

Certificate of Occupancy: What happens after 99 years?

You are the owner of a Certificate of Occupancy (C of O) covering landed property in Nigeria or you aspire to own one or you possess a Deed of Assignment as a purchaser from a C of O owner. Take out a minute to reflect on what is likely to happen to properties covered by Certificates of Occupancy after the expiry of the 99 year tenure granted by the Government. This thought raises very interesting questions, some of which are: Will the Government renew after the 99 years? Does the Certificate of Occupancy or the Land Use Act provide for any renewal? If the Government refuses to renew what would happen to the improvements on the land? At the risk of being pre-emptive let us assume that the Government shall at the expiry of 99 years renew the C of O (either by right or moral persuasion), then some other issues arise from the perspectives of the Purchaser for value and from a C of O holder which is: Who is entitled to the renewal? Is it the original holder of the C of O or the holder of a Deed of Assignment at the time of expiry? This article captures some streams of thought and practicalities arising from these posers and some practical issues arising from the renewal aspects of expired C of O. These issues come to the fore given the current imbroglio between the Federal Government and the families who originally owned the Ikoyi lands, but this article is surely not a commentary on that issue which is being a subject matter of a pending suit is sub judice.

By way of foundational knowledge, may we remind ourselves that the Land Use Act currently in force vests all land in Nigeria in the State Government to be held in trust for the people. The true import of this is that the Government owns the Land, and grants a Certificate of Occupancy which entitles the holder to certain rights and privileges over that land such as use and possession of the land. These rights are subject to keeping the covenants of paying the ground rents and other covenants contained therein. The Government still reserves the right to revoke the Certificate of Occupancy under the unquestionable power of overriding public purpose. The owner must obtain the consent of Government to assign or sublet the land. Clearly the way of the Land Use Act is that the Government is in control and the holder is under control as far as the landed property is concerned. Do you note that the Certificate granted is a Certificate of **Occupancy** and NOT a Certificate of Title or ownership? It would seem that the Act and its trappings merely give occupancy for a period not ownership. Under the Act therefore when parties exchange documents of sale (A Deed of Assignment) what is being sold is the amount of time unexpired from the 99 year right of occupancy – this is called “the unexpired residue of the term”.

Does the Land Use Act or the C of O provide for a Renewal after 99 years?

For purpose of clarity let us look at the Certificate of Occupancy and the clause granting this term which would usually read thus: “This is to certify that _____(hereinafter called the holder which term shall include any person defined as such in Section 50 of the Land Use Decree) is entitled to a right of occupancy in and

over the land described in the schedule and more particularly delineated in the plan annexed hereto, for a term of 99(Ninety-nine) years commencing from the____according to the true intent and meaning of the Land Use Decree and subject to the provisions thereof and to the following special terms and conditions“. This does not give an incline as to the possibilities for renewal. Other clauses in the C of O do not provide for renewal. Looking beyond the C of O to the Land Use Act, a cursory look at the Land Use Act shows that no clause provides for a renewal after 99 years. On this I stand to be corrected! If the reasoning that there is no renewal clause is in order, then the implication is that the C of O extinguishes by effluxion of time after 99 years just as a yearly tenancy expires after 1 year.

What happens to improvements on the land if the Government refuses to renew after 99 years?

This question is synonymous with asking: What will happen to Tenant's improvements and additions on a rented property? I am sure many know the answer to this. But for avoidance of doubt have you heard of the Latin maxim "quicquid plantatur solo, solo cedit" which translates "whatever is on the land is part of the land". Legally, by virtue of this maxim, all improvements on the land become an integral part of the land. It would seem that section 15 of the Land Use Act borrows a leaf from this maxim by allowing the holder the sole right to an absolute possession of all improvements on the land but this specifically for the length of the term only. So come 99 years if the Government neglects, omits or refuses to renew, the improvements by virtue of section 15 revert to Government. I hear someone say "there goes your skyscraper"! But will you be here?

And who is entitled to the renewal?

On the assumption that upon the expiry of 99 years the Government does renew the C of O, certain questions arise: Who is entitled to the renewal? Will it be the former owner of the Certificate of Occupancy or the Assignee? Are their respective heirs, assigns and successors in title entitled to the renewal? Legal minds will begin to ponder on these interesting points at that time. One school of thought will be that the owner of the Certificate of Occupancy has sold out and the heirs have absolutely no right over the land because their rights have been extinguished by the Deed of Assignment. This argument will be extended by saying that the Governor's consent to the Deed of Assignment formally introduced the new holder and passed all the rights of the original holder (including the right of renewal) to the Assignee. In some situations the property may even have passed hands many times before the 99 years expires. Who then would be the holder? Is it the original holder or any of the assignee's prior to the one in possession on the expiry of 99 years? What a maze? The lawyers for the original holder have a different school of thought (obviously). They have a fine argument that what the owner sold was the unexpired residue and the unexpired residue expires at the end of the 99 year term. They did not sell any other right apart from the "right of occupancy" for the unexpired residue of the term. They will contend that the renewal not being a stated right in the Certificate of Occupancy could not have been sold at the time because they cannot sell what they do not possess. And that the renewal accrues only upon expiry of the 99 years and application for a renewal to the appropriate authority. This school will also argue that there is privity of contract between the Government and the Assignee, and the consent to the Assignment does not establish any extra privileges like a right to the renewal,

therefore when the Assignee's term of the "unexpired residue" terminates the original holder steps in to deal with Government. The assignees lawyers would counter that the owner may have had a right if he assigned the unexpired residue of 99 year less one day, in which case it was a sublease not a complete assignment and the property legally reverted to the original owner a day before the 99 years expires. However to the extent that the Assignee was legally in "occupation" on the date of expiry he can ask the Government for a renewal. The Assignee will also counter argue that since the Land Use Act provides for a deemed right (that those who owned registered land prior to the Land Use Act are deemed to be C of O holders) the Deed of Assignment deems the Assignee to be the holder when the 99 years expires with the Assignee in occupation. After all they say "possession is 99 percent of the law" and the C of O is only a right to occupation. Depending on who is in power Government on its part will contend that the original holder had a definite term of 99 years so the reversion goes to Government, therefore Government cannot do a renewal since the Law does not provide for it. They will argue that the proper thing to do is to issue a fresh C of O to anybody they so decide. After all is the reversion not theirs to enjoy? Did you not read the C of O before you signed it?

And I can assure you that these arguments are never closed. Everyone may have a different perspective to it. However the current challenge as a Solicitor acting for Assignor or Assignee is to put your client in better stead when the 99 years expires. Several suggestions occur to me that are not free from debate and contrary opinions. One idea is to specifically assign any right to renewals alongside the unexpired residue by stating that the assignment is "for the unexpired residue of the term including all renewals". Another option is to include in the recitals to the Deed of Assignment a statement that the holder hereby assigns the unexpired residue and any rights of renewals. Why? The Evidence Act gives a legal presumption of truth on statements in recitals twenty years old. On the original holders side of the divide the flipside is to couch it to "exclude all renewals". Another suggestion to the original holder is to assign the property "for the unexpired residue of the term less one day". That way the property reverts to the original holder a day before the 99 years expires to be in better stead to claim the renewal.

One other issue that arises in thinking of the 99 years is as regards those who bought freehold land and registered it before the Land Use Act. These persons have what is called a deemed right i.e. they are deemed to be holders of a C of O although no formal C of O is issued to them. Some in search of the "higher title" have applied for C of O's, this in my opinion is not advisable in that the owner now formalises the obligations to pay ground rents and other controls, and he now signs a document (C of O) submitting to the 99 years term. After all the Land Use Act only mentions a deemed right and does not say if he is deemed to have a right of occupancy for 100 or 200 years. The 99 years tenure is not fixed by the Act. The salient issue however is whether 99 years begins to count against the holder of registered freehold land who is deemed to be the holder of a C of O from 1977? If so is he automatically deemed to have a right to renewal at the end of 99 years?

The thought of attempting a full analysis or a conclusion on all these issues is suicide. I leave it to superior legal minds to brainstorm and distil.

Ayuli Jemide is a Partner with Detail Solicitors.