Private Law

Revisiting Conveyancing risks under the Legal Regime for Land Registration in Nigeria: A Case for Title Insurance

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Abstract: This research investigates the conveyancing risks which cannot be cured under the present legal regime for land registration in Nigeria. Two fundamental issues motivated this study. The first is that, in Nigeria, registration of title to land is mandatory and meant to assure certainty of registered title amongst other reasons. However, it is settled law that registration of title per se cannot cure any defect in the title or confer validity which it does not possess. This phenomenon not only exposed registered title holders to hidden conveyancing risks, but also threatened the effectiveness and public trust in registration of title regime. The second problem is the lack of appropriate risk control measures that are specifically designed for registered title holders in country. Consequently, this paper evaluates the existing conveyancing risks in the particular context of the extant rules on land registration. Although the paper commends legal efforts aim at strengthening land registration in Nigeria, it demonstrates that there is enormity of conveying perils which largely defeats the benefits of registering title to land. In that regard, the study proposes the establishment of title insurance as new commercial model that will be tailored for conveyancing risks control in the country. It concludes that since insurance regulation is the exclusive preserve of the Federal government, the National Insurance Commission should pioneer the reform suggested in this paper by invoking section 101 of the Insurance Act 2003.

Keywords: Land registration; Conveyancing risks; Title insurance; Regulation; Nigeria

1. Introduction

The practice of registration of title to or interest in land, which remains the kernel of modern conveyancing in Nigeria today, has its root from the colonial era. This is largely because before the era of colonization, the area now known as Nigeria did not exist as country, in the first place. In the second place, there was no conveyancing law for the registration of instruments affecting land. However, the

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British, through conquest, took over the various indigenous land practices and set up English land administration, beginning with the compulsory *Registration Ordinance of 1883*. Since then, the land registration law was continuously reformed during the colonial era with several enactments such as *Land Registry Proclamations* of 1900 and 1910 as well as *Land Registration Ordinances* of 1915 and 1924. After attainment of Nigeria's independence in 1960, particularly with the enactment of the Land Use Act of 1978, all land in the Nigeria become vested in the Governor of each of the 36 States, except the Federal Capital Territory (FCT) Abuja, which is under the control of the Government of the Federation. In that regard, all the 36 States of the Federation have their respective Land Registration Laws, with Lagos State leading with recent reform by enactment of Lagos State Land Registration Law (LRL) 2015.

The central implications of these Land Registration Laws are to safeguard certainty of title to land, guarantee priority of interests, and promote public confidence in real property transactions amongst other connected matters (Smith, 2007). Above all, the laws are meant to ensure that no encumbrances exist on land and that the purchaser would enjoy quiet possession and use of the land (Umezulike, 2013, p. 371). Nevertheless, the fundamental problem is that no matter how ingenious land registration law could be, there exist potential conveyancing risks, which land registration *per se*, cannot cure. This position has long been rightly accepted by the Supreme Court in *Omosanya* v. *Anifowosho* (1959) F.S.C. 94, where it was held that registration of land *per se* cannot cure any existing defect or confer validity to invalid title. Consequently, several nations has turned searchlight to other methods of controlling the effect of conveyancing risks. From the perspective of insurance as a risk control mechanism, therefore, one of the parallel models that have globally evolved for the purpose of mitigating land conveyancing risks or damages is "*title insurance*" (Gosdin, 2008; Pelkey, 1927, pp. 38-52). As will be seen in the subsequent part of this article, the rationale for title insurance is multifaceted and includes providing protection from real property loss such as: unknown title defects, existing liens or encumbrances against the property title, errors in surveys and public records, title fraud, and other title-related risks that can affect valid sell, mortgage or lease of property in the future.

In fact, the central idea behind emergence of title insurance is the quest for effective and efficient conveyancing practices, which land registration *per se* may not achieve. This is largely because "title to land," which is the subject matter of land registration laws in Nigeria, is characterized as being permanent in nature, yet with a unique history of transactions involving persons who at one time held interests in it for divergent purposes (Arrunada, 2002, p. 582). These pre-existing

interests may be legal or equitable, possessory or non-possessory, and may continue to exist at the time of the last transaction. Some of the risks that accompany this chain of transactions are that the existing title may be defective, invalid or encumbered. However, the person that validly acquired the title in the last transaction may be unaware of these defects or encumbrances at the time of purchase. Since registration of land *per se* cannot cure any existing defect or confer validity to invalid title, *title insurance* is often seen as an alternative means of mitigating the effect of the occurrence of title risks.

Unfortunately, in Nigeria, unlike other countries like United States of America (USA), United Kingdom (UK), Canada, Mexico, Australia and China, title insurance is not yet established. Consequently, the literature on title insurance in the Nigeria's context is virtually scarce and underdeveloped. Besides, the benefit that may be derived from the synergy between title insurance and Land Registration is hardly a topic of academic discourse in Nigeria. This state of affair continues to exist despite the fact that land registration has long been part of the Nigeria's legal system. The fundamental consequence of the lack of title insurance is that the victims of defective or encumbered property resort to other means of dispute resolution which are in themselves defective (Agomo & Akaayar, 2015, pp. 1-30). Consequently, this paper not only closes the gaps in literature, but also advocates a new legal regime for the establishment of title insurance as a complementary model to land registration in Nigeria. It is believed that this research will not only prompt other constructive contributions, but also complements the renewed efforts by the Lagos State Government and other government agencies, in safeguarding the rights to real property in Nigeria.

The research is structured into six main parts. Following introduction in Part I, Part II overviews the distinctive nature and characteristics of title insurance as a socio-economic risk control mechanism. Part III examines the synergy between title insurance and land registration laws in Nigeria, with particular focus on LRL 2015. This is largely because LRL 2015 remains the most recent land registration law in Nigeria. Part IV evaluates some of the critical provisions of the land registration laws that may be complemented by the title insurance regime. Again, for reasons earlier noted, LRL 2015 shall be the point of reference. Part V suggests the regulatory approached for establishing title insurance in the country, while Part VI is the conclusion.

2. The Distinctive Nature and Characteristics of Title Insurance

The concept of *title insurance* is devoid of universal definition. For the purpose of this research, however, it may be described as a contract whereby a person called *insurer* agrees for a consideration called *premium* payable by another called *insured*, upon which the insurer agree to guarantee or protect the insured title to real estate against all loss or damage, not in excess of an agreed sum, which the insured may sustain by reason of existing defects, lien, encumbrances or marketability of title to a described estate or interest, or defects in the title of a mortgagor in the mortgage interest, as of the date of the policy (Pelkey, 1927, p. 42). The foregoing suggests that title insurance is an indemnity policy that is founded on the general principles of insurance such as premium, insurable interests, utmost good faith and uncertainty. In that regard, the traditional rule that under an indemnity policy, the insured shall be fully indemnified when the insured loss occur, but shall not be more than fully indemnified (*Castellain* v. *Preston* (1883)11 QBD 380), is applicable to title insurance as well. Thus, in *Empire Development Co.* v. *Title Guarantee and Trust Co*. (1918)225 N.Y. 53, 121 N.E. 468, it was held to the effect that title insurance is one of indemnity policy; as a result, the insured cannot make such contract one of profit to him.

Similarly, title insurance is not designed to prevent loss or damage associated with title to land or interest in mortgage. Rather, in a typical purchase of interests in real property, or lending in the case of mortgage transaction, the purchaser or lender may be faced with risks of defective title, or incur expenses in defending adverse claim. In that connection, title insurance is developed as a socio-economic mechanism for shifting these risks to the title insurance company upon the payment of premium insured. This is critical in many respects. For instance, a fire may destroy a building and improvements, but the ground will be left. However, a defective title takes away not only the house, but also the land on which it stands. Also, a deed or mortgage in the chain of title may be a forgery, or executed by a person other than the owner, but with the same name and identity as the owner, the discovery of which destroys the whole essence of mortgage and erode public confidence in the sector. These and many more potential title defects make title insurance an instructive conveyancing risk control mechanism.

Furthermore, the risks insured under title insurance are retrospective in nature. That is, the title insurer is liable to indemnify the insured for loss or damage arising out of hidden defects that existed before the date of the policy (Roberts, 1963, pp. 1-28). Consequently, in practice, a title insurer, prior to accepting an offer to insure title risks, conducts a title search so as to determine whether there exist actual or potential defects in the chain of title to property concerned. The findings of the

search, usually including atlases, indexes, surveys and title folders are then preserved by a mechanism technically called "abstract plant." The information in the title plant is significant in determining risks covered and exempted in the policy. Usually, defects that are discovered are exempted, while those defects that are not discovered but may exist at the date of the policy are covered. Also, all oversight errors arising from inadequate or faulty conduct of title search are covered. In any case, the liability of insurer, in cases of oversight errors, is based on the elementary principles of contract rather than on rules of negligence. In view of the importance of title search, a major portion of premium, usually in the ratio of 40 to 50 per cent, is dedicated for title search and abstract.

In addition, title insurance is designed in such a manner that the cost of defending defects in title, or adverse claim, by the insured is transferred to the title insurance company (Harry, 1966, p. 393). While, the title insurance company will covenant to defend the insured in any legal claim relating to the insured title, the liability is limited to defects which existed prior to the effective policy date. However, this service is unique because the cost of defending title is not conditioned on the validity of the claim. In other words, it does not matter whether the claim is itself defective or valid. Above all, there is no limit on the amount of legal services which will be provided.

Another unique feature of title insurance is that, the policy cover is indefinite, and not based on annual or biannual renewals. That is, once the insured pay the agreed premium, the policy continues without expiration date, subject only to the execution of quit deed. It does not matter whether the insured owns the property for one or 50 years, or his or her heirs own it for a hundred, or more, years (Harry, 1966, p. 399). In that regard, the insured party in title insurance is not only the named insured, but also his/her estate, heirs, devises, and personal representative.

Also, title insurance is *monoline* base in nature rather than *multiline* (Dwight, 2006, p. 83). This means that a title insurance company may only operate a title insurance business without combing it with other classes of insurance. The effect of this is that a title insurance company can underwrite title insurance business and apply its capital only to pay claims against title loss or damage. The policy could be sold to the property owners, technically called "*owner policies"*; or sold to mortgage lenders, technically called "*lender policies*". In any case, title insurance business is operated in accordance with the insurance laws of the territory of its operation.

Above all, Potter J described the nature of title insurance in *Foehrenbach* v. *German-American Title and Trust Co* (1907)217 Pa. St. 331: 336-7), thus:

The sole object of the title insurance is to cover possibilities of loss through defects that may cloud or invalidate title. It is for the assumption of whatever risk there may be in connection that premium is paid to, and accepted by, the company which issues the policy. Title insurance is not a mere guess work, nor is it a wager. It is based upon careful examination of the manuscripts of title and the exercise of judgment by skilled conveyancer. A policy of title insurance means the opinion of the company which issues it, as to the validity of the title backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured.

The totality of the foregoing strongly suggests that the business of title insurance is a combination of the business of conveyancing, abstracting and the examination of titles with that of insuring titles. Consequently, the trite law is that in determining the liability of the title insurance, the nature of the contract must first be determined and the capacity in which such company was acting ascertained (*Whitaker* v. *Title Insurance & Trust Co.* (1921)186 Cal. 432). With the above features of title insurance in mind, the next part of this article examines the synergy between title insurance and land registration law in Nigeria, with particular emphasis on the provisions of the LRL 2015 as point of reference.

3. Title Insurance and Land Registration Law (LRL 2015): the Synergy

The available literature revealed that the law relating to title insurance is a happy mixture of real property, contract, tort, and insurance law, which is affected by government law and regulation as well as pressure from the users of the policies (Burke, 2008, p. 27). In view of want of space, a detailed examination of all these laws is beyond the scope of this article. For the present purpose, an examination of the synergy between title insurance and the LRL 2015 is the focus. The analysis of the synergy is instructive in distilling not only the various aspects that title insurance could complements land registration laws, such as LRL 2015, but also in advancing a more effective land registration in Nigeria, in general.

The regimes of land registration law and title insurance are, in general, not strictly speaking closely related. Accordingly, while the rules and practices designed under land registration laws, like LRL 2015, may be closely aligned with real property law, title insurance is carried out in the context of generally acceptable insurance laws and practices. For instance, section 2 of the LRL 2015 stipulates that "Every *document* of interest or *title* to land in Lagos State shall be registered in accordance with the provisions of this law." The LRL 2015 went on to define the word "*document*" as including: "any deed, judgment, decree, order or other document in

writing requiring or capable of registration under this Law and includes certificate of occupancy". While the word "*title*" is not clearly define by the LRL 2015, the Black"s Law Dictionary describe "*title*" to include the legal link, or evidence, between the person who owns real property and the property itself (Garner, 2004, p. 1522). The combined insights from the meaning of "*document*" and "*title*" strongly suggests that "*document*" in relation to LRL 2015 are the legal means of proving legal links or interest between the owner of a property and the property itself. It seems that, it is this means of proving title to land situate in Lagos State that LRL 2015 requires it shall be registered. This is similar with many other land registration laws in Nigeria.

On the other hand, the phrase "title insurance" combines two broad concepts – "title" and "insurance". Although "title", in the context of this paper is explained earlier, the concept of "insurance" is devoid of universally acceptable definitions (Agomo, 2013, pp. 44-50). Thus, what could amount to "title", or "insurance", remains a question to be addressed by the extant laws of a particular jurisdiction. Nevertheless, when "title" is combined with "insurance" (i.e. title insurance), a distinct doctrine emerges, and has received diverse views regarding what it exactly means. Without revisiting these debates, title insurance, as earlier described at the beginning of Part 2 this paper, may be summed up as simply a policy cover for loss or damage associated with title to real property.

View in the above light, two fundamental things stand out clear. The first is that, the major objective of the land registration laws in Nigeria, like LRL 2015, is to safeguard effective and efficient title registration in the country. As Smith aptly demonstrated, the whole mark of land registration is to guarantee security of title which unregistered conveyancing does not assure (Smith, 2007, p. 444). In that regard, the purchaser of registrable title enjoys a guarantee from the State, and further assures subsequent purchasers that the exiting title is safe and valid. However, the trite law, as earlier exemplified by the Supreme Court in *Omosanya* v. *Anifowoshe* (1959), is that registration of title *per se* does not cure any defect in the title or confer validity which it does not possess. Thus, in the case of defective title, or error in public records, the effectiveness and efficiency of land registration become threatened. Besides, public trust and confidence in the registration regime may to a large extent be diminished. It is these risks which title registration cannot completely eradicate that creates commercial window for the regime of title insurance.

The second fundamental synergy in the context of this paper is that title insurance is a potential policy cover for those risks, which registration of title cannot cure. As Keeton rightly pointed out, under title insurance, an insurer provides an insurance

cover to a title holder in respect of attendant risks and damages regarding incomplete information about legal rights already existing at the time of underwriting the policy (Keeton, 1971, p. 18). As earlier noted, some of these risks include: unknown title defects, existing liens against the property title, errors in surveys and public records, and title fraud amongst other title related risks that can affect the owner's ability to sell, mortgage or lease property in the future.

The totality of the foregoing strongly suggests that title insurance device is inherently intertwined in the conveyancing processes in general, and the regime of LRL 2015 in particular. This is largely because title insurance remains one of the critical components in estate transactions that are designed to provide assurance to the homeowner or lender that interest in the property can be transferred unencumbered (Dumm, Macpherson & Simans, 2007, p. 53). In the case where defects, errors or omissions exist and are insured, any loss or damage arising in connection with registered title at the time of the policy would be indemnified by the insurer. Consequently, both the land registration laws in Nigeria and title insurance have something in common, which is providing security to real property. Besides, both land registration laws and title insurance provide not only an assurance to purchasers of property, or lenders in case of mortgage, that ownership can be transferred clear of encumbrances, but also showcase to the public the quality of local title searches. With the foregoing synergy in mind, the next part of this article evaluates some of the provisions of land registration laws in Nigeria, particularly the provisions of LRL 2015, which may be complemented by title insurance.

4. Beyond Land Registration Laws: Justifications for Title Insurance

As noted at the introductory part of this paper, the legal regime for the registration of land in Nigeria comprises statutes of the 36 States of the Federation and the FCT, Abuja. Consequently, it is practically impossible to examine all the provisions of these statutes in a paper of this nature. This section of the paper, therefore, limits itself to the LRL 2015. But again, even the LRL 2015 contains several provisions relating to the "registration of title to land", which for reason of want of space, only some of these provisions are examined here, starting with hidden perils at the time the title is transferred.

4.1. Hidden Perils at the Time the Title is Transferred

The foremost area, which in the context of this paper land registration cannot cure, is hidden risks at the time the title in land is transferred from the vendor to the purchaser. The extant statutes cannot provide solution either. For instance, section 2 of the LRL 2015 requires that every person who acquires a document of interest or title to land in Lagos State shall register it with land registry. Section 27 of the LRL 2015 adds that once interest or title is registered, it becomes valid evidence that the person is the holder of "that land parcel together with all the rights, privileges and appurtenances, except rights to mineral resources or mineral oil on the land." The foregoing position of law is similar with other registration laws in Nigeria. Accordingly, in the case of *Benedict Agunedu & 7 Ors* v. *Christopher Onwumere* (1994) 1 NWLR (Pt.321) 375), it was held that the consequence of non-registration of a document that qualifies to be registered is that such document will be inadmissible as evidence of title to that land. Consequently, it is mandatory to register a document that qualifies as registrable instrument in Nigeria. In Lagos State for instance, section 26 of the LRL 2015 compels "any holder in possession of registrable document to register it within sixty (60) days after obtaining the Governor's consent, where applicable." Upon registration, all the relevant information regarding the property and registered holder are kept in the Land Information Management System (LIMS). In a situation where the registered holder intends to sell, or charge the interest in the registered property, a search is allowed in conformity with section 22 of the LRL 2015. As keleher rightly noted, the purpose of the title search is to, among other reasons, identify all prior owners and, if any, outstanding liens, encumbrances and overriding rights and covenants (Keleher, 2012, p. 19). In addition, the search process assures not only good title, but also provide disclosure to the buyer, or mortgagee, the true state of affairs with respect to the real property before any further dealings in it, or with the owner.

From the perspective of title insurance, however, there could be some hidden title perils which are not of records with the land registry, or if of record, of such a nature that they could not reasonably be expected to have been discovered by a thorough search of the records with the land registry. The critical dangers are that the subsequent occurrence of any of such hidden perils may lead to loss or damage to the title holder. It is the consequences of these hidden perils that are the target of title insurance business. This is important because land registration law in Nigeria is yet to be adjudged error free. In fact, it is argument of this writer that the enabling provisions for handling hidden perils under Nigeria's land registration regime are substantially inadequate. For instance, it appears that the few requirements for checking title defects under LRL 2015 are the declaration of

encumbrances under section 10, and the power of the Registrar to correct errors in the title register under section 98. Consequently, it is further submitted that title insurance, which is a tailored mechanism for cushioning the adverse effect of hidden title perils, should be established as a complementary model for land registration laws, such as the LRL 2015. The foregoing discourse is closely linked with risk of loss or destruction of public records.

4.2. Risk of Loss or Destruction of Public Records

The second important area that justifies the establishment of title insurance in Nigeria is the need to mitigate the effect of loss or destruction of title records in land registry. This is important because section 37(1) and (4) of the LRL 2015, for instance, stipulates that where a registered title document (which include "Certificate of Occupancy" or "Land Certificate") is lost or destroyed, the holder may apply to the Registrar of land registry for the re-issuance of an extract of the title document. In addition to the application, the applicant is expected to attach a statutory declaration under the Oaths Law stating circumstances of the loss or destruction of the previous document, and publish the fact of the loss or destruction in any national newspaper in line with section 37(2) of the same LRL 2015. In any case, section 37(3) and (5) of the LRL 2015 gives that the Registrar absolute discretion either to re-issue or reject the re-issuance of the lost or destroyed title document. No doubt, section 37 of the LRL 2015 is commendable for availing a holder of registered title document an opportunity to get back a lost or destroyed title document.

However, it is the contention of this writer that section 37 of LRL 2015, together with other similar provisions in Nigeria, is substantially inadequate for a number of reasons. First, it wrongly assumes that only title documents in the custody of a registered holder are susceptible to being lost or destroyed. Far from that, title records with land registry are also amenable to loss or destruction just as is the case with title document with the holder. If this argument is anything to go by, it may further be contended that where loss or destruction of public records coincides with the loss or destruction of title documents in the custody of the holder, the source of getting valid information for re-issuance becomes highly challenging, if not impossible.

Nevertheless, skeptics of the foregoing argument may contend that in some States of the Federation, like Lagos State where Land Information Management System (LIMS) was introduced under section 17 of the LRL 2015, the challenge of sourcing information for re-insurance may be minimized. However, the LIMS is

also susceptible to cyber vices, such as hacking of the online information or destruction by online virus. In that connection, it is submitted that the *abstract plant*, usually kept with title insurance companies, would serve as alternative source of records for reconstructing lost or destroyed title information. As studies from other jurisdiction have shown "…when public records have been destroyed [or lost] by fire, public officials have used the abstract plant as a principal means of reconstructing the lost public records" (Harry, 1966, p. 398). The foregoing insights strongly suggest that *abstract plant* to be kept by title insurance companies can complement land registration regime in Nigeria where, for instance, title records with land registry are destroyed or lost.

Although caution must be taken against the existing common law rule established in "*Broadway Realty Co.* v. *Lawyers" Title Insurance & Trust Co.* (1916) 171 App. Div. 792 to the effect that to be actionable against the insurer, the loss or damaged covered must be by reason of encumbrances against which the insurer agreed to be bound. In any case, it can be inferred from the decision of the court in *Foehrenback v. German-American Title & Trust Co*. (1907) 217 Pa. St. 331, that the term "loss" is relative. Accordingly, in the case of *Empire Development Co*. v. *Title Insurance & Trust Co*. [1918] 225 N.Y. 53, it was held that loss should be measured in accordance with standards accepted by the parties. But again, another issue is who bears the cost of defending the action of the title holder? This issue is examined next.

4.3. Cost of Defending Title Claims

Another important way that title insurance can complement land registration law in Nigeria is through defending the title claim on behalf of the insured title holder. This is important because of a number of factors. Foremost, before the establishment of the present regime of land registration in Nigeria, there appeared to be a plethora of reported court cases on land title dispute in the country. A detail examination of the nature of these cases is available in extant literature on real property law in Nigeria (Smith, 2007; Umezulike, 2013). For the present purpose, it is argument of this writer that, some of the rules on land registration in Nigeria may create conflicts of interest, which may necessary require the registered holder to defend his interest. For instance, section 29 (1) of the LRL 2015 creates priority of registered interests. However, where conflict of interests has arisen, the Registrar under the LRL 2015 may refuse registration until the rights of the parties interested are heard and determined in line with section 29(4) of the LRL 2015.

It is submitted that where such refusal is to the adverse right of the registered holder, the need for the defence of title may have been arisen. Similarly, section 73 (1) of the LRL 2015 stipulates to the effect that any interested person may apply to court to prohibit or restrict the power of the registered holder to deal with the registered land. In the case where the order of prohibition or restriction is granted by the court, the register holder affected cannot deal in the land until such order is removed or cancelled as required by section 73(1) (b) and (7) of the LRL 2015. Again, this strongly suggests that the affected holder must take appropriate legal steps, such as challenging the order in court, so as to ensure that the prohibition or restriction is removed. Besides, section 106 of the LRL 2015 allows every person (including registered holder) who is "aggrieved by the decision of the Registrar on any matter he is by this Law authorized to decide", to appeal to court in person or by a Legal Practitioner, subject to satisfying the conditions stipulated under the provisions of the LRL. Obviously, the above provisions are indications that the registered title holder must at all times be prepared to defend title to land when the need arises.

With the above need to defend in mind, the question is who bears the cost of defending registered title? Under the LRL, for instance, it appears that the cost of defending registered title is the sole responsibility of the registered holder. Accordingly, section 38 of the LRL provides to the effect that, "All expenses incurred by the Registrar or by any person in connection with any investigation, hearing, or inquiry held by the Registrar for the purpose of this Law, shall be borne and paid for by such persons…".

While the nature of the claim and the amount required to defend title, either in person or through a Legal Practitioner, may vary with each particular case, the available literature reveals that the commonest and arguably, the most applied approach for defending registered title in Nigeria is litigation (Agomo & Akaayar, 2015). Unfortunately, litigation is generally characterized as not only being technical, complex, but also expensive. Where the cost cannot be afforded by the registered holder, the rights and privileges which seem to be created by the land registration law, such as LRL 2015, may be lost in the process.

Consequently, it is submitted that title insurance has a fundamental role to play for the insured title holder. This is largely because, whenever title insurance is sold and purchased by a registered title holder, the cost of defending any claim that may arise in relation to the registered title is transferred from the insured holder to the title insurance company. Thus, even in the event that there is no hidden defect in the registered title, the holder still retains a powerful cover against cost of title claim on the day a potential adverse claimant appears (Roberts, 1963).

Interestingly, the cost to be borne by the insurance company is not conditioned on the validity of the claim. Besides, there is no limit on the amount of legal services which will be provided. In fact, Harry (1966, p. 399) succinctly described this feature of title insurance when he states:

In addition to the basic benefit of indemnification against loss in the event of defective title, title insurance provide the insured with two additional services: a title report, or opinion of title, and defense in legal suits….The company promises to defend the insured in any legal action based on a claim of title or encumbrance prior to the effective policy date. Examples of such actions are the defense of the title against an adverse suit by another claiming to have title, or a court action to test the validity of an objection by a buyer because of a defect or encumbrance.

While Harry was writing in the context of USA title insurance, it is submitted that the same is applicable in the context of Nigeria's land registration regime. In that regard, the purchase of title insurance, when it is available, will provide a peace of mind to the registered holder under land registration laws, such as LRL 2015. This is largely because, at least, the title insurance company will be responsible for the cost of defending all claims that may arise against registered title within the duration of the policy. In addition to the above, a mortgagee's interest is the concern of title insurance, and this issue is examined next.

4.4. Title Insurance and Mortgagee Interests

The protection of the mortgagee interests under the legal regime for land registration in Nigeria is another area that can be complemented by title insurance. Under the land registration laws, like LRL 2015, the instrument crating a mortgage interest in favour of the mortgagee is one of the documents that are required to be registered. In that connection, section 49 (1) of the LRL 2015 provides that, "A holder of any land, sub-lease or mortgage under this Law may by a document in the prescribed form create a mortgage to secure the payment of a debt, or the fulfillment of any condition, and the document creating the mortgage may be registered as an encumbrance".

One of the obvious implications of the above provision is that upon registration, the registered mortgage instrument shall have effect as security only. This position is clearly articulated in section 49(2) of the LRL 2015. Consequently, in the case where the security created in favour the mortgagee is challenged by adverse claimants, the recovery of the sum lent under the mortgage transaction may be threatened, if not defeated. Further, this may be compounded where there are multiple mortgages over the same property. As section 50 of the LRL 2015

provides a mortgagor can create subsequent mortgages in the same manner as the first mortgage. It is contended by this writer that where more than one mortgage interests are created over the same property and both holders cannot adequately enjoy the protection under the LRL 2015, the situation may be mitigated by title insurance cover.

From the perspective of title insurance, therefore, it is submitted that lenders of mortgage securities created and registered under any land registration law in Nigeria may seek cover from *lender's policy*. This type of title policy is designed to protect the interest of mortgagee in a mortgage transaction. This is achieved by the insurer covenanting to the lender that the person to whom loan is advanced has valid title to the realty being offered as security, and that the mortgage is a valid first lien (Harry, 1966, p. 402). In practice, the face value of a *lender's policy* would be the amount of the mortgage. The policy period will expire when the mortgage is paid off and the mortgagee's interest in the property is terminated. However, if the mortgagee becomes the owner of the property, then the mortgage policy would continue in force, although this time as owner's policy. In fact, studies have shown that one of the fundamental factors that prompted the emergence of title insurance was the need to provide assurance of title in financing real estate transaction (Roberts, 1963, p. 8). In the above regards, it is submitted that the establishment of title insurance in Nigeria will in no small way strengthen conveyancing practices in the country. This is in addition to other miscellaneous title covers that are highlighted next.

4.5. Miscellaneous Title Insurance Covers

The extant literature on title insurance, as well as experiences from countries, such as USA and Canada, indicates that title insurance policies are usually classified as either *owner's policy* or *lender's policy* (Joyce, 2015). However, it appears that over the years other special policies relating to title insurance have evolved. In no special order, there is *leasehold policy*. This policy is issued to a long term tenant as an assurance that the leasor has a good title, which is clear of all possible encumbrances. It is designed for long-term tenancy agreement because the tenant would, in most case, making substantial investment in reconstructing the leased property. In effect, the right of registration created in favour of the sub-leasee under sections 42 of the LRL 2015, for instance, is insurable by a title insurance company.

Another is *easement policy*. Right of easement is one of the overriding rights of a registered title holder in Nigeria. In Lagos State, for instance, right of easement is

guaranteed under section 66(a) of the LRL 2015. The central aim of easement policy is to assure a prospective purchaser of real property that a valuable easement is valid and enforceable. Such easement rights are insurable as under title insurance. Above all, title insurance has been used to insure against loss from laws concerning building lines and restrictions affecting land. In the particular context of this paper, the restriction provided under sections 67 and 73 of the LRL, for instance, can be insured against prospective loss that may be incurred in that regard. With the totality of the foregoing discourse in mind, the next part of this article examines the approaches for establishing title insurance in Nigeria.

5. A Case for the Establishment of Title Insurance in Nigeria

Title insurance, as earlier noted at beginning of this research, evolved from imperfections in coveyancing practices. In particular, the Philadelphia State of the USA was the first to formally establish title insurance in 1868. Since then, title insurance has grown beyond the USA to over sixty countries, with Canada having most established title insurance outside USA. It is increasingly being used as risk control mechanisms that protect real estate purchasers and mortgage lenders against loss or damage that may arise after title registration.

It seems that in view of the importance of title insurance to land registration, countries have over the years, evolved enabling or regulatory rules for guiding the sector. While a detailed examination of these rules is beyond the scope of this study, it is important to reiterate that at common law, the law on title insurance is acknowledged to have started in 1868 with the case of *Watson v. Muirhead* 57 Pa. 161 (1868). In that case, Muirhead engaged a conveyancer who examined a title and issued an opinion of clear title to him. However, the conveyancer omitted to discover outstanding prior lien, which subsequently caused Muirhead to loss his property at a sheriff's sale. Muirhead sued the conveyancer and it was held that the conveyancer did not guarantee title to Muirhead and acted within professional standards. Consequently, the conveyancer was held not liable for the erroneous opinions.

Dumm *et al.*, rightly observed that the decision in *Watson v. Muirhead* led to a dramatic increase in demand for the most reputable conveyancers in Philadelphia (Dumm, Macpherson & Simans, 2007). Regulators also reacted by enacting standard rules for the regulation of title insurance, with the State of Pennsylvania being the first to enact a statute on title insurance in the history of the world. Since then, the rules and practice of title insurance has been developed through a plethora of case laws as well as statutes enacted by several countries. The detailed

examination of these laws is beyond the scope of this paper. For the present purpose, however, title insurance companies are required to obtain licence as title insurers before going into operation. Above all, title insurance business is subject to all capital and reserve requirements, prior approval of policy forms and rates amongst other regulatory principles and requirements.

In Nigeria, however, the area of title insurance as a distinct risk control mechanism is relatively unexplored. Accordingly, in law and in practice, there are no clear practices and definite standards for harnessing the benefits of title insurance into the Nigeria's conveyancing process, LRL 2015 inclusive. In fact, section 2 of the Insurance Act 2003, which provides for the classes of commercial insurance products and services in Nigeria, clearly omitted title insurance. This state of affairs continue to exist despite the research findings that title insurance is one of the typical methods of complementing regime for land registration many other jurisdiction such as USA, UK, Canada, Mexico, Australia and China amongst others. While title insurance continues to lag behind in Nigeria, the area of real estate conveyancing continues to flourish. This is clearly exemplified by the recent efforts by the Lagos State Government under the LRL 2015.

Informed by the above development, this study proposes the case for the establishment of formal title insurance business as a socio-economic risk control mechanism in Nigeria. Emphasis is on Nigeria as a country because, under the present legal regime, insurance regulation falls under the exclusive legislative powers of the Federal Government. This is inferred from item 33 of the Exclusive Legislative List to the Constitution of the Federal Republic of Nigeria 1999, as well as section 4(1) and (2) of the same Constitution. Given the long timeframe within which such reforms may be carried out in Nigeria, this study suggests that National Insurance Commission should invoke section 101 of the Insurance Act 2003 by introducing regulatory guidelines for the operation of title insurance in Nigeria. In designing the regulatory guidelines, lessons should be taken from the unique features of the title insurance examined in this paper, as well as the experiences from other countries like the USA, Mexico and Canada amongst other countries. Thus, an in-depth analysis of the experiences on the regulation of title insurance in other jurisdiction will form the subject for future research.

In any case, it must be pointed out that in establishing title insurance in Nigeria, caution should be taken of the fact that title insurance is not without defects. As findings have shown, the process of title insurance is amenable to near-monopoly power and with incentive to engage in abusive behavior (Dumm, Macpherson & Simans, 2007). That is the fact that the insured title holder who is the beneficiary of the policy cover is not closely involved in the purchasing process. Instead, the real

estate lawyers, real estate brokers and mortgage lenders have control over the process of placement of services. Above all, while title insurance is required by the lender, the premium is paid for by the borrower. This creates an unfamiliar situation that requires more transparency so as to increase consumer confidence in the entire conveyancing sector. This transparency is important in Nigeria because it aligns with goal of the present administration in fighting corruption in the private and public sectors of the country. It is believed by this writer that by so doing, the recent efforts put in by some State government, like the Lagos State Government under the LRL 2015, will not only be more effective, but also trigger the development of constructive synergy between title insurance and land registration in Nigeria. Above all, the establishment of title insurance will upon up economic opportunities for the country.

6. Conclusion

The article articulates the need for the establishment of title insurance as complementary model for achieving effective conveyancing practices in Nigeria. This is informed by the conveyancing risks, which land registration *per se* cannot cure. As noted in part 4 of this paper, these risks include: hidden perils at the time the title is transferred; risk of loss or destruction of public records; cost of defending title claims; defective title mortgage transactions; and miscellaneous title insurance covers. In view of the fact that insurance regulation (title insurance inclusive) is generally the exclusive preserve of the Federal Government under the Nigerian Constitution, the National Insurance Commission, which is the primary regulator of commercial insurance in Nigeria, should take the lead in the reform process recommended in this research. The National Insurance Commission can achieve this by invoking section 101 of the Insurance Act 2003 and introducing "Guidelines for Title Insurance in Nigeria", at least for a start. It is believed by this writer that by so doing the benefits of the synergy between title insurance and land registration would have become a reality in Nigeria.

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