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Leasehold interest in property law: A contract or an estate?

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Abstract
The paper investigates whether a leasehold interest in property law is a contract or an estate. Attempt to answer the question began with tracing the history and evolution of leases and the true character of the lease. Originally leases were regarded as personal contracts, operating *in personam*, between the parties and not creating or transferring any rights in rem that is, rights in the land itself. As the lease evolved and developed as a legal concept, the leaseholder was able to recover his land from all strangers and by this it could no longer be denied that he had an estate in the land (right in rem**)** or that he held it in tenure It argues that a lease is a contract that confers an estate on the lessee and therefore partakes both of contract and estate. The paper also inquires whether a lease can be frustrated in law.

Keywords: leasehold interest, lease, property law, contract, estate, frustration

Introduction

The relationship between the property — and contract-based views of the leasehold nexus remains one of the continuing tensions.

The above observation of Lord Browne — Wilkinson in *Hammerthsmith and Fulham LBC v. Mark* [1] sumnurises the essence of this paper. This is because for some time now [2] and even more recently [3] classification of a leasehold interest remains intractable[4] For instance, while it is the belief in some quarters that a leasehold interest cannot be divorced from being a contractual interest, especially tracing its historical evolution as a chattel interest, [5] another school of historical evolution regard it as a chattel interest [6]. Yet another school of thought fervently believe that a lease is purely a proprietary interest [7] which could only be defined as a 'real property'. In the center of this debate, the liberalist prefers to view a leasehold interest as that covering both proprietary and contractual interest thereby making it a "chattel real" [8]. The question is: "Is classification necessary once we can identify what a "lease" is? The aim of this paper is to analyze the true nature of a lease. The paper has several sections. Section 1 is introductory. Section 2 focuses on some conceptual clarifications. The beginning and development of leases forms the nucleus of section 3. Section 4 examines the question whether the doctrine of frustration is applicable to leases and section 5 is the conclusion.

Conceptual Clarifications

Lease

A lease is occasionally referred to as a "demise" or "term of years" or "tenancy" and all these synonymous terms have been interchangeably used by text writers and statutes. It is "any agreement which gives rise to relationship of Landlord and Tenant (real property) or lessor and lessee (real or personal property)" [9]

It is also defined as: "term of years" includes a term for less than a year or for a year or years and a fraction of a year or from year to year" [10]. In *Opara v. D.S. Nig. Ltd*, [11] a lease was defined as: "lease is the demise by the landlord of a less estate than that which he himself possesses on the land". It should be noted also that" lease" is often used interchangeably for the document.

Leasehold

A leasehold is "an estate in real property held by the lessee/tenant, under a lease the asset represents the right of the lessee to use lease property" [12]

Categories of Leaseholds

The various categories of leaseholds a re: tenancy for a fixed term, periodic tenancy, tenancy at will, tenancy at sufferance and statutory tenancy.

[1] [1992] 1 AC 478 at 491E HL
[2] From towards the end of the 12th century. See Peter Butt, Land Law (Sydney Law Book Company 2nd edn 1998) Para. 616, H.A Hill and J.W. Redman, Law of Landlord and Tenant (18th edn. Butterworths, 1991) Al
[3] Progressive Mailing House Property Ltd v Tabali Property Ltd. (1985) 157 CL.R 17 at 29: Per Mason J.
[4] M A Banire, 'The Concept and Functions of Leases' (2003) 22 JPPL 59.
[5] National Carriers Ltd. v. Panalpina (Northern) Ltd. (1981) 1 ALL ER. 161 at 185 per Lord Roskill. See also R.H..Maudsley and E.H.Burns, Land Law: Cases and Materials, (6th edn Butterworths, London, 1992) 408.
[6]National Carriers Ltd. v. Panalpina (Northern) Ltd. (1981) 1 ALL E.R. 161 at 185 per Lord Roskill. See also R.H. Maudsley and E.H. Burns (n5)
[7] R. Meggary and W.Wade, Law of Real Property (4th edn. Stevens & Co 1969) 673. See also J.A. Omotola 'The Doctrine of Frustration' — Its Applicability to Contract Relating to Land" (1984) 1 and 2 J.P.P.L 1, 7. For further reference see W. Woodfall, Law of Landlord and Tenant, (Vol 1, Sweet and Maxwell, London,) Ch. 1, Susan Bright and Geoff Gilbert: Landilord and Tenant Law, The Nature of Tenancies, (Clarendon Press, Oxford, 1995) 1
[8] National Carriers Ltd v Panalpina (Northern) Ltd (1981) (n6) 168. Per Lord Russell of Killowen
[9] Black's Law Dictionary. (6th edn St. Paul Minn. West Publishing Co 1990)
[10] Section 205 (1) (XXVII), Law of Property Act 1925, S.2 Property and Conveyancing law, Cap 100, Laws of the Western State of Nigeria 1959
[11] (1994) 4 NWLR (Pt 390) 440 at 459, para F. per Onalaja J.C.A, see also Odutola and another v Papersack Nigeria Ltd, (2006) 2 All NLR 248, online, Odutola and Another v Papersack Nigeria Ltd (SC 280/2003)[2006] NGSC 46 (15 December 2006) | Nigeria Legal Information Institute (nigerialii.org) accessed 27th November 2020
[12] Blacks' Law Dictionary (n9)

The Beginning and Development of Leases

To enable one to understand the nature of a lease, it is important to trace the evolution of leases beginning with the feudal system.

The Feudal System

Although in practice land is commonly and correctly described as owned by its various proprietors English Land Law still remains its original basis that all Land in England is owned by the Crown. A small part is in the Crown's own occupation, the rest is occupied by tenants holding either directly or indirectly from the Crown' [13]. This unusually perfect feudal structure was imposed after the Norman Conquest. Williams, I regarded the whole land of England as his by conquest. To reward his followers and those of the English who submitted to him he granted and confirmed certain Lands to be held of him as overlord. These lands were granted not by an out and out transfer, but to be held of the Crown upon certain conditions. Thus, Black acre might have been granted to X on the terms that he did homage [14] and swore fealty' [15] that he provided five armed horsemen to fight for the Crown for forty years in each year, and the like. White acre might have been granted to Y on condition that he supported the King's train in his coronation, X and Y might each in turn grant land to other persons to hold them in return for services and these others might repeat the process.

In this way, the feudal pyramid was constructed from the top downwards, with the king at the apex and the actual occupants of the land at the base. In the middle were persons who both rendered and received services, much in the same way as a modern leasehold tenant who has sublet the property.

In days when land and its produce constituted nearly the whole tangible wealth of a country, it was more usual to secure the performance of services by the grant of land in return for those services than it was to secure them by payment.

The whole social organization was set on land-holding in exchange for service Feudal services became a certain standardized, thus there was one set of services which became known at Knight's service [16] and there was another set which was known as Grants sergeant, [17] there was also another kind of service known as Socage, [18] and yet another known as Villeinage [19]. Leasehold tenure, the one form of tenure which remains familiar today played no part in this scheme, it stood outside the feudal system having developed lately. From towards the end of the twelfth century [20]. Leases or term of years became common, but they formed not of either the feudal system which was based on military tenure, or of the earliest agricultural system which produced socage and villein tenure.

The Development of the Lease as a Legal Concept

As earlier said, [21] towards the end of the twelfth century, leases for terms of year became common, but they formed no part either of the feudal system which was based on military tenure or of the original agricultural system which produced Socage and Villein tenure. They were perhaps introduced partly as a means of raising money, the purpose being to evade the medieval church's prohibition on usury and partly on account of the advantage that, unlike estates of freehold until the Statute of Wills in 1540, they could devolve by Will. As Martin Partington, succinctly puts it thus:

We know that the lease for years was being used by the I2th century. This was at a time when the feudal system of land tenure was still in operation. However, the lease was never part of the feudal system, rather it developed as a response to the desire of Landlords to use their land in a more commercial way [22].

In their early legal incidents, leases differed from other interest in land. They conferred no freehold, and they did not entitle the termor to the ordinary possessory remedies which were only available for free holders [23]

Originally leases were rather regarded as personal business arrangements in which one person allowed the other to use his land in return for a rent. They were in other words personal contracts, operating *in personam*, between the parties and not creating or transferring any rights in rem that is, rights in the land itself which could affect feudal status [24] The termor's remedy at first was a personal one against the lessor — in covenant, if he were ejected by the lessor on the warranty perhaps, if he was ejected by a stranger. The import of this was that if the termor was ejected by the lessor, the only legal remedy he had was a personal action against his lessor on the covenant, by which he may ask for damages, he cannot recover possession. He enjoyed no possessory remedies like the freeholder who could put up a Writ on action disseisin. In fact, at the initial stage the interest of a leaseholder was not at all recognized because he lacked *seisin* [25]. This often explains why the interest was regarded as pure personality otherwise known as chattels. And for a chattel, no estate can exist in it. During the same period, the real actions — (which were original feudal remedies) were not available to the termor. Remedies such as Writ of Right, The Possessory Assizes, Writs of Entry were not available to the termor for lack of possession which at all times resided in the lessor. This precarious position was succinctly described by Holdsworth thus:

The lessee may, it is true, repel force by force he may, that is resist the would-be ejection if, he can, but all the legal remedy he has is personal action against his lessor on the covenant, by which he may recover damages... As against third persons, he has probably no remedy at all [26].

The position of the termor became extremely inconvenient till around 1235 when better although inadequate remedy was developed to cater for the interest of the termor. For instance, the writ called *Quare ejecit infraterminum* was

[13] R. Megarry and W Wade: The Law of Real Property (n7) 12

[14] Homage was the spiritual bond created by the tenant swearing to be his Lord's man.

[15] Fealty, the temporal link arising from the tenant's oath to perform his feudal obligation faithfully

[16] Which included the provision of armed horsemen for battle

[17] Which included the performance of some honourable service for the king in person

[18] Which was some agricultural service which was both fixed to nature and amount.

[19] Which was also mostly agricultural service.

[20] H.A. Hill and J.W. Redman, Law of Landlord and Tenant (n2)

[21] H.A.Hill and J.W.Redman, Law of Landlord and Tenant (n2)

[22] Martin Partington, Landlord and Tenant:Setting the Context (Weidenfeld and Wicolson, London, 1975) 6.

[23] H. A Hill and J.W.Redman, Law of Landlord and Tenant (n2)

[24] R. Megarry and W. Wade, Law of Real Property (n7)

[25] M.A. Banire The Concept and Functions of Leases', (n54

[26] W.S. Holdsworth, History of English Law, (1st edn.vol 3 Methuen, 1923) 213; see also, Street v. Mountford (1985) A.C. 809 at 814 Per Lord Templeman.

invented by William Raleigh in 1235' to deal with intruders. This protective Writ was however frustrated, in its application, through restrictive interpretation. In its final form this Writ only applied to the case where the lessor had sold the land to another who has ejected lessee [27]. However, towards the 15th century, precisely 1499, liberal construction was then applied to the word "intruder" by the Common pleas so as to cater for the interest of lessees generally. This progressive interpretation of the Common Pleas was subsequently confirmed by the King's Bench which finally fixed the law that a lessee has a right to recover the land against ejectors in general.

This action was also known as action of ejectment. The reasons why this change was made were partly legal and partly economic, leases originally ceased for legal reasons to be employed in the creation of a mortgage. Therefore, the beneficial lease for this purpose went out of use. Also, the deterioration of the service system was the reason for letting the land for shorter or longer terms and such lessees were not sufficiently compensated when ejected if offered damages Also, government wanted to stop the displacement of people in the country side occasioned by the conversion of farmable land into grazing land for sheep. These were no doubt decisive reasons, which brought about the enlargement of the remedy which could be obtained by the Writ of ejectment. The writ of ejectment and the action it gave rise to were made to do real actions efficaciously and through them the common law at length acquired a uniform remedy for the protection of all kinds of interest in land [28]. The result of this development was that once the leaseholder was able to recover his land from all corners, it could no longer be denied that he had an estate in the land (a right in rem**)** or that he held it in tenure [29].

Ultimately, the law afforded him the legal advantage of possession, which had been used indifferently for any "possession" was ascribed to the termor and if the latter was dispossessed he could recover back possession by an action of ejectment, an action which from being confined originally to leaseholders, became universal form action recovering possession of land [30].

Thus, at this stage, a lease truly acquired a proprietary interest in land, [31] thereby justifying the observation of Lord Brown — Wilkinson that:

The lease provides a classic reminder of the fact that that a contract between two persons can, by itself, give rise to a property interest in one of them... The contract of tenancy confers upon the tenant a legal estate … such legal estate give rise to rights … incapable of being founded in contract alone [32].

Character of a Lease

At common law, landlord and tenant relationship gives rise to rights and duties betwixt the parties. These rights and duties are usually in the form of 'covenants' which are enforceable by the rules of contract law. Some of these covenants are not only statutory [33] but also of common law origin, and are in landlord and tenant relationship.

Some of these covenants are implied by law into the lease even where there is no express stipulation to that effect. Generally, there are a variety of covenants but precisely which covenants either of the parties is required to enter into is of course, a matter entirely of contract. To each lease is attached expressly or impliedly; covenants which are basically governed by contractual rules [34]

In addition to the foregoing, repudiatory breach and mitigation of loss which fall within contractual rules equally applied to lease of land [35]. And in fact, the creation of any lease presupposes the existence of a contract. For example, contractual capability to deal in land must be there before a person can rightfully create a lease. Consequently, whether at the inception of a lease or at the subsistence of the lease, the application of contractual rules is inevitable. Hence it is impossible to divorce a lease from a contract much of the law of leases is still contract law with statutory additions [36].

Is the Doctrine of Frustration Applicable to leases?

As to the question of the applicability of the law of frustration to leases judicial views on this question have been divergent and so are the views of academic writers. It has been suggested in *Cricklewood Property and Investment Trust Ltd v. Leighton's Investment Trusts Ltd* [37] by the House of Lords that in exceptional circumstances a lease may be determined by frustration where some convulsion of nature swallowed up the property altogether or buried it up in the depth of the sea, or regarding a building lease, if by subsequent legislation, a building on the land was permanently prohibited. The decision remains controversial [38]. In the case itself, the House of Lords was evenly divided with Viscount L.C and Lord Wright for and Lords Russell and Goddard against; while the fifth Lord, Lord Porter withheld his opinion. The case of *National Carriers Ltd v. Panalpina (Northern) Ltd* [39] accepts in principle that a lease could be frustrated in such rare occasion as were suggested in the *Cricklewood's case* without holding that lease concerned in the case frustrated. The facts of the *National Carriers case* are as follows: In 1974, National Carriers Ltd. granted a ten-year Lease of a purpose — built warehouse in Hull to Panalpina (Northern) Ltd. The lease was to run from January 1974. And the rent agreed to be £6,500 for the first five years and £13,000 for the second five years. In May 1979, the street which afforded the only vehicular access to the warehouse was closed by the local authority on account of the dangerous condition of a building opposite the warehouse.

[27] W. S. Holdsworth, History of English Law (n26) 214
[28] W.S. Holdsworth, History of English Law (n26) 214
[29] R.Megarry and W.Wade, Law of Real Property (n7) 1157
[30] Hill and Redman, Law of Landlord and Tenant (n3) 4
[31] Hill and Redman, Law of Landlord and Tenant (n3) A2. This is precisely around the 16th century. See also Kate Green, Land Law (2nd edn Macmillan 1993) 51.
[32] Harmmersmith and Fulham L.B.C. v. Monk (n2) 478 at 491, G— H or (1992) 1 ALL ER. at 10.
[33] See for example S.7 Conveyancing Act 1881, S.100(1)(b) Property and Conveyancing Law, Laws of W. Nigeria 1959
[34] See Progressive Mailing House Property Ltd v. Tabali Property Ltd (n4) 17 at 79 Per Mason J. In particular in the enforcement against Landlords of Implied Warranties of Liability and fitness. for use; American Courts have increasingly stressed that the contractual principles established in other areas of the law provide a more rational framework for the apportionment of Landlord//Tenant responsibilities See also Javin v. First National Realty Corporation 482F. 2d 1071 at 1080
[35] MA Banire 'The Concept and Functions of Leases' (n4) at 71.
[36] ibid
[37] (1945)1 ALL ER. 252
[38] AA Utuama Nigerian Law of Real Property, (C I Shaneson Limited 1989), 76.
[39] National Carriers Ltd v. Panalpina (Northern) Ltd (n6) 161, See also Donald Eakin T. 'Leases As Contract' Northern Ireland Legal Quarterly Vol. 32, No.2; 162.

The closure was bound to last for some time because the unsafe building was listed as being of special architectural or historical interest and so could not be demolished without the consent of the Secretary of State for the Environment. Consideration of the matter by the Secretary of State would have to be preceded, by a public local inquiry if local conservationists objected, as indeed they did. In July 1979, the landlords issued a writ claiming over £6000 in rent [40]. The defendant's sole ground of defence was that because of what had happened the lease was frustrated. The unanimous decision of the English House of Lords was that a lease can be frustrated but this particular one had not been. Lord Roskill in the *National Carrier's* case belongs to the school of thought which believes in the essential unity of contract law and that no type of contract should be excluded from doctrine of frustration. He observed in the *National Carriers'* case that a common law doctrine should not be held applicable in one area of contract but not in another and that to keep the distinction between leases on one type of contract and the other types of contract will definitely generate irregularities or anomalies [41].

But the Nigerian Supreme Court handed down is epoch-making decision that a lease can be frustrated and held that the lease in Araka *v. Monier Construction Co. (Nig.) Ltd* [42] was frustrated. The facts were that the plaintiff/appellant granted a yearly tenancy of his house in Port Harcourt to the defendant/respondent from 1st December, 1963, at annual rent of £1,100 payable in advance on the 1st day of every December each year. The house was occupied by the expatriate staff of the defendant/appellant: as a service occupier. The relationship between them continued on this basis until October, 1967, when as a result of the civil war, the expatriate staff left the country following an order by the then Biafran authorities that all expatriates should leave. When the civil war ended, the plaintiff/appellant claimed for rents due from the defendant/respondent from 1st December, 1967 to 1st December, 1969 in a letter dated 15th June, 1970.

The defendant/respondent denied liability and contended that the tenancy was frustrated when their expatriate engineer left Port Harcourt because, the tenancy was granted on the understanding that the house would be occupied by the expatriate staff.

On these facts and arguments, Allagoa J. gave judgment to the defendant/respondent. The plaintiff/ appellant was dissatisfied with the judgment and appealed to the Nigerian Supreme Court observed that the doctrine of frustration in some situations may apply to lease. Accordingly, it was held that in June in 1967, the very purpose for which the lease had been taken was frustrated by the action of the Biafran rebels and that since that date, the tenants have not enjoyed the benefits of the lease [43]

The decision has been seriously criticized because once a lease is granted an estate is created which the lease takes subject to all advantages and disadvantages [44] and therefore cannot be said to be frustrated. A long line of cases firmly endorses this view [45] In *Adeshigbin & Anor. v. Minaise & Anor*, [46] Coker Ag. J. decided (in 1958) that the common law doctrine of frustration applied to covenants in a lease as distinct from the lease. The facts were that the lessors had sued the lessee for damages for failure to build on the site leased to them as stipulated in the the lease. And also, for forfeiture and possession of the property. At the trial, the lessees contended that they were discharged from the contractual covenant in the lease by the legal restriction imposed by the Lagos Executive Development Board prohibiting the erection of new buildings in the locality. Coker, Ag. J., referring to the *Cricklewood's Case*, held that the defendants were relieved from performing covenant in the lease which had become impossible to perform, but refused to order forfeiture for reason that the procedure for ejectment of the tenant had not been complied with. This judgment to me, clearly recognized the principle that a contractual duty in a lease can be frustrated, while the tenurial relationship subsists.

The post-civil war (Nigerian civil war of 1967) cases have not departed from the position of non-applicability of frustration to leasehold interest or leases. The first of these cases was *Nwaiide v Ossai* [47] where Oputa J. declared that 'war may frustrate certain contracts but in general, the doctrine is not applicable to leases does. This was followed by the decision in *Okoli Osue v. Maihadishi & 0rs* [48]. The facts were that the defendants demised the premises comprising three shops to the plaintiff from 30th December, 1965. The plaintiff had possession of the property until the outbreak of the civil war when he fled from Onitsha. During the civil war, the shops were extensively damaged. When the war ended, the plaintiff wanted to re-enter the premises, but he was refused entry by the first 3 defendants, alleging among other things that as the three shops had been virtually destroyed and that the lease had come to an end and thus terminated by operation of law.

Considering the judgment in the *Cricklewood's case*, Agbakoba, J. observed that as far as the English House of Lords was concerned, the doctrine of frustration as it affects leases was still at large. He then held that, notwithstanding that the shops were extensively damaged during the war so that the plaintiff was not in a position to deliver them as shops at the expiration of the lease, the lease still subsisted. He further held that the common law doctrine of frustration does not apply to leases generally, since a lease creates a legal estate in favour of the lessee, not merely a contractual duty or obligation. The foregoing authorities show clearly that the decision in *Araka's case* stands alone even in Nigeria. It is argued that doctrine of frustration should not be applicable to leases. And this is consistent with nature of the concept of estate.

Different academics and jurists hold different views on the applicability of the doctrine of frustration to leases. Keith

[40] This represented the two quarters rent due on l April and 1st July minus some £1,500 which the Lessees paid for the six weeks or so between 1st April and the closure of the road.
[41] National Carriers Ltd v. Panalpina (Northern) Ltd (n6) 185 HL
[42] (1978) 9 &10 S.C.9
[43] Araka v. Monier Construction Co. (Nig.) Ltd (n42) 25 per. Bello JSC
[44] J.A.Omotola 'The Doctrine of Frustration — Its Applicability to Contract Relating to Land' (n7) 4.
[45] London & Northern Estate Company v Schlesinger (1916) 1 KB 20, Whitehall Court Ltd v Etilinger (1916) 1 K.B. 20, Mathew v Curling (1922) 2 A.C. 180; Denman v. Brise (1947) 2 ALL ER.; Highways Properties Ltd. v. Kelly Douglas Company Ltd. (1971) 17 D. L.R. (3rd) 710.
[46] (1958) LLR 12
[47] (1972] E.C.S.L.R. 576
[48] (1973) 3 E.C.S.L.R. (Pt. 11) 811

Hodkinson is of the view that the doctrine of frustration should be used very sparingly on leases [49] Finnie Fekumo holds the view that frustration is applicable to leases but in rare circumstances [50]. On the other hand, both J.A. Omotola [51] and A.A. Utuama [52] hold the view that frustration is not applicable to leases based on the "estate theory" which implies that upon grant of the interest, all obligations as far as proprietary interest is concerned become extinguished, the import of which is that all that remain in existence are the covenants. They both argue that a lease creates or confers an estate in land which cannot be said to be frustrated.

Analysis of the 'Estate Theory' in Leases

A lease is not only a contract but creates and vests in the lessee an interest or estate in land. As he has been noted earlier, originally leases were not regarded as property (an object of ownership) but as personal contracts binding only on the parties to it. But when they became fully protected by property law, they became estates.

To demonstrate this proprietary nature of a leasehold interest, references shall be made to the following areas: statutorily, leases are now recognized as an estate in land [53] That is why, it is now possible for proprietor of freehold of estate to create a lease on which he receives rent, and still has a legal estate, while the lease simultaneously command the character of an estate capable of further subletting in the situation of no prohibition. Furthermore, the subject of rent and distress is an evidence of the existence of an estate. This is because rent usually issues from the usage of land and mostly serves as an acknowledgement of the grantor's title, that is to say it goes with the reversion. Also, the right of distress which at common law is only available in a relationship of tenant and landlord.is not for instance available to a licensee due to this lack of estate [54] In a similar way, covenant that touches and concerns land, and which runs with the land or reversion otherwise known as privity of estate can only be experienced where there is existence of proprietary interest and not otherwise [55] Again, it is because a lease gives rise to an estate in land that it can survive the owner. That is, upon the death of a lessee, the unexpired interest he possessed in such land is transmissible to his heirs either under his Will or by intestacy. If it were a licence especially if not coupled with an interest; it will be uninheritable**.** Thus, from the foregoing**,** it can be argued that a lease creates an interest or estate in land. The inapplicability of frustration to leases is founded on the "estate theory" [56]. This theory is rooted on the argument that a lease creates a period of years or time in favour of the lessee which he takes subject to all the advantages and disadvantages. "There can therefore be no question of frustration as the term or time is already vested in the tenant or lessee and remains so vested in him whatever happens" [57]. And it was based on this theory that in *Denman v. Brise* [58] the English Court of Appeal held that the mere destruction of the premises did not terminate a lease and for that reason the landlord who rebuilt was obliged to permit his tenant to repossess the new building.

In *National Carriers Ltd v. Panalpina (Northern) Ltd* [59] the English House of Lords accepts the principle that a lease can be frustrated, but held the lease in the case was not frustrated. Oputa J in *Nwajide v Ossai* [60] also noted that the "civil war did not frustrate the lease as the lessor's principal obligation was executed. When he gave the lease to the plaintiffs in whom an estate then vested" In *Araka v Monier Construction Co (Nig.) Ltd*, [61] the Nigerian Supreme Court held that in June 1967, the lease was frustrated by the civil war and that the tenants did not enjoy the lease. Prof. Omotola [62] criticised the decision in *Araka* because it is void of principle and noted that it is an "attempt to throw over board a very fundamental principle of real property law".

Other Jurisdiction

American courts starting from the premise that leases of urban dwellings "should be interpreted and construed like any other contract" [63] began to recognize an implied warranty of habitability in residential leases [64]. To effectuate this newly created right, the American courts afforded the tenant what a rather remarkable remedy. The tenant was allowed to remain in possession of a defective premises and withhold rent. The importance of this remedial development becomes apparent when it is realized that previously the tenant had no such rent abatement right even if the landlord had breached an express term concerning the conditions of the premises. With the advent of this contractual approach to leases and its concomitant abatement remedy, Landlord-Tenant law stood at an important cross road, with at least three potential paths of development [65].

Firstly, [66] on the proposition that leases be treated "like any other contract" the American could have used a normal, transaction — oriented contractual method of ascertaining the material terms of the contract and extended the abatement remedy to all material breaches of those terms.

Secondly [67] the American Courts could have employed contractual method for determining material terms, but limited the availability of the abatement remedy to material breaches of terms affecting the livability of the premises.

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[49] [1981] Conv. 165—244 at 272 M A Bemire, 'Concept and Functions of Leases' (n4) at 71.

[50] Finnie Fekumo: Applicability of the Doctrine of Frustration to Land — A Reply Journal of Private and Property Law 1985) 3 36

[51] J A Omotola, 'The Doctrine of Frustration — Its Applicability to Contract Relating to Land' (n4) 47

[52] A A Utuama, 'Applicability of the Doctrine of Frustration to Land: A Rejoinder' Journal of Private and Property Law 19854, 35

[53] Section 48. Land Use Act, Cap 202, Laws of the Federation of Nigeria. 1990; S.3 Property and Conveyancing Law, Western Nigeria (1959), S.2 Conveyancing Act 1881; 5.205 (XIX) Law of Property Act (England) 1925

[54] Hancock v Austin (1863) 14 G.B.L. 3, Provisional Bill-Posting Co. v Low Motor Iron Co. (1909) 2 KB. 344 C.A. see also M A Banire, 'The Concept and Functions of Leases' (n4) 72

[55] M A Banire 'The Concept and Functions of Leases' (n4) 72

[56] J A Omotola 'The Doctrine of Frustration — Its Applicability to Contract Relating to land' (n7)

[57] J A Omotola 'The Doctrine of Frustration — Its Applicability to Contract Relating to land' (n87

[58] Denman v. Brise (n45) 22

[59] National Carriers Ltd v Panalpina (Northern) Ltd (n6) 161

[60] Nwajide v. Ossai (1975) 4 SC 207. 230.

[61] Araka v Monier Construction Co (Nig.) Ltd (n42) 25

[62] J A Omotola 'The Doctrine of Frustration — Its Applicability to Contract Relating to Land' (n7)

[63] Javins v, First Nat'L Realty Corp (n34) 1075

[64]American Courts frequently base the existence or the creation of the implied warranty upon the expectations of the parties as revealed by the lease Contract.

[65]Edward Chase, Hunter E., Taylor, J.R. "Landlord and Tenant: A study in Property and Contract Villanova Law Review 1985,30, 571 at 644

[66] ibid

[67] ibid

Thus, breach of a warranty of habitability alone would trigger the abatement remedy, but the area of the warranty could be defined broadly in accordance with transactional circumstances and expectations.

Thirdly, [68] and this is the most restrictive path the Courts could have defined the warranty of habitability in terms of minimal qualities essential to the bare livability of the premises, and limited the abatement remedy to breaches of such minimal guarantees.

It should be noted also that where the demised premises is destroyed and the premises is of rooms building or of a bui1iing without Land the American Courts have excused the tenant from the duty to pay rent. This attitude of the American Courts will seem to strengthen the view [69] that leases of urban dwelling units should be treated and construed like any other contract.

Conclusion

The answer to the question whether a lease is a contract or an estate became manifest from tracing the evolution of a lease. In early times, leaseholds were regarded as mere contractual rights to occupy land, they were hardly estates at all, but in times when the law came to give them full protection as proprietary interest they were added to the list of recognized estates. Today, a lease confers on the lessee both a contract and a legal estate. The paper argues that a lease is a contract that confers an interest in land or estate on the lessee and therefore holds both the character of contract and estate. The paper also inquires whether a leasehold interest or a lease can be frustrated in law. To this it argues that the common doctrine of frustration cannot apply to leases based on the fact that a lease confers a term of years on the lessee. Or it creates or produces an estate in land in favour of the lessee which cannot be frustrated in law. Various court decisions were used to support the arguments herein.

It will appear now that there is a further development. The American Courts in certain situations hold the view that "leases of urban dwelling units should be interpreted and construed like any other contract". If this view is accepted by other jurisdictions, it will appear that the "estate theory" would have been 'swallowed up' by the contractual view, and thereby making the evolution of a lease to be from contract through estate back to contract.

References

1. Banire MA. The Concept and Functions of Leases Journal of Private and Property Law. 2003; 22:59.
2. Black H. C. Law Dictionary. (6th edn St. Paul Minn. West Publishing Co, 1990.
3. Bright S and Gilbert: G Landlord and Tenant Law, The Nature of Tenancies, Clarendon Press, Oxford, 1995, 1.
4. Butt P. Land Law (Sydney Law Book Company 2nd edn 1998) Para. 616, Hill and Redman, Law of Landlord and Tenant (18th edn. Butterworths, 1991) Al
5. Chase E, Hunter E, Taylor JR. "Landlord and Tenant: A study in Property and Contract" 30 Villanova Law Review. 1985; 30:571.
6. Donald Eakin DT. 'Leases as Contract' Northern Ireland Legal Quarterly, 32, 2-162.
7. Fekumo F. Applicability of the Doctrine of Frustration to Land—A Reply Journal of Private and Property law. 1985; 3:36.
8. Green K, Land Law 2nd edn Macmillan, 1993, 51.
9. Hill HA, Redman JW. Law of Landlord and Tenant 17th edition, Butterworths, 1982, 202.
10. Holdsworth WS, History of English Law, 1st edn. Methuen, 1923; 3:213.
11. Omotola JA. The Doctrine of Frustration'—Its Applicability to Contract Relating to Land Journal of Private and Property Law. 1984; 1:2-1
12. Maudsley RH, Burns EH. Land Law: Cases and Materials, 6th edn Butterworths, London, 1992 408.
13. Meggary R, Wade W. *Law of Real Property* (4th edn. Stevens & Co 1969) 673.
14. Partington M. Landlord and Tenant: Setting the Context Weidenfeld and Wicolson, London, 1975, 6.
15. Utuama AA. Nigerian Law of Real Property, C I Shaneson Limited Ibadam, 1989, 76.
16. Utuama AA. 'Applicability of the Doctrine of Frustration to Land: A Rejoinder' Journal of Private and Property Law. 1985; 4:35
17. Woodfall W. Law of Landlord and Tenant, Vol 1, Sweet and Maxwell, London, Ch. 1,

[68] ibid
[69] Javins v. First Nat.l Realty (n34) 1075