the equipment has been installed. Consequently the lessor is placed in an unenviable position of not being

certain for a considerable time after his money has been invested in the equipment, that it will qualify for capital allowances. But if this were to be the only problem associated with obtaining the Acceptance Certificate, perhaps the lessors would have tried to exercise patience, but this is not so. The lessor may have to plead and wait for months for the inspectors to come and inspect the equipment and they only visit the site where the equipment is located in their own time and at their convenience. What in other sectors of the economy that have similar inspection practices is regarded as an essential credit-worthy financial service, is being turned into an major hurdle, with the equipment leasing company being at the mercy of civil service beaurocratic red tape. Even after the inspectors may have at their own convenience inspected the equipment, the problem does not end, the lessors may have to wait for months before the Acceptance Certificate is issued. Commenting on this the President of ELAN said:

> "On the average, it takes six to nine months today to obtain tax acceptance certificate from the Ministry. The procedure is cumbersome. It is a laborious process! There is no denying the fact that the ministry itself need to ease the procedure for obtaining these certificates if we are not unwittingly going to discourage investments in capital goods; if the national aim of attaining industrial emancipation is not to be defeated through our inability to be innovative to easier access to these certificates. We appeal to the Federal Ministry of Industries to go through a process of introspection with a view to identifying what is responsible for the slow pace in issuing tax acceptance certificates to our members. This will be one positive way of saving the leasing industry from imminent collapse. For indeed, how else can one justify ones investment in capital assets if the benefits accruing therefrom cannot be taken with relative ease? While we the lessors will continue to comply with the law, it would seem that our efforts deserve government encouragement".[16]

Suggested Solution

10.44 The Inspectorate Division of the Federal Ministry of Industries should, as the ELAN President has said, go through a process of introspection with a view to finding out what may be responsible for the long delays in issuing the Acceptance Certificate and remove them. If it means setting up a special unit to handle fully the processing,

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16. See ELAN's Newsletter vol. 1 no.3 of November 1991 p. 8.

inspection and issuing of Acceptance Certificates they should do that rather than carrying files and documents relating to a particular equipment leasing transaction from one section of the ministry to another.

CONCLUSION

10.45 Equipment leasing as I have tried to show in this thesis has become a very vibrant and lucrative world-wide commercial activity that is not only beneficial to the industrialized nations but also particularly useful to a developing economy such as Nigeria's, especially now that the country is not able to pay for all the imported equipment it needs and yet is striving to be self-sufficient in food production and to develop a strong industrial base. It is my submission therefore that the desire to develop a strong industrial base/grow technologically and to be self-sufficient in food production would be illusory without the importation and/or production of the necessary equipment, and since the nation cannot at the moment pay for the equipment, leasing would then be the best alternative. Even where the nation decides to produce the needed equipment locally it would still need imported equipment which the country cannot purchase outright and in the circumstance leasing it would appear to be the most sensible thing to do.

10.46 Leasing has also brought about a much desired maintenance culture in the nation's industries, as both the lessor and the lessee are eager to ensure that the leased equipment is properly handled and maintained.

10.47 Through leasing many of the nation's industries that closed down because they could not pay for the needed imported equipment have been revived.

10.48 Properly packaged and channelled equipment leasing should result in the allocation of more resources to the productive sectors of the economy thus increasing industrial capacity productivity and output. It would similarly promote more efficient allocation of scarce resources.

10.49 Equipment leasing has been welcomed in Nigeria as a very viable alternative form of financing the acquisition of capital asset, and there is no doubt that it will

continue to grow provided there is a concerted effort by all concerned to provide a conducive environment and this will not be achieved in an atmosphere of uncertainty. It is therefore my submission that an adequate and responsive regulatory framework in the form of equipment leasing law would be necessary for a more rapid and orderly development of this commercial activity.

10.50 All in all, there is no doubt whatsoever that equipment leasing has come to stay in Nigeria and that its future within the Nigerian Banking Environment is very bright. I consequently advise that it is essential constantly to appraise this commercial activity especially from the legal perspective, if only to minimise the risks involved and the general lack of awareness of the complex legal implications of its operations.

APPENDIX 1

Regulations Defining the Constitution, Duties and Powers of the West African Currency Board

1. The West African Currency Board has been constituted to provide for and to control the supply of currency of the British West African Colonies and Protectorates and Trust Territories (hereinafter referred to as the Constituent Territories), to ensure that the currency is maintained in a satisfactory condition and generally to watch over the interests of the Constituent Territories so far as the currency is concerned.
2. The members of the Board and the Secretary are appointed by the Sectretary of State.
3. The Board will have the power to appoint officers for the discharge of such duties in connection with currency in the United Kingdom or in British West Africa at such rates of salary as the Board may think fit, subject in each case to the approval of the Secretary of State.
4. The Board is authorized to incur expenditure necessary for the due performance of such duties as are now or may be hereafter assigned to it.
5. The Board will have authority to make all necessary arrangements for the minting of any special coins authorized for circulation in the Constituent Territories and to comply with applications for the supply of any coins at the time being legally current in those territories. Subject to the provisions of these Regulations and of any legislation from time to time in force in the constituent Territories, the Board may provide and may issue and re-issue therein notes hereinafter referred to as currency notes.
6. The plates from which the currency notes are printed shall be of such designs and shall bear such devices as the Sectretary of State shall approve and shall be prepared

by a person selected by the Board. The Board shall be responsible for their safe custody.

7. The currency notes shall be printed on such paper as may be approved by the Board and shall be authenticated by facsimiles of the signatures of the memebers of the Board for the time being.

8. The Board shall make such arrangements as it may from time to time think necessary or proper for the cancellation of notes withdrawn from further use, for the destruction of such cancelled notes and for recording the issue and cancellation of notes.

9. The Board shall issue at its main centres at Accra, Bathurst, Freetown and Lagos, in the Constituent Territories, to any person who makes demand in that behalf coin or currency notes equivalent to the value (at the rate of twenty shillings West African Currency to one pound sterling) of sums in sterling lodged with the Board in London.

The Board shall pay to any person who makes demand in that behalf sterling in London equivalent to the value (calculated as aforesaid) of coin or currency notes lodged with the Board at its aforesaid centres in the Constituent Territories.

Provided that:

i. The Board shall be entitled to levy from any person obtaining currency notes, coins or sterling under these provisions a commission at such rate or rates not exceeding three quarters of one per cent as it may determine from time to time.

ii. The Board may fix such minimum limits of values as it may think fit from time to time for the transactions referred to in this regulation.

iii. No person shall be entitled to receive currency in the Constituent Territories or payment in London unless the Board is satisfied that payment of sterling has been made in London or equivalent currency tendered in the Constituent Territories as the case may be.

10. Proceeds from the sale of coin and currency notes and all other revenue of the Board shall, after the necessary deductions have been made for all expenses and for any contributions made to the revenues of the British West African Governments under section 16 of these Regulations, be credited to a fund hereinafter referred to as the Currency Reserve Fund. Any losses which may be incurred will be debited to the Fund.

11. The Board may invest its funds in sterling securities of the Government of any part of His Majesty's dominions, or in such other manner as the Sectretary of State may approve. The extent to which investments may be made will be left to the discretion of the Board, whose duty it will be to hold, subject to any directions which may be received from the Sectretary of State, a proportion of its reserve in a liquid form.

12. The Board shall submit half-yearly to the Secretary of State a statement of the position of the Currency Reserve Fund on the last days of June and December in each year including a Statement of Securities.

13. The Board shall cause to be made up half-yearly and published in the Government Gazettes of the Constituent Territories an abstract showing:

(a) the whole amont of the West African coinage and note circulations on the last days of June and December in each year,

(b) the total amount of the Currency Reserve Fund on the said days,

(c) the nominal value of, price paid for and latest known market price of the securities forming the investment portion of the Reserve Fund.

14. The accounts of all the transactions of the Board will be audited by the Colonial Audit Department.

15. The Board will submit annually for the approval of the Secretary of State a statement of its transactions during the preceding year.

16. The Board may, with the approval of the Secretary of State, pay any sum which it thinks proper out of its income by way of contribution to the revenue

of the British West African Governments.

17. When the Board is satisfied, and shall have satisfied the Secretary of State that its reserves are more than sufficient to ensure the convertibility of the coin and note issue, and to provide a reasonable reserve against possible depreciation the Board may pay over the whole or part of the surplus amount in aid of the revenues of the British West African Governments.

18. The Regulations defining the constitution, duties and powers of the Board dated 11th July, 1924, are hereby revoked.

19. The Regulations may be cited as the West African Currency Board Regulations, 1949.

A. Creech Jones,

2nd September, 1949. Secretary of State

APPENDIX 2

Unidroit Convention on International Financial Leasing

THE STATES PARTIES TO THIS CONVENTION,

RECOGNISING the importance of removing certain legal impediments to the international financial leasing of equipment, while maintaining a fair balance of interests between the different parties to the transaction,

AWARE of the need to make international financial leasing more available,

CONSCIOUS of the fact that the rules of law governing the traditional contract of hire need to be adapted to the distinctive triangular relationship created by the financial leasing transaction,

RECOGNISING therefore the desirability of formulating certain uniform rules relating primarily to the civil and commercial law aspects of international financial leasing,

HAVE AGREED as follows:

CHAPTER 1 - SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

1 This convention governs a financial leasing transaction as described in paragraph 2 in which one party (the lessor),

(a) on the specifications of another party (the lessee), enters into an agreement (the supply agreement) with a third party (the supplier) under which the lessor

acquires plant, capital goods or other equipment (the equipment) on terms approved by the lessee so far as they concern its interests, and

(b) enters into an agreement (the leasing agreement) with the lessee, granting to the lessee the right to use the equipment in return for the payment of rentals.

2 The financial leasing transaction referred to in the previous paragraph is a transaction which includes the following characteristics:

(a) the lessee specifies the equipment and selects the supplier without relying primarily on the skill and judgment of the lessor;

(b) the equipment is acquired by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, either has been made or is to be made between the lessor and the lessee; and

(c) the rentals payable under the leasing agreement are calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost of the equipment.

3. This Convention applies whether or not the lessee has or subsequently acquires the option to buy the equipment or to hold it on lease for a further period, and whether or not for a nominal price or rental.

4. This Convention applies to financial leasing transactions in relation to all equipment save that which is to be used primarily for the lessee's personal, family or household purposes.

Article 2

In the case of one or more sub-leasing transactions involving the same equipment, this Convention applies to each transaction which is a financial leasing transaction and is otherwise subject to this Convention as if the person from whom the first lessor (as defined in paragraph 1 of the previous article) acquired the equipment were the supplier and as if the agreement under which the equipment was so acquired were the supply agreement.

Article 3

1 This Convention applies when the lessor and the lessee have their places of business in different States and:

(a) those States and the State in which the supplier has its place of business are Contracting States; or

(b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State.

2 A reference in this Convention to a party's place of business shall, if it has more than one place or business, mean the place of business which has the closest relationship to the relevant agreement and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that agreement.

Article 4

1 The provisions of this Convention shall not cease to apply merely because the equipment has become a fixture to or incorporated in land.

2 Any question whether or not the equipment has become a fixture to or incorporated in land, and if so the effect on the rights *inter se* of the lessor and a person having real rights in the land, shall be determined by the law of the State where the land is situated.

Article 5

1 The application of this Convention may be excluded only if each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it.

2 Where the application of this Convention has not been excluded in accordance with the previous paragraph, the parties may, in their relations with each other, derogate

from or vary the effect of any of its provisions except as stated in Articles 8(3) and 13(3)(b) and (4).

Article 6

1 In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2 Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER II - RIGHTS AND DUTIES OF THE PARTIES

Article 7

1 (a) the lessor's real rights in the equipment shall be valid against the lessee's trustee in bankruptcy and creditors, including creditors who have obtained an attachment or execution.

(b) For the purposes of this paragraph "trustee in bankrupcty" includes a liquidator, administrator or other person appointed to administer the lessee's estate for the benefit of the general body of creditors.

2 Where by the applicable law the lessor's real rights in the equipment are valid against a person referred to in the previous paragraph only on compliance with rules as to public notice, those rights shall be valid against that person only if there has been compliance with such rules.

3 For the purposes of the previous paragraph the applicable law is the law of the State which, at the time when a person referred to in paragraph 1 becomes entitled to invoke the rules referred to in the previous paragraph, is:

(a) in the case of a registered ship, the State in which it is registered in the name of the owner (for the purposes of this sub-paragraph a bareboat charterer is deemed not to be the owner);

(b) in the case of aircraft which is registered pursuant to the Convention on International Civil Aviation done at Chicago on 7 December 1944, the State in which it is so registered;

(c) in the case of other equipment of a kind normally moved from one State to another, including an aircraft engine, the State in which the lessee has its principal place of business;

(d) in the case of all other equipment, the State in which the equipment is situated.

4 Paragraph 2 shall not affect the provisions of any other treaty under which the lessor's real rights in the equipment are required to be recognised.

5 This article shall not affect the priority of any creditor having:

(a) a consensual or non-consensual lien or security interest in the equipment arising otherwise than by virtue of an attachment or execution, or

(b) any right or arrest, detention or disposition conferred specifically in relation to ships or aircraft under the law applicable by virtue of the rules of private international law.

Article 8

1 (a) Except as otherwise provided by this Convention or stated in the leasing agreement, the lessor shall not incur any liability to the lessee in respect of the equipment save to the extent that the lessee has suffered loss as the result of its reliance on the lessor's skill and judgment and of the lessor's intervention in the selection of the supplier or the specifications of the equipment.

(b) The lessor shall not, in its capacity of lessor, be liable to third parties for death, personal injury or damage to property caused by the equipment.

(c) The above provisions of this paragraph shall not govern any liability of the lessor in any other capacity, for example as owner.

2 The lessor warrants that the lessee's quiet possession will not be disturbed by a person who has a superior title or right, or who claims a superior title or right and acts under the authority of a court, where such title, right or claim is not derived from an act or omission of the lessee.

3 The parties may not derogate from or vary the effect of the provisions of the previous paragraph in so far as the superior title, right or claim is derived from an intentional or grossly negligent act or omission of the lessor.

4 The provisions of paragraphs 2 and 3 shall not affect any broader warranty of quiet possession by the lessor which is mandatory under the law applicable by virtue of the rules of private intentional law.

Article 9

1 The lessee shall take proper care of the equipment, use it in a reasonable manner and keep it in the condition in which it was delivered, subject to fair wear and tear and to any modification of the equipment agreed by the parties.

2 When the leasing agreement comes to an end the lessee, unless exercising a right to buy the equipment or to hold the equipment on lease for a further period, shall return the equipment, to the lessor in the condition specified in the previous paragraph.

Article 10

1 The duties of the supplier under the supply agreement shall also be owed to the lessee as if it were a party to that agreement and as if the equipment were to be supplied directly

to the lessee. However, the supplier shall not be liable to both the lessor and the lessee in respect of the same damage.

2 Nothing in this article shall entitle the lessee to terminate or rescind the supply agreement without the consent of the lessor.

Article 11

The lessee's rights derived from the supply agreement under this Convention shall not be affected by a variation of any term of the supply agreement previously approved by the lessee unless it consented to that variation.

Article 12

1 Where the equipment is not delivered or is delivered late or fails to conform to the supply agreement:

(a) the lessee has the right as against the lessor to reject the equipment or to terminate the leasing agreement; and

(b) the lessor has the right to remedy its failure to tender equipment in conformity with the supply agreement, as if the lessee had agreed to buy the equipment from the lessor under the same terms as those of the supply agreement.

2 A right conferred by the previous paragraph shall be exercisable in the same manner and shall be lost in the same circumstances as if the lessee had agreed to buy the equipment from the lessor under the same terms as those of the supply agreement.

3 The lessee shall be entitled to withhold rentals payable under the leasing agreement until the lessor has remedied its failure to tender equipment in conformity with the supply agreement or the lessee has lost the right to reject the equipment.

4 Where the lessee has exercised a right to terminate the leasing agreement, the lessee shall be entitled to recover any rentals and other sums paid in advance, less a reasonable sum for any benefit the lessee has derived from the equipment.

5 The lessee shall have no claim against the lessor for non-delivery, delay in delivery or delivery of non-conforming equipment except to the extent to which this results from the act or omission of the lessor.

6 Nothing in this article shall affect the lessee's rights against the supplier under Article 10.

Article 13

1 In the event of default by the lessee, the lessor may recover accrued unpaid rentals, together with interest and damages.

2 Where the lessee's default is substantial, then subject to paragraph 5 the lessor may also require accelerated payment of the value of the future rentals, where the leasing agreement so provides, or may terminate the leasing agreement and after such termination:

(a) recover possession of the equipment; and

(b) recover such damages as will place the lessor in the position in which it would have been had the lessee performed the leasing agreement in accordance with its terms.

3 (a) The leasing agreement may provide for the manner in which the damages recoverable under paragraph 2 (b) are to be computed.

(b) Such provision shall be enforceable between the parties unless it would result in damages substantially in excess of those provided for under paragraph 2 (b). The parties may not derogate from or vary the effect of the provisions of the present sub-paragraph.

4 Where the lessor has terminated the leasing agreement, it shall not be entitled to enforce a term of that agreement providing for acceleration of payment of future rentals, but the value of such rentals may be taken into account in computing damages under paragraph 2(b) and 3. The parties may not derogate from or vary the effect of the provisions of the present paragraph.

5 The lessor shall not be entitled to exercise its right of acceleration or it right of termination under paragraph 2 unless it has by notice given the lessee a reasonable opportunity of remedying the default so far as the same may be remedied.

6 The lessor shall not be entitled to recover damages to the extent that it has failed to take all reasonable steps to mitigate its loss.

Article 14

1 The lessor may transfer or otherwise deal with all or any of its rights in the equipment or under the leasing agreement. Such a transfer shall not relieve the lessor of any of its duties under the leasing agreement or alter either the nature of the leasing agreement or its legal treatment as provided in this Convention.

2 The lessee may transfer the right to the use of the equipment or other rights under the leasing agreement only with the consent of the lessor and subject to the rights of third parties.

CHAPTER III - FINAL PROVISIONS

Article 15

1 This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the Adoption of the Draft Unidroit Conventions on International Factoring and International Financial Leasing and will remain open for signature by all States at Ottawa until 31December 1990.

2 This Convention is subject to ratification, acceptance or approval by States which have signed it.

3 This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4 Ratification, acceptance, approval or accession is effected by the deposit of a formal instruction to that effect with the depository.

Article 16

1 This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2 For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 17

This Convention does not prevail over any treaty which has already been or may be entered into; in particular it shall not affect any liability imposed on any person by existing or future treaties.

Article 18

1 If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2 These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3 If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4 If a Contracting State makes no declaration under paragraph 1, the Convention is to extend to all territorial units of that State.

Article 19

1 Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the supplier, the lessor and the lessee have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

2 A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the supplier, the lessor and the lessee have their places of business in those States.

3 If a State which is the object of a declaration under the previous paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 20

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will substitute its domestic law for Article 8(3) if its

domestic law does not permit the lessor to exclude its liability for its default or negligence.

Article 21

1 Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2 Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3 A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article 19 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

4 Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5 A withdrawal of a declaration made under Article 19 renders inoperative in relation to the withdrawing State, as from the date on which the withdrawal takes effect, any joint or reciprocal unilateral declaration made by another State under that article.

Article 22

No reservations are permitted except those expressly authorised in this Convention.

Article 23

This Convention applies to a financial leasing transaction when the leasing agreement and the supply agreement are both concluded on or after the date on which the Convention enters into force in respect of the Contracting States referred to in Article 3(1)(a), or of the Contracting State or States referred to in paragraph 1(b) of that article.

Article 24

1 This Convention may be denounced by any Contracting State at any time after the date on which it enters into force for that State.

2 Denunciation is effected by the deposit of an instrument to that effect with the depositary.

3 A denunciation takes effect on the first day of the month following the expiration of six months after the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciatiion it takes effect upon the expiration of such longer period after its deposit with the depositary.

Article 25

1 This Convention shall be deposited with the Government of Canada.

2 The Government of Canada shall:

(a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made under Articles 18, 19 and 20;

(iii) the withdrawal of any declaration made under Article 21 (4);

(iv) the date of entry into force of the Convention;

(v) the deposit of an instrument of denunciation of the Convention together with the date of its deposit and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at Ottawa, this twenty-eighth day of May, one thousand nine hundred and eighty-eight, in a single original, of which the English and French texts are equally authentic.

APPENDIX 3

SPECIMEN OF AN OFFER LETTER OF A MAJOR COMMERCIAL BANK
Uwaoma Bank of Nigeria plc.

Our Ref:

Date:

The Managing Director

Adaku Nigeria Limited

30 Old Age Road

Satellite Town - Umuaka

Orlu-Imo State

Dear Sir,

LETTER OF OFFER (TEMPORARY)

We are pleased to inform you that after due consideration of your application for N1.0m lease facility, Uwaoma Bank of Nigeria Plc has approved your request subject to the following:-

1. PURPOSE OF FACILITY

   To finance the purchase of 2 units of semi trailer tank heads.

2. TENURE AND REPAYMENT

   The lease facility is for a period of twenty-one months and rentals shall be in

seven equal and consecutive instalments of N230,357.00 (payable in arrears) beginning three months after drawdown.

You would be informed at the end of the lease period whether or not we intend to sell the two tank heads. Where we do, we shall give you the first option.

3. MANAGEMENT FEE

1% payable annually and upfront at the beginning of each year.

4. PROCESSING/ARRANGEMENT FEE

1% payable once and upfront.

5. LEGAL FEE

The lawyer's professional fees and other fees for documentation are as per our standard scale of fees attached hereto.

6. SECURITY

(a) The Bank shall have legal title to the vehicles throughout the duration of the lease term.

(b) You will put in place a deposit of N100,000.00 being 10% of the cost of the equipment.

7. COVENANTS

(a) You will ensure that the vehicles are comprehensively insured at all times with out interest noted as accident/loss payee beneficiary.

(b) You will ensure at all times that the vehicles are in good state of mainten ance and repair.

(c) You will prominently display at all times the labels or other markings of our title to the vehicles.

(d) You will pay all legal fees and other incidental costs to this facility.

(e) You will submit to us the, audited accounts of the company within 180 days from the end of each accounting year.

8. CONDITIONS PRECEDENT TO DRAWDOWN

(a) Acceptance of offer.

(b) Board resolution of Adaku Nigeria Limited accepting the facility, and authorising certain members of the board, to sign all documents in respect of this facility, on behalf of the company.

(c) Signed and executed lease agreement.

(d) Payment of all upfront fees.

9. OTHER CONDITIONS

You will execute an acceptance certificate certifying that the vehicles are in good working condition at the time of delivery.

If you accept the foregoing conditions please sign the five originals of this letter and affix your company's seal thereon and return same to us within 14 days from the date on this letter.

We look forward to a continous and more rewarding business relationship.

Yours faithfully

for: UWAOMA BANK OF NIGERIA PLC.

SENIOR MANAGER/HEAD
EQUIPMENT LEASING DEPT.

EXECUTIVE DIRECTOR
CORPORATE BANKING DIVISION

ACCEPTANCE

The above listed conditions are accepted by us.

MANAGING DIRECTOR/CHAIRMAN	DIRECTOR/SECRETARY
ADAKU NIGERIA LIMITED	ADAKU NIGERIA LIMITED

APPENDIX 4

SPECIMEN OF AN OPERATING LEASE AGREEMENT OF A MAJOR MERCHANT BANK

THIS LEASE made this .....day of .....19..... Between XYZ Merchant Bank Limited of Broad Street, Lagos, their successors and assigns (hereinafter called "the Lessor") of the one part AND ABC Company Limited, of Marina, Lagos, their successors and assigns (hereinafter called "the Lessor") of the other part.

WITNESSETH that in consideration of the mutual convenants hereinafter contained it is hereby agreed as follows:-

1. LEASE. The Lessor shall lease and the Lessee shall take on hire all machinery equipment and other property described in the schedule. All machinery equipment and other property described in the said schedule is hereinafter collectively called "the equipment".

2. TERM. The term of this Lease in respect of the equipment:-

(a) shall commence on the date of delivery thereof to the Lessee; and

(b) shall terminate on the date specified in the Schedule unless renewed on terms stated therein.

3. RENT. The rent for the equipment described in the Schedule shall be the amount designated in the Schedule and shall be paid in advance in the amounts and at the times set forth in the Schedule to the Lessor at its above address or to such other person and/or at such other place at the Lessor may from time to time designate in writing.

4. USE. The Lessee shall keep the equipment properly housed, shall use the equipment in a careful and proper manner and shall comply with all requirements of law relating to the possession, use or maintenance of the equipment. If at any time during the term of this Lease the Lessor supplies the Lessee with labels plates or other

markings stating that the equipment is owned by the Lessor the Lessee shall affix and keep the same upon a prominent place on each item of the equipment insofar as it is practicable to do so or so far as requested by the Lessor.

5. LESSEE'S INSPECTION CONCLUSIVE PRESUMPTIONS. The Lessee shall inspect the equipment within forty-eight hours after receipt thereof and unless within that period the Lessee leaves written notice as to any defect in the equipment, it shall be conclusively presumed that the equipment is in good condition and repair.

6. INSPECTION. The Lessee shall:-

(a) not unreasonably withold from the Lessor permission during normal business hours to enter upon any premises where the equipment may be for the purpose of inspecting the same

(b) notify the Lessor in advance of any change of address of the place where the equipment is housed or ordinarily kept.

7. ALTERATIONS. Without the prior written consent of the Lessor the Lessee shall not make any alterations, additions or improvements to the equipment. All additions and improvements of whatsoever kind or nature made to the equipment shall belong to and become the property of the Lessor upon the expiration or earlier termination of this Lease unless otherwise agreed.

8(a). DAMAGE AND LOSS. The Lessee agrees to replace the equipment if it should be lost and to indemnify and keep indemnified the Lessor against any loss, damage, costs, and expenses the Lessor may suffer or sustain by reason of the equipment being lost, damaged or destroyed by any cause whatsoever.

(b) To notify the Lessor forthwith in writing of the loss or of damage of any kind whatever to the equipment.

9. SURRENDER. Upon the expiration or earlier termination of this Lease the Lessee shall return the equipment at its own expenses to the Lessor in good repair and condition and working order ordinary wear and tear resulting from proper use thereon alone expected according to the Lessor's requirements.

10. INSURANCE. The Lessee shall insure and keep insured the equipment compreshensively against all the usual risks applicable to such equipment or connected with their use or shall otherwise be required by law and such risks shall include without being limited to loss or damage by fire, theft, and accident and the Lessee shall indemnify the Lessor against any loss arising from the Lessee's failure to take out or keep alive the said policies of insurance. All such insurance shall be with a company or companies approved by the Lessor. The proceeds of every such insurance shall be applied at the option of the Lessor either:-

(a) towards the replacement, restoration or repair of the equipment or

(b) towards payment of the obligations of the Lessee hereunder,

the Lessee remaining liable for any loss or damage sustained by the lessor. The Lessee shall notify the insurers that lessor's interest be noted on the policy, as loss payee, and consent of the insurers obtained to that effect.

11. TAXES. The Lessee shall keep the equipment free and clear of all liens and encumbrances and shall pay all licence fees, registration fees, assessments charges and taxes which may now or hereafter be imposed upon the ownership, leasing, renting, sale, possession, importation, or use of the equipment (excluding any taxes on or assessed by reference to the profits of the Lessor).

12. LESSOR'S PAYMENT. In case of failure of the Lessee to procure or maintain insurances or to pay fees, assessments, charges, and taxes as herein before specified the Lessor shall be entitled to effect such insurances or pay such fees assessments, charges, and taxes as the case may be. In the event of payment by the Lessor every amount so paid shall be repayable to the Lessor with the next instalment of rent and failure to repay the same shall carry with it the same consequences including the payment of interest thereon at ten per cent per annum as failure to pay any instalment of rent.

13. WARRANTIES. The Lessee shall be entitled to the benefit of any guarantees or warranties which may be given by the manufacturers of the equipment but the Lessor gives no warranties either expressed or implied as to any matter whatsoever including

without limitation the description, year of manufacture or condition of the equipment, its merchantability, or its fitness for any particular purpose.

14. INDEMNITY. The Lessee shall indemnify the Lessor against any and all claims, actions, suits, proceeding, costs, expenses, duties, damages, and liabilities arising in respect of the equipment.

15. DEFAULT. If the Lessee fails within ten days after the same is due and payable to pay any instalment of rent or other amount payable hereunder or fails to observe keep or perform any other provision of this Lease required to be observed, kept, or performed by the Lessee the Lessor shall have the right to exercise in respect of the equipment the subject of this Lease or of any other Lease in force between the Lessee and Lessor any one or more of the following remedies:-

(a) to terminate the Lease either by notice in writing to the Lessee or by taking possession of the equipment without demand or notice wherever the same may be and without being liable to the Lessee for any loss or damage whatsoever which may thereby be occasioned

(b) to sue for and recover all rentals accrued due

(c) to recover damages in respect of any loss sustained by the Lessor as a result of such failure.

Notwithstanding any such repossession or any other action which the Lessor may take the Lessee shall be and remain liable for the full performance of all outstanding obligations on its part to be performed under this Lease and any other Lease in force.

16. CONDITIONS PRECENDENT TO THE LESSOR'S CONSENT TO THE LESSEE CONTINUING IN POSSESSION OF THE EQUIPMENT. The Lessee shall not suffer the equipment or any part thereof to be taken under any distress for rent or in execution or under other process of Law and shall not commit nor suffer to be committed any act of bankruptcy nor any act or thing upon which an act of bankruptcy could at the time or subsequently be founded nor compound nor attempt to compound with his creditors nor being a company call a meeting of its creditors nor pass an effective resolution for winding-up nor suffer a winding-up order to be made against it.

17. CURRENT REMEDIES. No right or remedy herein conferred upon or reserved to the Lessor is exclusive of any other right or remedy herein or by law or equity provided or permitted but each shall be cumulative of every other right or remedy given hereunder or now or hereafter existing and may be enforced concurrently therewith or from time to time.

18. ASSIGNMENT. The Lessee shall not without the written consent of the Lessor sub-let or lend the equipmnet. Nor shall the Lessee sell, offer for sale, charge, pledge, assign, or otherwise dispose of the equipment nor suffer it to be taken out of the Lessee's possession or legally or equitably deal or attempt to deal with the equipment nor hold himself out as the owner of the equipment nor pledge the equipment nor create a lien upon the equipment whatsoever.

19. OWNERSHIP. The equipment is and shall at all times be and remain the sole and exlusive property of the Lessor and the Lessee shall have no right, title, or interest thereto except as expressly set forth in this Lease.

20. ADDITIONAL RENT. Should the Lessee fail to pay any instalment of the rent herein reserved or any other sum required to be paid by the Lessee to the Lessor within ten days after the due date for payment thereon the Lessee shall pay to the Lessor additional rent thereon from the due date until the date of payment equal to interest at the rate of ten per cent per annum.

21. GOVERNING LAWS. This lease agreement shall be interpreted and construed in accordance with the laws of the Federal Republic of Nigeria as may from time to time be in force.

22. NOTICES. Service of all notices under this Lease shall be sufficient if given personally or posted to the party involved at its respective address above set forth or at such address as such party may provide in writing from time to time and shall if posted be deemed to be served when in the ordinary course of post the same would be delivered.

23. ARBITRATION. The lessor and lessee agree that should any dispute arise during the currency of this lease they shall first refer such dispute to an arbitration jointly appointed to us.

24. STAMP DUTY. The Lessee shall pay any and all stamp duty on the Lease and the counterpart thereof or any other documentation or legal fees.

IN WITNESS WHEREOF THE COMMON SEAL OF XYZ MERCHANT BANK LTD. was hereunto affixed the day and year first above written in the presence of:

DIRECTOR OR AUTHORIZED SIGNATORY	SECRETARY OR AUTHORIZED SIGNATORY

THE COMMON SEAL OF THE WITHIN NAMED ABC COMPANY LTD. was hereunto affixed the day and year first above written in the presence of:

DIRECTOR OR AUTHORIZED SIGNATORY	SECRETARY OR AUTHORIZED SIGNATORY

APPENDIX 5

SPECIMEN OF A FINANCE LEASE AGREEMENT OF A MAJOR COMMERCIAL BANK

THIS LEASE AGREEMENT is made this day of 19 between OBINNA BANK OF NIGERIA PLC. a company incorporated under the Laws of the Federal Republic of Nigeria and having its registered office at (hereinafter referred to as "the Lessor" which expression shall wherever the context admits include its successors-in-title and assigns) of the one part, AND

CHIAKA NIGERIA LIMITED

incorporated under the Laws of the Federal Republic of Nigeria and having its registered office at

(hereinafter referred to as "the Lessee" which expression shall wherever the context admits, include its successors-in-title and assigns) of the other part.

WHEREAS:

(a) At the request of the Lessee, the Lessor has agreed to purchase/has purchased the equipment(s) (hereinafter called "the Equipment" which expression shall be deemed to include all replacements and renewals thereof and all accessories and additions whether made before or after the date of this Lease Agreement) more particularly described on the first Schedule attached hereto which schedule shall form an integral part of this Lease Agreement.

(b) The Lessor hereby agrees to lease and the Lessee hereby agrees to take on lease from the Lessor the Equipment for the period upon the terms and conditions herein set forth and SUBJECT ALWAYS to the due and punctual payment of

rental hereinafter mentioned and the due observance and performance of the Lessee of the terms and conditions herein contained.

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATIONS

In this Agreement the following terms shall have the meanings hereinafter ascribed to them:

(a) "The Equipment" means the machinery or equipment together with the relevant manuals on maintenance, operation and instructions (if any) accompanying same specified in the First Schedule hereto hereby leased by the Lessor for the use of the Lessee in carrying on the company's business and the expression "Equipment" shall also be deemed to include all renewals thereof and all accessories and additions thereto whether made before or after this Agreement.

(b) "The Schedule" means any schedule forming an addendum or addenda to this Agreement and shall for all purposes be deemed to form an integral part of this Agreement.

(c) "This Agreement" means the Equipment Lease Agreement between the Lessor and the Lessee together with any modifications amendments thereto including the Schedules and Appendix thereto.

(d) "Appendix" means any documents required to be executed subsequent to or as a condition to this Agreement and any such Appendix shall be deemed to be an integral part of this Agreement.

(e) "Site" means the place or places at which the Equipment or any part thereof are located as referred to in this Agreement.

(f) "Supplier" means the manufacturer or supplier of the Equipment or any party thereof referred to in this Agreement.

(g) "Rental" means the amount of each instalment agreed to be paid by the Lessee to the Lessor in consideration of the Lessor leasing to the Lessee the Equipment to which this Agreement relates.

(h) "The Lease Term" means the period specified in and commencing on the date mentioned hereunder.

(i) "Acceptance Certificate" means the Appendix hereto stating the acceptance of the Lessee of the Equipment.

(j) Where there are two or more persons or parties included in the term "the Lessee" their liabilities under this Lease Agreement shall be joint and several.

(k) Word inputing the plural shall include the singular.

2. AGREEMENT TO LEASE

The Lessor hereby lets to the Lessee and the Lessee hereby receives and takes on lease from the Lessor upon the terms and conditions herein mentioned the Equipment described in the first schedule hereto for the period and upon the terms and conditions herein contained and SUBJECT ALWAYS to the due and punctual payment of the rent hereinafter mentioned and the due observance and performance of the convenants and conditions hereinafter contained.

3. TERM

Subject to the provisions for earlier termination as elsewhere provided in this Lease Agreement the initial term (hereafter called "the Initial Term") of the Lease hereby created shall be the period stated on the First Schedule hereto which term shall commence on the date when the Acceptance Certificate provided by Lessor is signed by the Lessee.

4. RENTALS

(a) The Lessee shall pay to the Lessor during the Lease Term without deduction or set-off, the rentals specified in the First Schedule hereto such rentals to be paid at the times mentioned herein, net of all taxes.

(b) Punctual payment shall be of the essence of this Agreement and the Lessor shall be entitled to treat this Agreement as having been repudiated by the Lessee if any rentals or part thereof is not paid promptly upon the due date. The Lessees shall pay to the Lessor interest on overdue rentals at a rate of 6% per annum over the Lessor's Prime Lending Rate from time to time currently at 26% per annum until payment thereof scheduled to run from day to day and to accrue after as well as before any judgment.

(c) Should the Lessor be required by law to make any deduction for taxes or otherwise the Lessee shall pay to the Lessor such additional amounts as may be necessary to enable the Lessor to receive a net amount equal to the full amount which would otherwise have been payable hereunder.

(d) All payments of rentals shall be paid to the Lessor at the Branch of the Lessor.

(e) The Lessee's obligation to pay the rentals specified in the first schedule hereto and the right of the Lessor in and to such rental are absolute and unconditional and are not subject to any abatement, reduction, set off, defence, counter claim or recoupment due or alleged to be due to, or by reason of any past, present or future claims which the Lessee may have against the Lessor, the manufacturer or seller of the Equipment, or against any person for any reason whatsoever.

5. DELIVERY OF EQUIPMENT

(a) The Lessee shall inspect the Equipment and sign the Delivery and Acceptance Certificate provided by the Lessor not later than the date stated on the First Schedule hereto and after receipt of the Equipment either from the seller or from the Lessor as the case may be.

(b) In the event that the Lessee discovers any defects in the Equipment or had any complaints in respect thereof the Lessee shall immediately notify the Lessor thereof and specifically state such defects and complaint in the Delivery and Acceptance Certificate PROVIDED that nothing in this clause shall be construed to imply that the Lessor is liable, or responsible for such defects and complaints.

(c) In the event of the Lessee failing to so notify the Lessor in accordance with the clause 5 (b) above, the Lessee hereby agrees that it shall be deemed that the Equipment has been delivered in perfect condition and that the Lessee shall not raise any objections whatsoever thereafter.

6. EXCLUDING & LIMITING CLAUSES

(a) The Lessee, having negotiated with the Seller and having on its own accord selected the Equipment for its own use, hereby acknowledges and declares

that the Lessor shall not be responsible for any delay in delivery or non-delivery by the seller of the Equipment or for any defects or for the quality of fitness of the Equipment or any part or parts thereof.

(b) In the event that the Lessee suffers any damages in consequence of any delay in delivery or non-delivery of or any defect in or quality of or unfitness of the Equipment and the Lessee having duly signed the Acceptance Certificate, the Lessor agrees to assign to the Lessee (at the Lessee(s) own cost and expense) whatever rights the Lessor may have, if any, to seek such compensation for damages from the Seller PROVIDED always and it is hereby declared that the Lessor makes no representation or warranty as to the likelihood or possibility of recovery of such compensation.

(c) Any liability the lessor might otherwise incur and any right or immunity the Lessee might otherwise possess in respect of any conditions, warranties or representaion relating to the condition of the Equipment or its merchantable quality or suitability or fitness for the particular or any purpose for which it is or may be whether express or implied and whether arising under this Lease Agreement or under any prior Agreement or in oral or written statements made by or on behalf of any person in the course of negotiations in which the Lessee or its representative may have been concerned prior to this Lease Agreement are hereby exluded. No liability shall attach to the Lessor either in contract or in tort for loss, injury or damage sustained by reason of any defect in the Equipment whether such defect be latent or apparent on examination and the Lessor shall not be liable to indemnify the Lessee in respect of any claim made against the Lessee by a third party for any such loss, injury or damage.

(d) Neither the Seller nor any dealer through whom this Lease Agreement was negotiated or by whom the Equipment was supplied nor any person in the employ of the Seller or any such dealer or supplier is or is to be deemed the agent or acting on behalf of the Lessor for any purpose and no liability is to be attached to the lessor for any conditions, warranties or representations made by the Seller or such dealer or supplier or person in the employ of the Seller or such dealer or supplier.

7. CUSTODY OF THE EQUIPMENT

(a) In the event that the Lessor instructs the Lessee to affix labels, plates or other markings on the Equipment to indicate that the Equipment is owned by the Lessor, the Lessee shall forthwith at its own cost and expense follow such instructions.

(b) The Lessor shall arrange to deliver (but at the Lessee's cost and expense) the Equipment to the address stated in the First Schedule hereto and the Lessee shall not remove the Equipment therefrom, without the Lessor's prior written consent. The Lessee shall promptly notify the Lessor of any change in the Lessor's address and upon request by the Lessor promptly inform the Lessor of the whereabouts of the Equipment.

8. COVENANTS BY LESSOR

(a) The Lessee, paying the prescribed rentals and complying with the other terms and conditions of this Agreement herein contained shall be entitled to possess and use the Equipment during the Lease Term without interruption by the Lessor, any assignee of the Lessor or any other person claiming under or through the Lessor.

(b) The Lessee shall be entitled to the benefit or any guarantee or warranties which may be given by the supplier of the Equipment but the Lessor gives no warranties either express or implied, as to any matter whatsoever, including, but without limitation to, the description, year of manufacture or condition of the Equipment their merchantability or their fitness for any particular purpose.

9. TITLE TO THE EQUIPMENT

The Equipment shall at all times remain the property of the Lessor and nothing in this Agreement shall be construed as conferring on the Lessee any right or interest in the Equipment otherwise than as Lessee. The provisions of this clause shall apply notwithstanding that the Equipment shall be for the exclusive use of a third party for purpose incidental to the third party's own business and the Lessee shall be responsible for any damage caused by such use and notwithstanding that the Equipment may have been affixed to any land or building and the Lessee shall be responsible for any damage caused by any person to such land or building by the affixing of the Equipment thereto or the removal of the same therefrom (whether such affixing or removal be effected by the Lessor or the Lessee) the lessee shall as may be requested by the Lessor continuously display prominently on the Equipment a notice of the lessor's title to the Equipment.

10. CONDITIONS PRECEDENT

The Lessee hereby covenants that the following preconditions of this Agreement have been complied with, and that such of the preconditions and other conditions which are intended to be performed as contained in the Lessor's offer letter dated shall be complied with.

(a) That it shall submit to the Lessor the original of the Lessee's Board Resolution under the Lessee's seal and duly executed by the Lessee's Director

and Secretary authorising the Lessee to enter into this Agreement with the Lessor.

(b) That the Lessee shall submit to the Lessor a certified true copy of its Memorandum and Articles of Association as well as a certified true copy of its Certificate of Incorporation.

(c) That the Lessee shall permit the Lessor the right to claim capital allowance deductions on the Equipment.

11. REPRESENTATION AND WARRANTIES

The Lessee represents and warrants to the Lessor that:

(a) The Lessee has the power to enter into and perform this Agreement and has taken all necessary actions to authorise the Lessee to enter into this Agreement and to authorise the execution, delivery and performance of the same in accordance with its terms.

(b) There has been no material or adverse change in its financial position as represented to the Lessor prior to the signing of this Agreement.

(c) There is no litigation or administrative proceeding pending against the Lessee which would substantially affect the financial position of the Lessee or its ability to carry on its normal business.

(d) Such consents, licenses, approvals, authorisations or exemptions of any governmental or other regulatory authority, or agency (if any) required on the part of the Lessee for or in connection with the validity, performance, admissibility in evidence or enforceability of this Agreement have been obtained and are in full force and effect and true copies thereof have been

delivered to the Lessor and the conditions contained therein or otherwise applicable thereto have been and will at the appropriate time be complied with or fulfilled.

(e) The Lessee is not in default under any obligation in respect of any borrowed money and that the execution and performance of this Agreement will not be or result in a breach or default under any provision of any other Agreement to which the Lessee is a party.

(f) That no event of default or other event which with the giving of notice and/or lapse of time, might constitute an event of default has occured and is continuing unremedied nor will any event of default or other event as aforesaid prohibit the execution of this Agreement by the Lessee.

(g) Lessee is a legal entity, duly organised, validly existing and has adequate power to enter into and perform this lease agreement.

(h) The entering into and performing of this Lease Agreement will not violate any judgment order, Law or regulation applicable to the Lessee or any provision of the Lessee's Memorandum and Articles of Association or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon any assets of the lessee or on the Equipment pursuant to any instrument to which the Lessee is a party or by which it or it's assets may be bound.

12. COVENANTS BY THE LESSEE

The Lessee shall throughout the Lease Terms specified in the first schedule hereto:

(a) Immediately on demand by the Lessor, provide the Lessor with such particulars, statements and details as to the Lessee's financial status and the place and state and condition of the Equipment as the Lessor shall require.

(b) At its own cost and expense at all times:

(i) dutifully and faithfully follow the Equipment manufacturer's recommendations as to use, service and maintenance thereof;

(ii) conduct regular and proper inspection of the Equipment;

(iii) replace all missing, damaged or broken parts with parts supplied or recommended by the original maufacturers of the Equipment or with the prior written approval of the Lessor with parts of equal quality and value and in default of so doing permit the Lessor to take possession of the Equipment for the purpose of having repairs carried out and repay to the Lessor full cost of such repairs and the Lessor shall have a lien on the Equipment until such repayment is made, but exercise of such lien shall not prevent the accrual of rental hereunder;

(iv) Ensure that the Equipment is operated in a skillful and proper manner and by persons who are competent to operate the same;

(v) Punctually pay all registration charges, licence fees, rent, rates, taxes and other outgoings payable in respect of the Equipment or the custody and use thereof and produce to the Lessor on demand the last receipts for all such payments and in the event of the Lessee making default under this, the Lessor shall be at liberty to make all such payments and to recover the amount thereof forthwith.

(c) Punctually pay all amounts of rentals payable hereunder.

(d) Keep the Equipment, at its own expenses and without effect on its rental obligation in good serviceable repair and condition, fair wear and tear only expected and punctually pay for all servicing of and repairs and other work done to the Equipment.

Furthermore, the Lessee shall take all steps as are necessary to keep the Equipment free from distress, execution and/or any other legal process whatsoever.

(e) Obtain at its own cost and expense all necessary licences, permits and permission for the use of the Equipment and not use the Equipment or permit same to be used contrary to any law or any regulation or bye-law for the time being in force.

(f) Not without the prior written consent of the lessor, sell, assign, pledge, mortgage, charge or encumber the Equipment or create or allow to be created any lien on the Equipment whether for repairs or otherwise, and in the event of any breach of this sub-clause by the Lessee, the Lessor shall be entitled (but shall not be bound) to pay to the third party such sum as is necessary to procure the release of the Equipment from any charge, encumbrance or lien, and shall be entitled to recover such sum from the Lessee forthwith.

(g) Permit the Lessors, or any person(s) authorised by the Lessor at all reasonable times to enter upon the premises in which the Equipment is for the time being placed or being kept for the purpose of inspecting and examining the condition of the Equipment.

(h) Keep the Lessor informed at all times of any changes in the Lessee's address.

(i) Forthwith notify the Lessor of the loss or destruction or any damage to the Equipment.

(j) Ensure that in so far as the Equipment is affixed to any land or building, such equipment shall be capable of being removed without material injury to the said land, building, premises and that all such steps shall be taken as are necessary to prevent title to the Equipment from passing to the owner of the said land or building/premises.

(k) Comply in all respects with the requirements of any improvement or prohibition notice served on the Lessee in respect of or relating to the use of the Equipment or any part thereof and that the Lessee shall forthwith send to the Lessor a copy of any such notice served on the Lessee.

(l) Not to do or permit anything whereby the right of the Lessor to capital allowance in respect of the Equipment may be called into question or the amount thereof reduced.

(m) Not to bring any action or claim whatsoever against the Lessor in respect of any defect which may appear from time to time in the Equipment.

(n) Forthwith give notice of the Lessor's interest in the Equipment to any existing or future mortgage or charge of the Lessee's assets or holder or any security created on the premises comprising the Equipment location or any other person, including the Landlord having any interest in the fixtures, fittings or contents of such premises or other premises where the Equipment may for the time being be situated.

(o) Submit to the Lessor its Audited Accounts not later that 120 days after the end of each financial year and quarterly Management Accounts within 60 days, the said accounts to be prepared by a firm of Chartered Accountants.

(p) Not to undertake any borrowing without the written consent of the Lessor such consent not be unreasonably withheld.

(q) Pay all stamp duties and other charges (excluding taxes and such other impositions) that may become payable in relation to this Agreement.

(r) Pay all legal fees incidental to the documentation of this Agreement and for the recovery of any amount falling due hereunder.

(s) Not without the prior written consent of the Lessor make any material alterations, additions or improvements to the Equipment. All engineering modifications and improvements which are required for the Equipment shall belong to and become the property of the Lessor upon the expiration or earlier termination of this Agreement unless otherwise agreed.

13. LOSS OR DESTRUCTION OR DAMAGE TO EQUIPMENT

(a) In the event of any loss or damage to the Equipment, the Lessee at its cost and expense and at the option of the Lessor, shall forthwith:

(i) replace the Equipment with like equipment in good repair, condition and working order,

or

(ii) reinstate the Equipment and render it in good repair, condition and working order,

(b) Where the Equipment or any material part thereof is lost, stolen, destroyed or damaged by the negligence or wrongful act of a third party, the Lessee shall immediately notify the Lessor in writing. The Lessee shall not compromise any claims which the Lessor may have against such third party without the prior written consent of the Lessor, and shall allow the Lessor to take over the conduct of any negotiations except in relation to claims of the Lessee for personal injuries, loss of use of the Equipment, or loss or damage to the property of the Lessee unconnected with the Equipment.

(c) Notwithstanding such loss or damage the obligations of the Lessee hereunder shall continue with full force and effect.

14. INSURANCE

(a) The Lessee shall at its expense insure the Equipment in the name of the Lessor against all risk determined at the discretion of the Lessor with an insurance company approved by the Lessor in such amount that shall cover the stipulated loss value of the Equipment stated in the first schedule hereto. Such insurance policies shall include personal injury, loss or damage by accident, fire, theft and other risks usually covered by insurance in the type of business for which the equipment is for the time being used.

(b) The Lessee shall punctually pay all premiums and other monies necessary for effecting and keeping up such insurance immediately on the same becoming due and shall deliver the policy and the receipts thereof to the Lessor.

(c) The Lessor shall be entitled to receive all insurance proceeds and monies if and when any event covered by the policy or the insurance occurs.

(d) Failure to recover under any insurance effected pursuant to this clause shall not relieve the Lessee from any of its responsibilities, covenants and obligations under any part of or the whole of this lease Agreement.

(e) The Lessee shall not do any act or thing whereby any of the insurance affected under this clause will or may be vitiated.

15 APPLICATION OF INSURANCE MONIES

(a) If the Equipment or any material part thereof shall be damaged during the term of this Agreement and in the opinion of the insurers it is economic that such damages be made good, all insurance monies payable under such policy shall be applied in making good the said damage.

(b) If the Equipment or any material part thereof shall be lost, stolen, destroyed or damaged to such an extent as to be in the opinion of the insurers incapable of economic repair, the insurance monies payable under the said policy shall at the option of the Lessor either;

(i) be applied towards reimbursement of the Lessee for the cost of repair provided the Lessee covenants to complete the repairs to the satisfaction of the Lessor, or

(ii) be applied towards the replacement of the Equipment with Equipment of equivalent value, type and quality, in which event the fresh equipment shall be held by the Lessee under the same terms of this Lease, or

(iii) if such option is not exercised by the Lessor this Agreement shall

terminate automatically in respect of equipment so lost, stolen, destroyed, or damaged and any monies received by the Lessor pursuant to the provisions of this Agreement shall be wholly appropriated by the Lessor.

(c) Save as provided by sub-clause (b) (iii) of this clause, the loss, theft, or destruction of or damage to the Equipment shall not affect the continuance of this lease or the Lessee's liability for payments of rental hereunder.

(d) If and when events covered by the insurance should occur, the Lessee shall immediately notify the Lessor thereof in writing of such event.

16. EVENTS OF DEFAULT

The occurence of any of the following events among others, shall constitute an Event of Default:

(i) if the Lessee fails to pay the Rental provided for in the first schedule hereto within ten (10) days from the date on which same became due and payable or any other sums and monies due and payable under this Lease Agreement.

(ii) if the Lessee fails to observe or perform all or any provision of this Lease Agreement, and this default is not cured within ten (10) days after notice thereof from the Lessor.

(iii) if there occurs any affirmative act of insolvency by the Lessee, or the filling by the Lessee of any petition or action under any petition or action under any bankruptcy, re-organisation, insolvency arrangement, liquidation, dissolution or laws for the relief of, or relating to debtors.

(iv) if any material representaion or warranty made by the Lessee in this Lease Agreement or any notice or Certificate of Statement delivered or made hereunder prove to be false or incorrect or materially inaccurate when made or delivered.

(v) if the Lessee in default in respect of loans from any creditor is unable to pay its debts within the meaning of section 409 of the Companies and Allied Matters Decree 1990 or any Statutory Modification or Re-enactment thereof.

(vi) if there should be in the opinion of the Lessor any material adverse change in the financial condition of the Lessee.

(vii) if any litigation or administrative proceedings is of or before any court or governmental authority or agency shall be commenced to enjoin or restrain the execution and performance of this Lease Agreement or to question in any manner the laws or proceedings of the Lessee under which this Lease Agreement is to be executed, performed or enforced or any of the said laws or proceedings shall be repealed, revoked or rescinded in whole or in part and in any such event and at any time thereafter if any such events shall be continuing.

(viii) if the Lessee ceases or threatens to cease to carry on its business or attempts to transfer or dispose of all or a substantial proportion of its assets, or if the property of the Lessee is compulsorily acquired by order of any governmental or any other authority and in consequence the Lessee's business is substantially adversely affected, or there are moves to disolve or wind-up the Lessees' business.

(ix) if the Lessee shall abandone the equipment.

17. REMEDIES

Upon the happening of any Event of Default, the Lessor shall without any prejudice to any pre-existing liability of the Lessee to the Lessor have the right forthwith to exercise all or any of the following remedies without having to give any prior notice or demand to the Lessee:

(a) to declare a part or any part of or entire amount of the total amount of the rental under this Lease Agreement payable and all monies, sums, costs and expenses under this Lease Agreement shall immediately become due and payable by the Lessee.

(b) to take possession of the Equipment or demand its return.

(c) to terminate the Lease hereby created and to demand from the Lessee the full amount and value of the Equipment in addition thereto, to claim from the Lessee for compenastion for all loss and damages including but not limited to loss of profit.

(d) to sue for and recover all rentals accrued due as at the date of repossession of the Equipment pursuant to the terms of this Lease Agreement together with all other sums due from the Lessee to the Lessor pursuant to the terms of this Lease Agreement.

18. Even if any of the remedies provided for in sub-paragraph (a) and (b) of clause 17 of this Agreement have been taken by the Lessor, the Lessee shall not be relieved from any other liability under this Lease Agreement including but not limited to liability for damages.

19. The exercise of any of the foregoing remedies by the Lessor will not constitute a termination of this Lease Agreement unless in writing. No remedy referred to in this clause is intended to be exclusive, but each shall be cumulative, and in addition to any other remedy referred to above or otherwise available to the Lessor at Law or in equity.

20. In the event of default as hereinbefore contained occuring, the Lessee shall pay to the Lessor all expenses (including Legal Cost on a full indemnity basis) incurred by or on behalf of the Lessor in ascertaining the whereabouts of, taking possession, preserving, insuring and storing the Equipment, and of any legal proceedings by or on behalf of the Lessor to enforce the provisions of this Agreement.

21. CAPITAL ALLOWANCES

The Lessee shall not be liable for fair wear and tear of the Equipment and the burden of depreciation resulting from any such fair wear and tear shall fall upon the Lessor who shall be entitled to claim from the Federal Inland Revenue all capital allowances in respect of the Equipment.

PROVIDED that in the event either that the capital expenditure involved in the provision of the Equipment does not qualify for capital allowances for taxation purposes or the Lessee becoming for whatever reason entitled to capital allowance instead of the Lessor the Lessee shall reimburse the Lessor in full any additional taxes that the Lessor may be called upon to pay as a result thereof.

22. PROHIBITION OF ASSIGNMENT OF RIGHTS BY THE LESSEE

(a) The Lease hereby created is personal to the Lessee and the Lessee shall not be entitled to assign its rights or obligations hereunder to any third party.

(b) No monetary obligations of the Lessee under this Lease Agreement may be offset or set-off with any claims against the Lessor, the Seller, the Lessor's assignees and/or predecessors-in-title or successors-in-title of the Lessor.

23. SURRENDER OF EQUIPMENT

(a) Upon the expiration or earlier termination of this Lease Agreement for any reason whatsoever, the Lessee shall deliver up the Equipment to the Lessor in good and serviceable repair, condition and working order, ordinary wear and tear resulting from proper use thereof alone expected, to the location to be advised by the Lessor or if so required by the Lessor shall hold the Equipment available for collection by the Lessor or its agents and the Lessor or its agent may without notice retake possession of the Equipment and may for that purpose enter upon any land or buildings on or in which the Equipment is or is believed by the Lessor or its agents to be situated and if the Equipment or any part thereof is affixed to such land or building, the Lessor shall be entitled to sever the same therefrom and to remove the Equipment or part thereof so severed and the Lessee shall be responsible for all damages caused to the land or building by such removal.

(b) All cost of installation, packaging, insurance and transportation, delivery, collection and/or repossession of the Equipment will be borne by the Lessee.

24. ASSIGNMENT

The Lessor shall be entitled to assign this Lease Agreement or any rights or rights hereunder including the rights conferred on the Lessor to enter upon land or buildings to inspect the Equipment and to sever and repossess the same and any assignment of this Lease Agreement by the Lessor shall be deemed to include an assignment of the Lessors right to enter, sever and repossess.

25. REMEDIES AND WAIVERS

(a) No failure, omission, forebearance, delay or indulgence by the Lessor in exercising or enforcing any rights, power or privilege under the terms and conditions of this Lease or the granting of them by the Lessor to the Lessee shall prejudice, effect or restrict the rights and powers of the Lessor or shall operate as a waiver thereof nor shall any single or partial exercise of any right, powers or privilege preclude any other rights or privilege hereunder nor shall any waiver of any subsequent or any continuing breach hereof.

(b) No right or remedy herein conferred upon or reserved to the Lessor is exclusive of any other right or remedy therein or by law or equity provided or permitted, but shall be cumulative of every other right or remedy given hereunder or now or hereafter existing and may be enforced concurrently therewith or from time to time.

27. INDEMNITY

The Lessee agrees to indemnify and hereby indemnifies the Lessor against, and holds the Lessor harmless from any and all claims, suits, proceedings, costs, expenses, damages, liabilities, at law or in equity including legal fees and expenses arising out of, connected with, or resulting from this Lease agreement, including, without limitation, the manufacture, selection, purchase, delivery, possession, condition, use, operation or return thereof. The Lessee's obligation hereunder will survive the expiration of this lease Agreement with respect to acts or events occuring or alleged to have occured prior to the return of the Equipment to Lessor at the end of the term of this Lease Agreement as stated on the First Schedule hereto.

28. INCORPORATION OF SCHEDULES AND APPENDICES

Any Schedule or Appendix to this Agreement shall be construed as an integral part of this Agreement.

29. AGREEMENT SUPERSEDES PREVIOUS ARRANGEMENT

This Lease Agreement embodies all the terms and conditions between the parties hereto and supersedes and cancels in all respects all previous arrangements, agreements and undertakings, if any, between the parties hereto whether such be written or oral.

30. The Agreement and the Schedules hereto shall together take effect as one Lease and all references to the Agreement hereinafter shall be deemed to be referenced to the Agreement as supplemented by the provisions of the schedules.

31. ARBITRATION

The parties to this lease agreement hereby agree that should any difference in opinion or any dispute arise during the currency of this lease agreement the difference or dispute shall first be referred to an arbitrator as may be mutually agreed.

32. NOTICES

Service of all notices under this Lease shall be sufficient by hand or sent by registered post to the party involved at its respective address above set forth, or at such address as such party may provide in writing from time to time, and shall if posted, be deemed to be served forteen days after the same was posted inclusive of the day of postage and the registration slip issued by the post office at which the letter containing the notice was posted shall be sufficient proof of such notice.

33. GOVERNING LAWS/JURISDICTION

This Agreement shall be interpreted and construed in accordance with the laws of the Federal Republic of Nigeria as may from time to time be in force and the parties agree to accept the jurisdiction of the Nigerian Courts.

34. AMENDMENT

This Lease Agreement shall not be amended save by a document signed and sealed by the Lessor and the Lessee.

IN WITNESS WHEREOF THIS LEASE AGREEMENT IS HEREBY EXECUTED UNDER THE COMMON SEALS OF THE PARTIES HERETO THE DAY AND YEAR FIRST ABOVE WRITTEN.

THE COMMON SEAL OF THE WITHIN NAMED
OBINNA BANK OF NIGERIA PLC WAS HEREUNTO
AFFIXED IN THE PRESENCE OF

DIRECTOR SECRETARY

THE COMMON SEAL OF THE WITHIN NAMED
CHIAKA NIGERIA LIMITED
WAS HEREUNTO AFFIXED IN THE PRESENCE OF

DIRECTOR SECRETARY

FIRST SCHEDULE

Date : .....

FIRST SCHEDULE TO LEASE AGREEEMENT DATED .....DAY OF.....19.....

BETWEEN.....OBINNA BANK OF NIGERIA PLC..... (LESSOR)

AND .....CHIAKA NIGERIA LIMITED..... (LESSEE)

(1) ADDRESS FOR NOTICES

CHIAKA NIGERIA LIMITED	OBINNA BANK OF NIGERIA PLC
.....	.....
.....(LESSEE)	.....(LESSOR)

DESCRIPTION OF EQUIPMENT

DESCRIPTION	QUANTITY	MODEL NUMBER	REGISTRATION NUMBER	

(3) SELLER .....

(4) PLACE AT WHICH THE EQUIPMENT IS TO BE DELIVERED AND LOCATED .....

.....

(5) EXPECTED DATE OF DELIVERY OF THE EQUIPMENT BY THE SELLER .....

.....

(6) TERM OF LEASE .....

(7) RENTAL: .....

AT MONTHLY/QUATRERLY .....

THE FIRST SHALL BE DUE ON ..... DAY OF .....

ALL SUBSEQUENT RENTAL PAYMENTS SHALL BE DUE ON THE SAME DAY OF EACH SUCCEEDING ..... THEREAFTER

(8) MODE OF PAYMENT .....

(9) PLACE OF PAYMENT .....

(10) RENT FOR RENEWED LEASE (where applicable)

All the terms and conditions of the Lease dated ..... day of ..... are hereby incorporated herein and made a part hereof as if such terms and conditions were set forth herein. By their execution and delivery of this Schedule, the Parties hereby reaffirm all of the terms and conditions of the Lease Agreement dated ..... day of .....except to the extent, if any, modified hereby.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE
CAUSED THEIR COMMON SEAL TO BE HEREUNTO
AFFIXED THE DAY AND YEAR ABOVE WRITTEN

THE COMMON SEAL OF THE WITHIN NAMED

OBINNA BANK OF NIGERIA PLC WAS

HERETO AFFIXED IN THE PRESENCE OF

DIRECTOR SECRETARY

THE COMMON SEAL OF THE WITHIN NAMED

CHIAKA NIGERIA LIMITED

WAS HEREUNTO AFFIXED IN THE PRESENCE OF

DIRECTOR SECRETARY

SECOND SCHEDULE

Date .....

SECOND SCHEDULE TO LEASE AGREEMENT DATED .....DAY OF .....

BETWEEN ..... (LESSOR)

AND ..... (LESSEE)

RENEWAL OPTION

(a) Where the Lessee is desirous of renewing the Lease Agreement, PROVIDED that the Lessee shall not at the time be in default under any of the terms or conditions of the above referred Lease Agreement, the Lessee shall have the option ("Renewal Option") upon not less than .....(day(s) prior written notice delivered to the Lessor, to lease all the Equipment described in The First Schedule hereto upon the expiry of the initial lease term, for an additional term ("the Additional Term" of ..... at the Lessor's option.

(b) The exercise price of the Renewal Option shall be Fair Rental Value of the Equipment on the expiration date for additional term. "Fair Rental Value" shall mean and refer to the value as resonably determined by the Lessor.

IN WITNESS WHEREOF THIS SECOND SCHEDULE IS HEREBY EXECUTED UNDER THE COMMON SEAL OF THE PARTIES HERETO THIS DAY AND YEAR ABOVE WRITTEN.

THE COMMON SEAL OF THE WITHIN NAMED

OBINNA BANK OF NIGERIA PLC

WAS HEREUNTO AFFIXED IN THE PRESENCE OF

DIRECTOR SECRETARY

THE COMMON SEAL OF THE WITHIN NAMED

CHIAKA NIGERIA LIMITED WAS

HEREUNTO AFFIXED IN THE PRESENCE OF

DIRECTOR SECRETARY

To: OBINNA BANK OF NIGERIA PLC

_____

_____

_____

RE: CERTIFICATE OF DELIVERY AND ACCEPTANCE

We hereby confirm and certify to you that:

(1) This Certificate of Acceptance is issued in accordance with the Equipment Lease Agreement dated the .....of..... 19 ..... made between OBINNA BANK OF NIGERIA PLC (Lessor) of

AND

CHIAKA NIGERIA LIMITED (Lessee) of

(2) We have agreed to lease the Equipment specified in the aforesaid Lease Agreement, from you upon the terms and conditions set out in the Lease Agreement from the date of despatch of this Certificate of Acceptance to you.

(3) All safety regulations in relation to the Equipment have been complied with and all required or recommended safety apparatus have been correctly installed and/or supplied.

(4) We confirm that insurance cover on the Equipment has been effected in accordance with the terms of the aforesaid Lease.

(5) We hereby certify that the Equipment has been delivered and inspected by us and is now in our possession in good order and repair free from any defect whatsoever and is by this Certificate accepted by the Lessee for the purpose of the Lease.

THE COMMON SEAL OF THE WITHIN NAMED

LESSEE WAS HERE UNTO AFFIXED IN THE

PRESENCE OF

DIRECTOR SECRETARY

APPENDIX 6

Changes in the Rates Applicable for Capital Allowance Between 1979 and 1989

In 1979 the rates applicable for capital allowances were as follows:

Qualifying Expenditure	Initial Allowance	Annual Allowance
Building Expenditure	5%	10%
Agricultural Plant Expenditure	10%	-
Industrial Building Expenditure	15%	10%
Mining Expenditure	20%	12%
Plant Expenditure	20%	12%
Plantation Expenditure	25%	15%

In 1985 some amendments were made in both the qualifying expenditure area as well as the rates applicable to the allowances. The table below shows the amendments:

Qualifying Expenditure	Initial Allowance	Annual Allowance
Building Expenditure	5%	10%
Industrial Building Expenditure	15%	10%
Mining Expenditure	20%	10%
Plant Expenditure	20%	10%
Motor Vehicles Expenditure	20%	25%
Plantation Equipment Expenditure	20%	33%
Housing Estate Expenditure	20%	10%
Ranching & Plantation Expenditure	25%	15%

In 1987 a further amendment was made as follows:

Qualifying Expenditure	**Initial Allowance**	**Annual Allowance**
Furniture & Fittings Expenditure	15%	10%
Research & Development Expenditure	25%	12%
Motor Vehicle Expenditure	25%	20%

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ABBREVIATIONS

A.L.R. Comm	-	African Law Reports Commercial
All E.R.	-	All England Law Reports
All E.R. Rep	-	All England Law Reports Reprint
All N.L.R.	-	All Nigerian Law Reports
A.C.	-	Law Reports, Appeal Cases, House of Lords
A.L.J.R.	-	Australian Law Journal Reports
B. & Ad.	-	Barnewall And Alderson's Reports, King's Bench
Beav.	-	Beavan's Reports, Rolls Court
Bos. & P.N.R.	-	Bosanquet and Puller's New Reports Common Pleas
Camp.	-	Campbell's Reports, Nisi-Prius
C.C.H.C.J.	-	Certified Copies of High Court (of Lagos State) Judgments
Ch. D	-	Law Reports, Chancery Division
Cro. Jac.	-	Croke's Reports, James 1, King's Bench and Common Pleas
C.L.Y.	-	Current Law Year
D.L.R.	-	Dominion Law Reports (Canada)
E.C.S.L.R.	-	Law Reports of East Central State of Nigeria
E.N.L.R.	-	Law Reports of Eastern Nigeria
E. & B.	-	Ellis and Blackburn's Reports, Queens Bench
F.C.A.	-	Reserved Judgments of the Federal Court of Appeal
F.N.L.R.	-	Federal Nigeria Law Reports
F.S.C.	-	Selected Judgments of the Federal Supreme Court of Nigeria
F. Supp. (USDC)	-	Federal Supplement, United States District Court
H. & C.	-	Hurlstone and Coltman's Report Exchequer
K.B.	-	Law Reports, King's Bench Division
L.J.C.H.	-	Law Journal, Chancery
L.R.C.P.	-	Law Reports, Common Pleas

L.L.R.	-	Law Reports of the High Court of Lagos State
L.J.K.B.	-	Law Journal, Kings Bench
L.J.P.C.	-	Law Journal, Privy Council
L.J.Q.B.	-	Law Journal, Queen's Bench
L.T.R.	-	Law Times Reports
Ld. Rayn	-	Lord Raymond's Reports, King's Bench
M.L.J.	-	Malayan Law Journal
N.C.L.R.	-	Nigerian Commercial Law Reports
N.L.R.	-	Nigerian Law Report
N.M.L.R.	-	Nigerian Monthly Law Reports
N.N.L.R.	-	Law Reports of Northern Nigeria
N.R.N.L.R.	-	Law Reports of the Northern Region of Nigeria
N.L.J.	-	New Law Journal
N.Z.L.J.	-	New Zealand Law Journal
N.Z.L.R.	-	New Zealand Law Report
Q.B.	-	Law Reports, Queen's Bench Division
Q.B.D.	-	Law Reports, Queen's Bench Division
S.C.	-	Selected Judgment of the Supreme Court of Nigeria
S.C.	-	Court of Session Cases (Scotland)
Sol. Jo.	-	Solicitors' Journal
S.L.T.	-	Scottish Law Times
T.L.R.	-	Times Law Reports
U.I.L.R.	-	University of Ife (Nigeria) Law Reports
W.A.C.A.	-	West African Court of Appeal
W.N.	-	Law Reports, Weekly Notes
W.R.N.L.R.	-	Western Region of Nigeria Law Reports
W.S.C.A.	-	Selected Judgments of the Court of Appeal of Western State
W.S.N.L.R.	-	Selected Judgments of the High Court Western State of Nigeria

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