English Real Property Concepts of Strict Settlements Rules against Perpetuities and their Applicability to Common Law Jurisdictions

Rose Ohiama Ugbe*, Maureen Ossullivan**, Anugbum Onuoha, Ekanem-Otu Omoniyi^ & Uche Jack-Osimiri#***

** LLB (Calabar), LLM (Jos), PhD (Jos) BL (Lagos) Associate Professor & Dean Faculty of Law, University of Calabar, Nigeria*

*** BTech (Estate Mgt) LLB (RSU), LLM (RSU), PhD (IMSU) BL (Abuja) Associate Professor & Head of Department of Private, Nigeria*

**** BA (Cork) BCL (Cork), LLM (Warwick), PhD (Edinburgh) PCHE (New England) PGD (Spanish), Lecturer School of Law, University of Galway, Ireland*

^ LLB (Maiduguri), LLM (Uyo), PhD (Abuja) BL (Enugu) Lecturer Faculty of Law, University of Calabar, Nigeria

 # LLB (London), LLM (London), PhD (Galway-Ireland), BL (Lagos) FCTI, FSALS, FPAM, ACII, Solicitor, Faculty of Law, Rivers State University Port Harcourt & Adjunct Prof Faculty of Law University of Calabar. Nigeria

DOI: 10.55662/CLRJ.2024.1004

Abstract

This paper provides a critique of the English Common Law Real Property Concepts of Strict Settlements, the Rules Against Perpetuities and evaluates their applicability to selected Common Law jurisdictions. The two concepts impact on Land ownership in different countries. It scrutinizes the possibility of their existence today in the light of the constraints imposed by real property legislations of selected countries. The study looks at the gifts made under strict settlements which may be invalidated for infringement of the old and new perpetuity rules and the powers of the tenants for life regarding the settled estates created under the received English laws. This research centers' around evaluating how far the common law jurisdictions welcome English Real

Property Concepts of Strict Settlements and the Rules Against Perpetuities, bringing out successes and difficulties in some cases while using Nigeria as a case study. The research also tries to defined the concept, citing some cases and statutes to bring to lime light the dynamics in the applicability when it comes to real property ownership. It ends up by bringing some results, although not completely positive[1] and propose improvements.

Keywords: *Perpetuities, Strict Settlements and their Impact on Land Ownership at Common Law Jurisdictions*

1. General Introduction on the Operation of Perpetuities and Strict Settlements at Common Law Jurisdictions

Scotland had never applied it because it is not a common law country[2] and also as a result of the previous the influence of Roman law, it is rooted in England and Wales,[3] Northern[4] Ireland[5] and Republic of Ireland, where the rules survived[6] until[7] recent abolition.0[8] 0It is proposed to evaluate the obscure future interest in some States of Nigerian such as Strict Settlements in the light of the constraints imposed by property legislations. It further looks at the gifts made in modern times which may be invalidated for infringement of old and new

[1] The authors are thankful to the anonymous referees and reviewers for enhancement comments on their earlier draft. The usual disclaimer applies, only the authors are responsible for any defect (s), although unintended and regrettable.
[2] Instead a trust is created in Scotland – See Trust (Scotland) Act 1921.
[3] In England and Wales Perpetuities and Accumulations Act 1964 formerly fixed the wait and see period of 80 years but 2009 Act extended it to 125 years.
[4] Ferguson v. Ferguson (1885) 17 LR IR 552 and McGrady v. CIR (1951) NI 155 and Andrew Lyall and Albert Power Land Law in Ireland p.296
[5] Perpetuities Act 1966 which reformed it with modifications such as age reduction where it is required and an alternative flat period of 80 years wait and see period.
[6] Re Murphy's Estate (1964) IR 308 at 313, Andrew Lyall and Albert Power Land Law in Ireland p.296.
[7] As a result of spirited criticisms that the concepts are now obsolete by eminent academics – See Lucy-Ann Buckley on Perpetuities Reform in Ireland (2002) 37(1) Irish Jurist 143-166, John Mee From Here to Eternity, Perpetuities Reform in Ireland (2000) 22 Dublin ULJ 91.
[8] Its abolition by Land and Conveyancing Law Reform Act 2009. Under S.16 LCA 2009 (Ireland) future interests may nevertheless exist in Equity under Trust of Land. It is argued that the equitable interests must comply with the Old Rules Against Perpetuities in Whitby v. Mitchell and the Modern Rule Against Perpetuities even though both have been abolished at law under S.17 Land & Conveyancing (Reforms) Act 2009 (Ireland) (Legal Estate as opposed to Equitable Estate).

perpetuity rules, the powers of tenants for life under United Kingdom Laws alongside with the developments in Nigeria, Canada, Kenya, Uganda, Tanzania, Ghana, Serra-Leone, Bahamas, USA, Australia, West Indian States of Barbados, Jamaica, Trinidad and Tobago and other parts of British Commonwealth. Although some States in common law jurisdictions such as Manitoba abrogated it because they encountered difficulties in its application, others are at the verge of its reformation and despite sceptism, it is argued that Strict Settlements and Perpetuities Rules survived. Both are economically viable as they facilitated the removal of the impediment against marketability of lands and helped effective taxation. It is also a means of promoting the universality in the distribution, redistribution of wealth and thereby forestalling the circulation of prosperity/treasures in the hands of privileged few families. This paper proposes to deliberate on the following: -

(i) The origin of Strict Settlement and Rules against perpetuities,
(ii). Similarity between Settled Land and African Communal Land-Ownership
(iii) Meaning of Strict Settlement and its Operations in Common Law Countries,
(iv) Strict Settlements in Nigerian in the Face of the Old and Modern English Rules Against Perpetuities?
(v) Operation of Rules Against Perpetuities in Different Jurisdictions
(vi) The Option to Renew Building Lease and Option to Purchase thr Reversion of Building Lease and the Perpetuity Rules?
(vii) The Charitable Trusts and Perpetuities Rules?
(viii) Who is a Tenant for Life?
(ix) Powers of Tenant for Life and the impact of Statutory and Judicial Controls,
(x) Powers of Infant Tenant for Life are exercisable by Trustees on his behalf,
(xi) Investment Powers of Tenant for life and Controls by the trustees,
(xii) Statutory and Judicial Control imposed on the Powers of Tenant for Life,
(xiii) Sale of Settled land and its effect on the Concept of Conversion or Over-reaching,
(xiv) Irregular exercise of the Powers of the Tenant for Life and the effect on the Purchasers and remedies,
(xv) The duties of tenant of Tenant for Life/Trustee to Renovate. Preserve and Rehabilitate Trust Property and liability for breach,

(xvi) The Impact of Land Use Act on the Powers of Tenant for Life.

(xvii) Conclusion.

2. The Origin of Strict Settlement & Rules against Perpetuities.

The English common law rules are applicable to Nigeria and other former British colonies[9] subject to the qualifications where the local circumstances could permit.[10] The rule against perpetuities constitutes part of the common law's[11] doctrine designed to check-mate the landowners' ability to posthumously control the enjoyment[12] and facilitate inalienability of his lands by extending it to generations upon generations in the remotest future in violation of the perpetuity period. Countries that encountered problem with it, abolished it such as Western-States[13] of Nigeria. It is still applicable in some parts of Eastern-Nigeria, Lagos and Northern-States because the law, practices in Britain, including doctrine of common law, equity, pre-1900 statutes of general application and probate principles, were made applicable[14] subject to the qualification which the local circumstances, could permit and provided such laws are not repugnant[15] to natural justice, equity, good conscience or incompatible directly or by implication with written law in force.[16] It is obvious the rules against perpetuities and strict settlement constitute the British common law which do not violate the repugnancy doctrine.

[9] Nigeria, former trading partner of Great-Britain/Ireland in 16-17 Centuries, become a colony - Lagos was ceded to British-Monarch by Treaty of Cession dated 6 August 1861, the Protectorates of Southern and Northern Nigeria were respectively established in 1900 and amalgamated in 1914. After 99 years Colonial Rule1861 to 1960, She gained political independence 1 October1960 and acquired Republican status 1 October 1963.

[10] In Nyali Limited v. Attorney General of East Africa (1955) 1 All ER 646 at 653 (Privy Council's case) as Lord Denning puts it – the English Oak transported and transplanted into a foreign soil can no longer retain its former tough character and texture.

[11] From the early times, common law judges have shown a strong bias in favour of the free alienability of land - See JHC Morris & W. Barton Leach – Rule Against Perpetuities (London Steven & Sons Limited 1956) pp.3-13 and John Chipman Gray – Rule Against Perpetuities 4th Ed by Roland Gray (Boston; Little Brown & Company 1942) pp. 126-190.

[12] Posner, Richard A. – Economic Analysis of Law p. 394 2nd Ed.1977(Boston Massachusetts USA)

[13] SS.176 (1) Property and Conveyancing Act 1959 (Western-Nigeria)

[14] SS.28 – 33 High Court Law (1963) Northern-Nigeria

[15] SS.34 – 35 High Court Law (1963) Northern-Nigeria

[16] SS.10 – 16 High Court Law (2003) Lagos State-Nigeria.

Great Landowners in England in 17TH Century developed means of keeping their landed properties in their families forever and thereby perpetuating their wealth within their lineages. Wealth is power and none of them wanted to be known as the poor provider who dissipated family prosperities.[17] Patriarchs of landed properties families who feared the possibility that their noble lines could produce spendthrift, extravagant, prodigal great-grand-children, who might sell away their families' estates, initially used entail/fee tails, to forestall this likelihood. This worked well until the introduction of the **Statute-De-Donis-Conditionalibus 1285** and the judicial response that the tenant in possession could bar the entail through the procedural device called the common recovery.[18] The English great-landowners later resorted to strict settlement to protect assets and perpetuate the land in t2h2eir family lineage forever. This generated the common law response through the imposition of Rule Against Perpetuities. In **DUKE OF-NORFOLK'S-CASE 1681**[19] in order to prevent primogeniture and perpetuate the land in his lineage, the Duke placed the most valuable lands under settlement with a condition that his 2nd eldest-son-Henry shall inherit it if his eldest insane son Thomas died childless. Duke also made provision for Charles his last son. After Thomas died, Henry received the land and the title as his father had intended. Henry was greedy and also wanted the land which his father had left for Charles and he argued that the devise to Charles was void as it involved perpetuity. The **LORD CHANCELLOR NORTHINGHAM** held the devise was not a perpetuity and was therefore valid. His Lordship stated thus; -

….''You may limit, it seems, upon contingency to happen in life…I will stop where-ever any visible inconvenience doth appear., for the just bound of a fee-simple upon a fee simple are not just determined, but the first inconvenience that ariseth upon it, will regulate it.[20]

LORD KEEPER-NORTH summed up the position as follows; -

[17] Peter A. Appel – Embarrassing Rule Against Perpetuities (2004) vol. 54 (No.2) Journal of Legal Education pp. 264 at 267-268.
[18] AWB Simpson – History of Land Law 2nd Ed. pp. 129 -132, 235 -240
[19] (1681) 22 Eng. Rep.931.
[20] Duke of Norfolk (1682)3 Ch Ca.1 at 49

….''Perpetuity is a thing **odious in law** and **destructive to the commonwealth**, it puts a **stop to commerce and prevents the circulation of the riches of the kingdom** and therefore it is **not to be countenanced in equity**. If in equity, you should come near a perpetuity, then the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of this court, but would be destructive for the commonwealth''.[21]

The above rules which was started with flexible formulation, gradually metamorphosed and became entrenched into common law of England for over 300 years now and were transplanted into commonwealth countries[22] by virtue of spread of colonialism and bilateral transfer of friendship.

3. Similarity between Settled Lands and African Communal Land Ownership

The Great-African-Landowners in Nigeria, Ghana, Tanzania, Kenya, Uganda, Malawi, Zambia and other former British colonies in East and West African countries – now part of independent Commonwealth, share similarity with their English counterpart. The Rules against Perpetuities operate there in similar dimension under what is known as communal land-ownership. The land(s) in the primordial times were originally individuals' acquisitions. The patriarch/matriarch founder(s) acquired them by virtue of original first settlements on virgin land(s) or by conquest of weaker individuals/tribes. The land(s) were then passed to subsequent generation(s) of the present-day families or community. The communal land(s) belong to the entire community. The family land belongs to the entire family, few are dead, many are living and countless-members-yet-unborn.[23] Future generations who are not-yet-born are also the land-owners. African dead ancestors/ancestresses are-not cremated but

[21]Duke of Norfolk (1682) 3 Ch. Ca. 1, 22 E.R. 931 (Ch) (Lord Nottingham) Duke of Norfolk (1682), rev'd (1683)1 Vern.164,23 E.R. 388, (Ch), Duke of Norfolk (1683) rev'd (1685),3 Ch.Ca.53,22 E.R. 963 (HL) (Lord-Nottingham's judgement restored).

8[22] Daren J Reid – Perpetual Problem of Perpetuities in Saskatchewan-Canada (2003) vol. 66 Saskatchewan Law Review511 at 515.

[23] The Famous-Ghana-High-Chief (Nana)Sir Ofori-Attah and High-Chief Aleto of Nigeria - both once said before West-African-Land-Committee in 1862: - we conceive that lands belong to vast-family, few are dead, many are living but countless members are yet-unborn''

buried in the land and lands form the spiritual-link between the past (the dead), the present (those-presently-living) and future generations-yet-unborn. In **ADESANYA v. OTUEWU**[24] it was held that the ownership of land belongs to entire family members past, present, those yet unborn and power of management is vested on the family-head who is in position of trustee to allocate lands to family members and land reserved for future generation can be loaned to strangers for cultivation and other purposes.[25] Membership of family[26] is through parentage/adoptions. Children born out of wedlock can be acknowledged[27] and now enjoy constitutionally acquired legitimacy.[28] On the death of the patriarch-Father, his children inherited[29] parcels of his lands which may be partitioned[30] amongst all the sons[31] including unmarried daughters.[32]

In **KAZAULA v.GAURA**[33] it was held that under the Tanzanian patrilineal system, on the death of the owner intestate, his first son holds the lands on trust for himself, all his brothers,

[24](1993)1 NWLR (Pt.270)414 at 458

[25]Maisham v. Anchan (1998) 6 NWLR (Pt.108) 565 at 568 CA.

[26]Membership of the family raises the status of inheritance - See Adeyemi v. Opeyori (1976)6 ECSLR 387 at 388 (SCN).

[27]Arewa v. Olarenwaju (below). In Opara v. Murambiwa (2005) Zambia LR 141 at 142 the Supreme Court held the registration of two-children at Nigerian-Embassy, obtaining Nigerian-passports for them by their putative father with the children bearing his surname constitute acknowledgement of children he procreated outside-wedlock.

[28] S.34 (1) (6) 1999 Nigerian-Constitution provides no person shall be subject to any discrimination on the basis of the circumstances of his birth, sex, race, creed or be held into slavery and servitude.

[29] Adeseye v.Taiwo (1956)1 FSC 104, Lewis v. Bankole(1909)1 NLR 81, Dawodu v. Dawodu (1958) 3 FSC 46. The court would take judicial notice under native law, custom, the right of the children of intestate deceased, to succeed to father's property – See Kareem v. Ogunde (1972)1 ALL NLR (Pt.1) 73 (1972)1 SC 182. Inheritance excludes brothers, sisters of the deceased in the patrilineal setting – See Adisa v. Ladokun (1973)3 ECSLR(Pt.2)1112 where Nigerian-SC held customary law excludes brothers-sisters in succession in the estate where the deceased left children surviving him. Sowemimo JSC was emphatic that as a result of children age-disability, the surviving-brother could act as trustee-in-possession of land until attainment of majority-age. If he leaves no children, the brother may inherit. See Ali v. Rep (2005) Malawi LR 1 Malawi customary law, sister of deceased, other family members were held entitled to inherit the house, the deceased built on family land where marriage between deceased and widow was not blessed with children but occupational right of the widow must be protected, per Kamwambe J.

[30] Olowosago v. Adebanjor (1988) 4 NWLR (Pt.88) 272, Buraimoh v. Bamgbose (1989) 3 NWLR (Pt.109) 353 at 357, Umezulike IA – ABC Contemporary Land Law (2013) pp.285-301 (Snaap-Press-Limited Enugu-Nigeria)

[31]Kazaula v. Gaura (below)

[32]Kazaula v.Gaura (below) at145.

[33](1982) Tanzania LR 143.

ISSN 2581 3382
Annual Volume 10 – 2024

unmarried sisters and their children and widows of the deceased.[34] In **MUMO v. MAKAU**[35] Kenya CA held that amongst the Kikuyu tribe and other tribes of Kenya that operate the patrilineal system, the eldest son holds estate for himself and as a trustee for all the family members.[36] In the patrilineal mode of inheritance, the eldest/First Son would become the trustee of the Father's family lands, for himself, his brothers, his unmarried sisters and his widow. The daughters who decides to get married into another family in the patrilineal system would be granted right of user in her father's family[37] land or she would be compensated with money under statutory-trust-for-sale.

4. Meaning of Strict Settlement and its Operations in Common Law Countries

English Strict Settlement and Rules Against Perpetuities have its origin as integral part of the common law. It has been transplanted into many common law countries notably US, Canada, Australia, Ghana, Kenya, Uganda, Tanzania, Malaysia, West Indian States of Trinidad, Tobago, Jamaica and Barbados. Settlement is a fundamental device used by land owners to provide regular income or enjoyment of their lands and other properties in future to their descendants, other members of their families and other desired objects in succession.[38] Whereas the aim of strict settlement is to perpetuate the family-estate through successive generations rendering same inalienable, the object of trust for sale enjoins the trustees to market or dispose the trust property, invest its proceeds or distribute same to named objects. The term 'strict settlement' means any deed, will, agreement or other instrument under or by which any estate or interest in land for the time being, is or deemed limited to or in trust for

[34] This is also the position amongst patrilineal-Ibos of Nigeria, See-Osolu v.Osolu (2003) 11 NWLR (Pt.832) 608 at 615 where-Nigeria-SC held that under native law, custom the land is vested on the eldest surviving son of deceased-owner as trustee-custodian on behalf of other family members, allotments of family land without his consent as family-head is null and void. Although family-head/chief has power to allocate, re-allocate parcels of customary lands for use, occupation, such powers must be exercised within constitutional provisions facilitating individuals' rights to freely engage in economic activities, right to work, pursue livelihood, movement and residence anywhere in the country, See-Msofi v.Banda (2007) Malawi LR 246 at 247 per Mzikamanda J.

[35] (2004)1 E.A.L.R 170 at171

[36] Gituanya v.Gituanya (1983) Kenya LR 575, Karuji v.Muthiora (1984) Kenya LR 712 at 713 where this principle of patrilineal inheritance were applied.

[37]Nezianya v. Okagbue (1963) ALL NLR 358 at 360.

[38] S.1(1)(i)(ii)(iii) Settled Land Act 1925, Okesuji v.Lawal (below), Shonekan v.Smith (below)

ISSN 2581 3382
Annual Volume 10 – 2024

any person(s) by way of succession.[39] The land the subject matter of the settlement is called the settled land.[40] In **OKESUJI v. LAWAL**[41] the device of real property situate at No. 178 Bamgbose Street Lagos to B for life remainder to his children in equal shares absolutely, was held to create a strict-settlement. In **ADEMOLA v. SHODIPO**[42] the testator under a will left a landed property to his children to be used as a family-house. It was held that no trust for sale was created as there was no direction/charges to the executors/trustees to do anything other than treat same as family-property. Settlement also embraces a situation where the beneficiaries are not entitled to possession of the settled land but only the rents and profits accruing therefrom including the payment of annuities to the wife of the deceased testator.[43]

Strictly speaking, the determination of whether the land is settled or not is governed by the state of affairs and limitations contained in the conveyancing instrument at the time of the settlement taking effect.[44] Settlement also includes land vested or held by an infant in his own rights or jointly with others.[45] In **ALAKIJA v. NATIONAL BANK (NIGERIA) LIMITED**[46] real estates in the property known as 21 Broad Street Lagos vested' in "A", a minor, by 'virtue of his father's Will dated 27/11/42. F died on 20/5/45. It was held that the Will created a settlement of the property in 1945 and "A" was therefore a tenant for life under the settlement. **KAZEEM J**. **relying** on **S. 2(1) SLA 1882** held that the phrase "in possession" under **S. 59 SLA 1882** should be construed as being used in a statutory sense of being entitled to the receipt of income in contradistinction to "in reversion"/"in remainder".[47]

[39] S. 2 Settled Land Act 1882-1890 (pre-1900 English Statute of General Application applicable to Lagos, Abuja, Eastern & Northern States of Nigeria), S. 2 (l) Property & Conveyancing Law (1959 Western-States-of-Nigeria) and Thomas v. Nabham (below), Taylor v. Kingsway Stores (Nigeria) Ltd. (below).

[40] S. 2(3) SLA 1882, Okesuji v.Lawal (below), Shonekan v. Smith (below), Nasr v. FB1R (below) Taylor v. Kingsway Stores Limited (below).

[41] (1986)2 NWLR (Pt.22) 417 at 419-421(CA) Aff'd by Nigerian-SC (1991)1 NWLR (Pt. 170) 661 at 676-677 and Shodipo v. Coker (1963)1 SCNLR 54 at *55*.

[42] (1989) 5 NWLR (Pt. 121)329 at 331-332 (C.A).

[43] Re Jeffrey's No. 2 (1939) CH. *205*.

[44] S. 2(4) SLA 1882 Alakija v. National Bank (Nigeria) Limited (below), Thomas v. Nabham (below).

[45] S.1(1)(i)(d) Settled Land Act 1925 replacing S.59 SLA 1882, Alakija v.National Bank (Nigeria) Limited (below)

[46] (1974) 5 CCHCJ 649.

[47] It is immaterial whether or not there are surplus rent/income which the person entitled in fact received - see Re Atkinson (1885) 30 CH 605.

ISSN 2581 3382
Annual Volume 10 – 2024

In line with the above, settlement would cover a situation where infant(s) are entitled to share rents until the property is sold.[48]

In the same way, property purchased from the proceeds of the sale of settled land is also deemed settled land.[49] In **OLUWOLE-COKER v. GBADEBO-COKER**[50] testator by his will settled landed property to his two sons for life remainder to their children in common. The property was subsequently sold, the purchase price used to purchase 99 years-leasehold of another property. It was held that the leasehold having being purchased with the trust-money was subject to the settlement under the Will. Settlement also include land which infant held with others (whether adults)[51] or minors[52] as joint beneficiaries. In **THOMAS v. NABHAM**[53] at the time of the testator's death, the devisee's (children) in his Will were all minors. The court held the premises were settled land.

Similarly, in **NASIR v. FEDERAL BOARD OF INLAND REVENUE**[54] the settlor conveyed his real property to himself as the grantor and to his six children as tenants in common with intent to reduce his tax liability. It was held: -

(i) The deed of gift executed is valid for the purpose of creating settlement with regard to the interest of the minors/beneficiaries named therein;
(ii) In absence of any named trustee in the settlement and until one is appointed by the court, there is no person on whose hands income tax accruing from the property could be assessed for tax purposes.

---

48 The infants are entitled to both the corpus and income. In Re Wells (1933) CH.29 it was held that since by virtue of S. 2(1) (i) SLA 1882-1890 land includes rents and profits and possession includes receipt of income, the infants were entitled in possession to the land within the meaning of S. 59 SLA 1882.

49 Oluwole-Coker v. Gbadebo-Coker (below).

50 (1956) Lagos LR 27at 28-29 per Hubbard J.

51 Alakija v. NBN (above)

52 Thomas v. Nabham (below), Nasr. v. FBIR (below).

53 (1947) 12 WACA 229.

54 (1964) Lagos LR 1 at 8

In **CHADERTON v. CHADERTON**[55] the testator in his Will devised his landed properties known and called ''Glendora-Ilfracombe'' to his wife, after her death or remarriage, to his children in equal shares absolutely and ''Chadville ' if any of his children shall predecease him or his wife, leaving issue(s), the share of such child or children, shall go and be paid for the use of such surviving issue(s) (grand-children) respectively, as if they survived him. **Barbados High Court** held that the above clauses in the Will, created settlement under the Act,[56] Wife was a tenant for life (TFL) and that the interests given to the children of the testator were vested, as distinct from contingent interests, which were likely to be divested on the happening of a future event and therefore the interest which the grandchildren took were contingent remainders.[57]

In view of the developed case law authorities enumerated above , settlement applies with some modification to many commonwealth countries if any piece of land is subject to an entail, determinable Interest, life interest, advancement, maintenance or other payment for the benefit of any person or is charged voluntarily or in consideration of marriage or by way of family arrangement with the payment of a rent charge.[58] Sometimes, as a result of the vagueness of conditions precedent and linguistic inscrutability, of the conditions imposed by the testator, being too vague, imprecise and the court may instead, void the settlement, hold that the bequest create settlement and order the transfer of absolute ownership to the beneficiary, as alternative.[59] Where an infant as a beneficiary is entitled to maintenance and education allowance payments out of income arising from investment trust funds and the trustees in their sole discretion exercised their discretion validly, the court would not interfere unless there is evidence of dishonesty.[60] In **MAKEDA-MARLEY v. MUTUAL SECURITY MERCHANT BANK & TRUST COMPANY LIMITED**[61] the court held that D did not exercise its discretion in a mala fide manner because the sums currently being remitted for the maintenance and education of the infant beneficiary, were adequate and the discretion had been validly and bonafidely exercised.

55 (1976)11 Barbados LR 10 at 11-12 per Ward J.
56 Settled Estate Ordinance 1906 (Barbados).
57 Relying on Re Kilpatrick's Policies Trusts (1965) 2 ALL ER 673 at 678-679
58 P.A. Oluyede Modern Nigerian Land Law, Evans Publishers (1989) p.76.
59 McGowan v. Kelly (2008) 1 Irish LRM 218 per Lafoy J.
60 Makeda-Marley v. Mutual Security Merchant Bank &Trust Company Limited (below)
61 (1992) 29 Jamaican LR 229

5. Meaning of Strict Settlements in Nigeria in the Face of the Old and Modern English Rules against Perpetuities?

English Strict Settlement and Rules Against Perpetuities apply to commonwealth countries, subject to modifications as local circumstances would permit. As a result of British Colonization in 19TH Century, lands that were inherited from the patriarchs' and matriarchs' founders/ancestors/ancestresses in East and West African countries, which were, originally inalienable, subsequently became article of commerce. Upper-Middle-Class-Structures emerged with enormous wealth and influence. This led to individualization of lands. The famous-Nigerian-Lawyer and Human-Rights-Activists **Chief Gani-Fawehinmi (deceased)** also used the settlement device to accommodate all his descendants. By a will dated 19TH December 2008, he devised his Country-home-building-in-Ondo-State-of-Nigeria to his **two-wives, children, grandchildren, great grand-children and great-great-grand-children, his sisters and their children** shall have access to the said house.[62] There is no doubt that this device infringed the perpetuity rules.

Like Gani-Fawehinmi, most lands-owners in modern-day-Nigeria resorted to the creation of strict settlement in the common form, in order to perpetuate lands within their family lineage. One notable example is a man from **Ikwerre Tribe of Rivers State of Nigeria** Settlor **apprehensive of the rascality, profligacy of his first son, the possibility that he may plunder his estate after his death**, created the following settlement thus: -

> "I device my 10 acres of land situate at No. 888 Dappa-Biriye Layout Port Harcourt to my wife[63] for life or until remarriage, remainder to my son for life, remainder to my grandson for life, remainder to my great grand-children in common and remainder to my great-great-great grandchildren absolutely".

62 Clause 12 Gani-Fawehinmi's-Will.

63 Wife has a life-interest in the real property of her late husband, See - Chinweze v. Mazi (1989) 1 NWLR (Pt.97) 254 at 258-9 (NSC).

It is proposed here to examine the impact of rules against perpetuities on the above hypothetical trust-instrument, in the light of many constraints. This strict-settlement as represented above, if religiously followed, is capable of elongation and could last up to 4 to 6 generations in the family, about 640 years in violation of the perpetuities rules.[64] The average life span in Nigeria is estimated at 80 years.[65] The last surviving wife of the Settlor is 52 years old presently and if she could live up to 80, she has more 28 years of productive life. The settlor's son is currently 21 years old, unmarried and in the third year in 4 years BA[66] degree programme. The Son could live up to 80 years with the remaining 59 years more, of productive life-span. There were no grandchildren, no great-grand-children and no great-great-great-grand-children at the time of the creation of the trust instrument settlement 4 years ago and presently. These **six generations contemplated whose lives-in-being** could be estimated at 80 years for each, all estimated at 480, plus 28 and 59 years. The total lives-in-being for all the **eight generations,** could be estimated at 567 years. The land would fetter leading to waste of the economic fortunes, commonwealth of the future generations thereby **prevents the circulation of the riches of the kingdom**.[67]

The above, would constitute clear infringement of the **old rule against perpetuities which postulates that all the contingent remainders after the first life estate to the heir of an unborn child[68] is void.[69]** This is oftentimes called the **rule against double or more or multiple possibilities**. The first possibility is that the "Son" may not have a son (he may choose **Roman Catholic Priesthood life with oath of celibacy** or become a good-timer, merry-go-round-bachelor-for-life or outright decision not to marry, procreate/own a family). Even if the first possibility is allowed, the second possibility is that the Son of the Son (grandson) (if at all he may be born) may himself not have son et cetera. This grant, alienation or device contained in the deed of settlement described above, would lead to **possibility-upon-possibilities.** Instead

[64] Rules against perpetuities were held applicable to Nigeria, See-Frank-Coker v.George-Coker (1938) 14 NLR 83, Salimotu-Coker Alfred-Coker (1946) 17 NLR 55 (both cases discussed below).

[65] Japanese have 130 years' lives' spans.

[66] BA in Theatre-Arts at University of Lagos-Nigeria.
[67] As postulated by Lord-Keeper-North in Duke of Norfolk-case(above).
[68] Whitty v. Mitchell (1890)44 Ch.D.85
[69]Gray, John Chipman and Gray, Roland, Rules Against Perpetuities (1942) p.201 (https://www.worldcat.org/oclc/1738415) downloaded 30/09/2014.

of vesting the property to all the beneficiaries for the anticipated duration of inordinate 567 years, the **first possibility would be permitted by the court, the second, double, more, multiple and subsequent unrealistic possibilities would be held void.**[70] The excesses stated above, would be cut down by the common law.

In the light of the above, the device to the yet-unborn grandson of the Settlor would be valid only while the rest of the interests to his great-grand-children, great-great-great-grandchildren and subsequent generations – would be expunged and held void. The attitude of the court is to adopt **"CY-PRESS"**[71] - **Rule-of-Construction**[72] **in rescuing the gifts** and introducing the **''wait and see'' approach** to allow time for the validity of the dispositions.[73] Under this rule, the court is allowed to use its discretion to reform the grant in such a way that it does not violate the rule. The court may reduce the offensive age of the contingency and give effect to the intention of the Settlor as near as possible - give the grandson estate in fee[74] simple[75] absolute[76] (which has been converted into a Right-of-Occupancy[77] by the operation of Land Use Act and Land Act). **The CY-PRESS- Rule-of-Construction has been codified in Bahamas**, thus giving it statutory backing. This statute seeks to modify the law relating to the nullification or avoidance of future interests in property on the grounds of remoteness. It provides thus;- where it has become apparent that any **disposition would be void solely on the ground of infringement of perpetuity rules**, and where the general i**ntention** originally governing the disposition can be **ascertained** in accordance with the general principles of interpretation of the instrument and the rules of evidence, the disposition may, **on the application to the court by an interested person, be varied so as to give effect** (as far as

[70] Whitty v. Mitchell (above)
[71] The power of the Court to amend legal instrument
[72] Cypress rule of construction has universal application in common law countries – See Re Maynard (1973) 8 Barbados LR 84, Re Shugrabai Charity Trust Kenya (1960) East Africa LR 521 and Cheshire Foundation Ireland v. Attorney General (2011) IEHC (2012) 1 Irish LRM 369.
[73] Morris and Wade – Perpetuities Reforms at Last (1964) 80 LQR 486
[74] Fee Simple is the largest estate possible for an interest in land and also the beneficial owner who enjoys completely all the rights and privileges legally possible in respect of such land, See - Alli v. Ikusabella (1985)1 NWLR (Pt. 4)630 at 640, Wilkinson v. Edusei (1963) 1 Ghana LR 393.
[75] Fee Simple has been abolished in Nigeria, Tanzania and a grant of it would now only pass a Right of Occupancy to the grantee under SS.1, 5, 6, 34 and 35 Land Use Act 1978 (Nigeria), SS.1, 2, 3, 20 and 22 Land Act 1999 (Tanzania). Fee-Simple is called Mailo Land in Uganda.
[76] Tanzanian-Cases - Nitin Coffee Estates Limited v.United Engineering Works Limited(1988) TLR 203 at 211 CA, Premchand Nattu Limited v. Land Officer (1963) EALR 941,(1963)2 WLR (1963)AC 177 Privy-Council interpreting SS. 34, 35, 36 Land Ordinance 1923 (Tanzania).
[77] Obikoya & Sons Limited v. Governor-Lagos-State (1987)1 NWLR(Pt.50)385 at 390 CA.

possible), to the **general intention of the Settlor or testator** within the limits of the Rules[78] Against Perpetuities.[79]

The next, is the **Modern-Rule-Against-Perpetuities** often-called the **Rule-Against Remoteness[80]-of-Vesting.[81]** It postulates that interest must vest, if at all, within the perpetuity-period-of-a-life[82]-in-being[83] plus a further period of 21 years.[84] Life/lives spans-in-Nigeria and Tanzania today are estimated at 80 years plus additional 21 years totaling 101 years. As a device to defeat perpetual-freehold[85] and reverse the inalienability of land, nullify the perpetual trust and limit the period in which **Dead-Settlor's-hand[86] could control the affairs of the living and future enjoyment of his landed property,** the interest created by the settlor in excess of 101 years, the excess years, would become void. The anticipate period - 640 years would be subtracted from 101 years permissible under the modern rule against perpetuities and the excess of 539 years would be expunged.

The next consideration is to consider the impact of the statutory control on the above rules. We argue that settlement has not been abolished by the Land Use Act; subject to the

78 Perpetuities Act 1995 (Bahamas).

79 Perpetuities (Amendments) Act 2004, 2006 (Bahamas)

80 Duke of Norfolk's Case (1681) 2 Swan 454 (1685) 3 Ch. Case 1

81 Vesting means to cloth with possession, deliver full-possession of land-estate therein, to give Seism, See-Onwuka v. Ediala (1989)1 NWLR (Pt. 96)182 at 185 where NSC held: "vested" has acquired specialized meaning in law of property as where title to property comes to the heir upon the death of the owner-intestate. In Oloja v. Governor Benue State (2016)3 NWLR (Pt. 1499) 217 at 227 CA held a vested interest is a personal right to derive, share a benefit protected by law, it is a right completely and definitely accrued which is not subject to defeat or cancellation.

82 Life, lives-in-being is the term of natural-life-span of the alienee/grantee/devisee in the deed of Settlement. Discussed generally by Deech – Lives in Being Revived (1981) 97 LQR 593 discussed in Todd Textbook on Trusts p.182 (4TH Ed 1999) and Pearce and Mee Land Lawp.103 (2ND Ed 2000). See also SS. 3(1), 6(4) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) where perpetuities period was fixed for a period of lives in being plus a further period of 21 years subject to a maximum period pegged to 150 years.

83 Megarry and Wade – Law of Real Property 5TH Ed pp. 239 – 240 (Stevens London) where the authors put it – that the vesting of an interest devised in the settlement, must not be capable of exceeding a period based on an existing life time of the devisee.

84 Cadel v. Palmer (1833)1 CL&Fin.372,6 Eng.Rep.936 (HL 1832,1833)

85 Note - the English Perpetuities & Accumulation Act 1964 has been repealed and consolidated in 2009. Instead of the previously fixed flat period of 80 years as the maximum duration of perpetuity period, it is now **125 years**, for interest to vest, irrespective of any perpetuity period stated in any trust instrument. The 1964 Act and the Consolidation Act 2009, both do not apply to Nigeria because they are post-1900 English statutes and they are not pre-1960 probate practice.

86 This is oftentimes called '**Dead-Mans-Hands Posthumously Controlling'** the affairs of the living and the future enjoyment of real property

restrictions outlined above. Since the maximum duration of the grant of the Right of Occupancy and the issuance of the Certificate of Occupancy thereon shall be for a definite period[87] not exceeding[88] 7, 40, 45 or 99 years,[89] it would appear the interests created by settlement must vest within 99 years and Certificate of Occupancy is renewable for further term[90] after the expiration of the initial term.[91] What is more the settlor/holder of Right of Occupancy having absolute ownership to the unexhausted improvements[92] on the landed property. It is submitted that both settlement and rules against perpetuities survived the Land Use Act.

6. Operation of Rules against Perpetuities in other Jurisdictions

In **England and Wales,** the rules against perpetuity[93] still apply to date and the period of 'wait and see for the judges' which was formerly fixed for a flat period of 80 years for interest to vest within the life-in-being,[94] has been extended to 125 years.[95] In **Kenya** it shall not exceed 80 years[96] and its life/lives-in-being thereafter shall be specified within 18 years thereunder.[97]

---

87 S.8 LUA 1978 and S. 4(a) Land Use Law A.S.N. No. 2 (1979) (Anambra & Enugu States).
Otti v. Attorney-General Plateau State (1985) HCNLR 787 Aff'd (1986) 3 CA (Pt. 2) 235 at 340.

88 SS. 4(a), 7, 12(a) Land Use Regulation Nos. 38 & 39 (1979) Anambra & Enugu States, S I Land Use Regulation LSLN No. 38 (1981) as amended in 2000 (Lagos State).

89 The holding will be for an indefinite period unless and until a grant for a definite term in form of Certificate of Occupancy is made to the deemed hold of the Right of Occupancy - See Obikoya Limited v. Governor of Lagos State (1989) 1 NWLR (Pt.50) 385 at .390 CA.

90 SS.4(a),7,12(a) Land Use Regulation Nos.38 & 39(1979) Anambra &Enugu-States-Nigeria

91 Certificate of Occupancy renewable and rarely refused in practice.

92 S.15 Land Use Act 1978.

93 The rule against perpetuities is closely related to the rule against inalienability which promotes freedom to alienate property as soon as it becomes vested - See Stewart v. Fields (above) where the court equated the rule against perpetuities with the rule against inalienability and therefore both seek to prevent frozen ownership – attempt by the Settlor/Testator to permanently remove the property from the Market place. Both concepts stipulate that property must not be rendered inalienable longer that the perpetuity period. The rule against accumulation prevents the compulsory accumulation of income beyond the perpetuity period so as to forestall frozen liquidity – money/commonwealth must freely be circulated within the economy of the kingdom and must not privatized by the privileged few. Both the rule against inalienability and rule against accumulation are outside the scope of this paper.

94 Perpetuities & Accumulations Act 1964(England and Wales)

95 S. 5 (1) Perpetuities & Accumulations Act 2009 (England and Wales).

96 S.5 (1) Perpetuities & Accumulations Act 1985 (Kenya).

97 S.5 (2) Perpetuities & Accumulations Act 1985 (Kenya).

This is similar to **West-Indian-State-of-Barbados** with flat period of 80 years[98] for any disposition in an instrument, to vest. In **STEWART v. FIELDS**[99] the court equated the rule against perpetuities with the **rule against inalienability** and therefore the device by testator to his descendants only, in order to perpetuate the land in his family only was held to offend this rule and therefore repugnant and inoperative. In the **Bahamas,** the statutory modifications in the avoidance of future interests in property on grounds of remoteness, are visible. Any disposition made in respect of non-vested interest in property, shall become void, if it fails to vest in perpetuity period of lives in being plus 21 years[100] the further extension and validity (depending on the actual events) shall be subject to a maximum period of 150 years[101]

In **United States of American (US)** jurisdictions, it is applicable to some States.[102] They apply the ''wait and see approach'' or a ''second look approach.'' These States[103] adopted **the Uniform Statutory Rule Against Perpetuities (USRAP)** or a variation of it fixing the perpetuity rule or extending the period to 90 years for the interests to vest after its creation.[104] In some States, it has been repealed[105] in its entirety, while others such as Florida[106] has extended the waiting period to 360 years for trusts.[107]

In **Australian** jurisdictions, each of the Seven States have adopted the United Kingdom's methodology and practice, with statutory modification. It is now the wait and see duration pegged at a flat period of 80 years.[108]

[98] S. 169 (1) (2) Law of Property 1979 (Barbados)
[99] (1991) 26 Barbados LR 445 per Chase J.
[100] S. 3(1) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)
[101] S. 6(4) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)
[102] Moynihan, Cornelius J, Kurtz, Sheldon F., - Introduction to Law of Real Property 3rd Ed (2002) pp. 248 -260 (Saint Paul Minnesota), http://www.worldcat.org/oclc/9800778 downloaded 30/09/2014
[103] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Indiana, Kansas, , Massachusetts, Minnesota, Montana, Nebraska, Nevada, , New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, District of Columbia, US Virgin Island and New York.
[104] http;//www.nccusl.org/Act/Summary.aspc/title-Statutory/Rule.Against Perpetuities, http;//
[105] Such as Alaska, Idaho, New Jersey, Pennsylvania, Kentucky and South Dakota
[106] Florida State 689.225(2) (f) (2008) http;//www.leg.state.fl.us/statute/index.cmf/mode/view
[107] http;//en.wikipedia.org/Rule against perpetuities downloaded 30/09/2014
[108] S. 7 (1) Perpetuities Act 1984 (New South Wales), S.8 (1) (Australian Capital Territory), S.187 (Northern Territory), S.101 (Western Australia), S.5 (Victoria) S.209 (Queensland) S.6 (Tasmania).

In **Nigerian**, Courts recognized the operation of the common law rules against perpetuities. In **FRANK-COKER v. GEORGE-COKER**[109] the testator devised his dwelling house to the whole of his family, his children, blood relations, grandchildren and that his house should not be sold and at present the house should be occupied by grandson Nath and Son Edward. The property was eventually sold by order of the court. At the hearing of the summons to determine those entitled to share in the proceeds of the sale, objection was raised that the bequest contravened the rule against perpetuities and was also void on the ground of uncertainty. It was held that the device did not, as the intention of the testator was to make his dwelling house a family home.

CAREY J remarked thus:

> "…there can be no question regarding the rule against perpetuities in that the bequest to the whole of the testator's family.... was not an executory device or future limitation but took effect immediately on the death of the testator and the property affected thereby vested".[110]

Similarly, in **SALIMOTU-COKER v. ALFRED-COKER**[111] the testator who was survived by two sons made a will where he his landed property in Lagos for the use of his children's children (grand-children) forever. It was agreed without further contention that the device was **void for remoteness because there were no grand-children at the time**. It was held that the non-existence of the grand-children at the time in which the limitation took effect, made the device an executory one and since the will took effect in 1897, the Land Transfer Act 1897 could not have been applied to the limitation which was void as a legal executory gift, but may not necessarily be void for remoteness. Nevertheless, if it meant perpetuity,[112] the gift may not have been void for perpetuity, if the grand-children would be born within the duration of the lives of the two children but the children all died without their own children, the gift still offended the perpetuity rule and therefore became void.

---

[109] (1938)14 NLR 83 at 85 Aff'd by WACA (West-African-Court of Appeal) p.86.
[110] (above) at 85 Aff'd page 86 by WACA (West African Court of Appeal No.851 dated 7TH November 1938 Unreported).
[111] (1946) 17 NLR 55
[112] Prof Ben Nwabueze – Nigerian Land Law (1973) pp. 102-103

In **Uganda,** there is rule against **remoteness of vesting**. Where a bequest is made to a **person not in existence** at the time of testator's death, subject to a prior interest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interests of the testator in the thing bequeathed.[113] Where a bequest is made to a person of a particular description and there is **no person at the testator's death that answers that description**, the bequest is void, except if the property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but for his or her possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, and if a person answering to that description is alive at the death of the testator or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he or she is dead, to his or her representatives.[114] As regards the **Rule Against Perpetuities,** it has a limited application to life-in-being only as no bequest is valid, if the vesting of the thing bequeathed is delayed beyond the lifetime of one or more persons living at the time of the testator's death, and the minority of some person is in existence at the expiration of that period, and to whom, if he or she attains full age, the thing bequeathed is to belong.[115]

It appears perpetuities rules are not very popular even though it applies in African countries[116] in loose sense as epitomized in scantiness of case laws in **Kenya** and **Uganda** and others. The reason being that in African countries majority of all the lands are owned by extended families, large communities comprising, hamlets, villages and clans. The notion of the ownership of land in Africa is not individualistic but controversially communal with several bottlenecks against permitted alienability in limited circumstances only. This is true especially in **Tanzanian** jurisdiction, where its operation has been whittled-down or rendered non-existent by the statute. The **S. 3, Rules Against Perpetuities (Limitation of Application) Act 1969,** provides thus; - the Rules Against Perpetuities shall not apply to any specified disposition, and any such disposition shall not fail by reason of contravention of the Rules Against Perpetuities.

[113] S. 100 Succession Act 1996 (Uganda).
[114] S. 99 Succession Act 1996 (Uganda).
[115] S. 101 Succession Act 1996 (Uganda)
[116] Prof Ben Nwabueze – Nigerian Land Law (1973) pp. 102-103 and Prof RW James & GM Fimbo - Land Tenure and Policy in Tanzania Law (1974) pp. 52-57

ISSN 2581 3382
Annual Volume 10 – 2024

In **Ireland's Republic,** it applied and was abolished recently[117] and all transfers in land would now exist as equitable interests under a trust, the legal fee simple estate being vested on the trustees.[118] Outright abolition without replacement raises the possibility that contingent interests may be created which would remain contingent over a long period and therefore remove the land from the market[119] the very evil prohibited by the rules against perpetuities.

In the **Canadian jurisdictions**, some of the provinces had abolished it while others have attempted to reform and retain it. Amongst the reformers, are **Ontario**[120] and **Alberta.**[121] The abolitionists is **Manitoba** and its substitute legislation achieve two things. Firstly, all future interests created in its province must now take effect behind trusts[122] and all them shall be govern by the applicable trusts legislation and are subject to judicial review upon certain conditions. In this respect, Manitoban trusts' statutes which replaced the perpetuities rules achieved similar object of making land available thereby facilitating alienability and transfer of interests from realty into personalty. Secondly, it achieved fair mutual balance between the desires of the absolute land owners of the present generation's desire to regulate the enjoyment of their landed properties beyond their own mortality or death and those who want to posthumously deal with the properties as their own after the death of the present owner.[123] In spite of some apparent defects, it limited the dead man's hand posthumous control of the affair of subsequent generations(s).

Among the **Canadian** retentionists/reformists, the **Saskatchewan Province** has been applying it even though there are clear difficulties. In **SCURRY-RAINBOW OIL (SAKATCHEWN) LIMITED v. TAYLOR**[124] a lease which was granted to Imperial Oil Limited in 1949 by Taylor expired in 1959. In 1960 Taylor executed another top-up lease, to Freeholders Oil Company Limited, which was to take effect after the termination of the first

[117] S. 16 Land and Conveyancing Law Reform Act 2009.
[118] John Mee – From Here to Eternity? Perpetuities Reforms in Ireland (2000) 7(1) Dublin ULJ 91 at 100
[119] Andrew Lyall – Land Law in Ireland 3RD Ed (2000) pp.326-328 Round Hall Publication.
[120] The Perpetuities Act 1966 (Ontario)
[121] The Perpetuities Act 2000 (Alberta)
[122] Chapter 43, Perpetuities & Accumulations Act (1982-83-84 Manitoba).
[123] Daren J Reid – Perpetual Problem of Perpetuities in Saskatchewan (2003) vol. 66 Saskatchewan Law Review 511 at 519.
[124] (2001) 203 DLR (4TH) 38 (2001) WWR 23 (2001) SKCA 85 (hereinafter-called Scurry CA) Cited in DLR rev'd (1998) 5 WWR 424, 170 Sask. R. 222 (2001) (QB) (Scurry QB).

imperial oil lease. The said lease which was alleged to have infringed the perpetuities rule reads thus: -.

> '' in the event of termination, cancellation, avoidance or expiration of the said **drilling lease, the grantor hereby grants and lease to the grantee all the mines, minerals and mineral rights, to enjoy same for a term of 99 years** from the date hereof. The question was whether the term granted was **vested or contingent?** It was alleged the lease infringed the perpetuity rule as there was a possibility that the interest given to the **Freeholders Oil might not vest within 21 years from the date of its creation**. As this was a **commercial matter**, there were **no life/lives-in-being in the document to be measured and the perpetuity period was just simply 21 years**. If the interest was vested, there was no violation of the perpetuity rule and the Freeholders Oil lease and subsequent interest derived from it would be valid.

GERIN J (as he then was) held the interest was contingent on the expiration of the Imperial Oil lease. **His Lordship** stated thus: -

> ….''the opening phraseology speaks in the impugned clause, speaks to contingency and to the future. To ascribe to those words a definition equivalent to a way of describing a reversionary interest, is to distort the words beyond recognition.[125]

His Lordship continued that as the interests may or may not have been vested within the 21 years period, it was void under the operation of the perpetuity rule. As a result, all the transactions and documents that superseded the Freeholders Oil lease purporting to pass their interest on, were void as well **– nemo dat quod non habet.**

Top-up leases do not remove land from commercial development and activity but rather encourage it. This being so, it would not be contrary to the public interest to remove such

[125] (2001) 203 DLR (4TH) 38 at 40

leases from the ambit of the rule against perpetuities.[126] However, in the light of the failed attempt to reform the Saskatchewan legislation in 1995,[127] the Freeholders Oil top-up was deemed invalid ab-initio by the strict operation of the perpetuity rule and all subsequent interests derived from it were invalid as well. The Saskatchewan CA faced with the violation of the perpetuities rule by a majority of 2 to 1 set aside the trial court's judgement.

TALLIS JA[128] who read the majority judgement, acknowledged that the top-up lease violated the letters of the perpetuities rule but on public policy consideration, he refused to adhere to it and held thus: -

> …'' On public policy of preventing the fettering of the marketability of property over long periods of time by indirect restraints upon alienation, the general purpose of the rule is to prevent the tying-up of property to the detriment of the society in general.[129]

In analyzing the top-up lease in question, having regards to the stated purpose, **TALLIS JA** went on and stated the following conclusion thus: -

> …'' Given the development of the top-up leasing as a useful and desirable type of transaction in the oil and gas industry, the application of the orthodox rule against perpetuities does not reflect modern realities. When the rule was formulated by the judges in the earlier times, top-up leases in the oil and gas industry were not contemplated[130]

Academic opinion averred that the top-up leases encourage production, prevent the market stagnation of land by preventing remotely vested interests being cut-up by perpetuities rule, and that the CA judges rightly decided not to apply it in order not to reach incongruous decision that may negative the purpose - oil and gas top-up leases does not violate the policy

[126] Ibid at 54
[127] Ibid at 56.
[128] With Sherstobitoff JA Concuring
[129] Surry (CA) at 52.
[130] Ibid at 66.

and purpose of marketability of the perpetuities rule.[131] With the greatest respect to our learned friend, attractive as this argument may seem, it leans towards the failed abolition and reforms which the legislature abandoned in 1995. Adjusting the common law rule by the judges, with utmost humility is tantamount to judicial reform and opposed to legislative reform. The judges do not make, amend but interpret laws. It is the law as it is for the judiciary and the law as it ought to be for the legislature in the political separation of powers. Doing otherwise as CA's majority judgement did here amounts to naked usurpation of legislative functions what Lord Devlin in 1970's labelled judges who fill-in gaps in legislations. It is on this basis that the minority judgement.

JACKSON JA who dissented and supported the application of the perpetuities' rule in apparent approval of the trial court's judgement. She confidently favour's the legislature reform option as opposed to judicial repairing. Her Ladyship confidently asserts thus: -

> …." Admittedly, the very much policy considerations and arguments on the other side are no less so. The pint is that the courts are not equipped to weigh the legitimacy of these concerns whereas the legislature is. Through the vehicle of statute law, the legislature can accomplish many things which the courts through pronouncements, cannot.[132]

7. The Option to Renew Building Lease and Option to Purchase the Reversion of Building Lease and Perpetuities Rules?

The creation of option to renew in a building lease, for a valuable consideration is an exception to the perpetuity rule.[133] Similarly, the creation of option to purchase the reversion interest of

[131] Daren J. Reid pp. 516-517
[132] Surry (CA) at 52.
[133] This is a common law rule now statutorily codified by SS. 3(3)(a) (b), 6(4) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to charitable trusts, trusts of a fund registered under Superannuation and other Trust Funds.

a building lease, constitutes also an exception to the perpetuity rule.[134] .The Rules Against Perpetuities shall not apply to dispositions consisting/conferring an option[135] to acquire for valuable consideration, a reversionary[136] interest of a term of lease (whether directly or indirectly) if the option is exercisable by the lessee or his successors[137] in title provided the option is exercisable at or before the expiration of one year following the determination of the lease.[138] This is subject to the proviso that the option to renew the building lease,[139] (for valuable consideration) or option to purchase the reversionary[140] freehold (for valuable consideration), must be exercised within the stipulated perpetuity period of 21 years.[141]

8. The Charitable Trusts and Perpetuities Rules?

The creation of charitable trust is an exception to the perpetuity rule.[142] The requirement is that the charitable trust must be validly charitable[143] otherwise, it would be void. In **RE WILL OF MOMORDU ALLIE (DECEASED)** [144] **SMITH CJ** held that charitability criteria are judged in four angles such as for the relief for poverty, advancement of education, religion

[134] This is a common law rule now statutorily codified by SS. 3(3)(a) (b), 6(4) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to charitable trusts, trusts of a fund registered under Superannuation and other Trust Funds.

[135] S. 15 (1) (a) (b) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)

[136] S. 15 (1) (a) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)

[137] This is a common law rule now statutorily codified by S. 15(1)(a) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to option to renew a lease exercisable by lessee or his successors-in-title

[137] This is a common law rule now statutorily codified by S. 15(1)(b)(4) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to option to purchase a reversion of a building lease exercisable by lessee or his successors-in-title beyond 21 years.

[138] This is a common law rule now statutorily codified by S. 15(1)(a) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to option to renew a lease exercisable by lessee or his successors-in-title

[139]This is a common law rule now statutorily codified by S. 15(1)(b)(3) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to option to purchase a reversion of a building lease exercisable by lessee or his successors-in-title beyond 21 years.

[140] This is a common law rule now statutorily codified by S. 15 (4) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas) which provides that perpetuities rules shall not apply to option to purchase a reversion of a building lease exercisable by lessee or his successors-in-title not exercisable beyond 21 years.

[142] This is a common law rule now statutorily codified by S. 15(1)(a) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)

[143] S. 15 (1) (a) (b) Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)

[144] (????) African LR Com???

ISSN 2581 3382
Annual Volume 10 – 2024

and other purpose beneficial to the community. Therefore, a transfer of property for ever, to be held on trust to provide money to defray travelling expenses of members of testator's family who visit Freetown from their home-village at Jabber, was held void for violation of perpetuity rule as there is no direct benefit to the rich and poor people in the community. The **Court of Appeal**[145] affirmed the judgement that the trust is not charitable to escape the Rules Against Perpetuities and dismissed the appeal.

Also, in **FATIMOLA v. OGUNDIMU**[146] the testatrix purported to create a charitable trust whereby she devised her landed property to members of **religious sect** of **Faith African Church**, 'forever, in perpetuity' provided they **perform yearly feast ceremony in memory and remembrance of her**. **JOHNSON J** held the gift to the religious set has no direct benefit to the public at large and did not qualify as charitable trust for advancement of religion and bequeath was therefore caught under the perpetuity rule and void. His Lordship was emphatic that on strict construction on the charitability of the gifts under the will, it failed and fell into residue of the estate and since the testatrix died childless, none of her blood relation surfaced, the applicants as her adopted and step-children succeed to the property on intestacy.

In England the perpetuity period which was formerly fixed for a flat period of 80 years for interest to vest within the life-in-being,[147] has been extended to 125 years.[148] In Kenya it shall not exceed 80 years[149] and its life/lives-in-being thereafter shall be specified within 80 years thereunder.[150] This is similar to Barbados with flat period of 80 years[151] and Bahamas 150 years[152] for any disposition in an instrument, to vest.

---

145 (1962) (CIV APP 3 of 1962) [1962] SLCA 10 (26 July 1962), Unanimous judgement of Sierra Leone Freetown CA as per Ames P, Dove-Edwin and Bankole-Jones JJA

146 (1977) 12 CCHCJ 3799

147 Perpetuities & Accumulations Act 1964 (England)

148 5 (1) Perpetuities & Accumulations Act 2009 (England).

149 S.5 (1) Perpetuities & Accumulations Act 1985 (Kenya)

150 S.5 (2) Perpetuities & Accumulations Act 1985 (Kenya).

151 S. 169 (1) (2) Law of Property 1979 (Barbados)

152 .SS, 6 (4) and 18 (2) Perpetuities (Amendments) Act 2006 (Bahamas),

ISSN 2581 3382
Annual Volume 10 – 2024

9. Who is a Tenant for Life?

The Parliament through the Settled Land Act 1882 interfered with people's private land-owning arrangements of the great landowners not only in England but in many other common law jurisdictions too. SLA introduced free marketability of Settled land by conferring power of sale on the Tenant for Life (TFL).[153]

The **Settled Land Acts 1882-1890** applies to Nigeria being a pre-1900 English Statute of General Application[154] for all categories of settlement created by deed.[155] But for the settlements created by Will, being a **probate[156] cause** the **Settled Land Act 1925** also applies, being the law and practice in force in England[157] at time of political independent in 1960.

It is necessary at this stage to consider whom TFL is, his powers under the Statutes and controls imposed by the courts and Land Use Act 1978. A tenant for life is a person for the time being beneficially entitled[158] to the settled land for life i.e. the first holder of life estate in possession.[159] Two or more persons can be tenants for life whether jointly or in common, provided the land is vested on them.[160] In **ROBERT v. KENNY**[161] by her Will, the testatrix left her estate to D for life remainder in equal shares to P2, P3 and P4 who sought the court's

153 SS. 3, 4, 36 (1) Settled Land Act 1882, Alakija v. NBN (above), Thomas v. Nabham (above), Taylor v. Kingsway Stores (Nigeria) Limited (below), Nasr v. FBIR, (above) for Eastern, Northern & Abuja and Lagos States of Nigeria. Strict settlement had been abolished in Western States of Nigeria see – S. 21 Property and Conveyancing Law 1959 and any settled property now operates as trust for sale - See S. 32 Property Conveyancing Law 1959 and Ademola v. Shodipo (above).

154 SS. 12 & 16 High Court Laws (2003) Lagos State, S. 17 (1963) (Eastern), S.12 (1963) (Northern) States respectively - See Ojule v. Okoya (1968) 2 All NLR 44, Lemonu v. Alli-Balogun (1975) 1 All NLR 37 at 38 (1975) 3 SC 87 (1975) 5 UILR (Pt.3) 317.

155 SS. 3, 4, 36 (1) Settled Land Act 1882, Okesuji v. Lawal (below), Alakija v. NBN (above), Thomas v. Nabham (above), Taylor v. Kingsway Stores (Nigeria) Limited (below), Nasr v. FBIR, (above) for Eastern, Northern & Abuja and Lagos States of Nigeria. Strict settlement had been abolished in Western States of Nigeria see – S. 21 Property & Conveyancing Law. 1959 and any settled property now operates as trust for sale - See S. 32 Property Conveyancing Law 1959 and Ademola v. Shodipo (above).

156 S.16 High Court Laws (2003) Lagos State and UK Settled Land Act 1925 is applicable to Nigeria if it is a probate action because it would qualify as pe-independence state in UK as at 01 October 1960 – See SCN decision in Okesuji v. Lawal (above).

157 SS. 12 & 16 High Court Laws (2003) Lagos State

158 S. 1(5) Settled Lands Act 1882.

159 Yetunde-Coker v. Folarin-Coker (below)

160 S. 1(6) Settled Lands Act 1882, Thomas v. Nabham (above), Nasr v. FBIR (above).

161 (2000) 1 Irish R 33

determination whether the bequest gave D an absolute estate or a life estate?. **GEORGEGAN J** held that the Will conferred on D a life estate and therefore he is TFL.

In **YETUNDE-COKER v. FOLARIN-COKER**[162] the testatrix devised in her Will all her freehold property to her daughter for life, on her death; to her children in fee simple.[163] It was held that by the Will of the deceased, a life interest was created in favour of the daughter (D) and remainder to all her children absolutely. **ADEFARASIN J.** observed thus:

> …. "The interest of D (Mrs. Endora Remilekum Coker) was vested in possession while those of her children were future interests. The interest which her children had (remainder men) would only be realized on the death of their Mother/tenant for life. On the death of the TFL, the interest of the three grand-children which were hitherto contingent, became vested and crystallized on the death of their mother TFL. Therefore, the estate of one of the beneficiaries who pre-deceased the TFL, is entitled to take the share of the deceased beneficiary"[164]

His lordship, granted the declaration that on the death of the deceased beneficiary, his successor-in-title, could inherit the deceased own share in the estate.[165]

From the above, it is clear that TFL is the holder of the first life estate in possession as opposed to absolute ownership.[166] An infant can be a TFL if the first life estate is vested in him personally[167] or jointly with other infant(s) or adult(s) beneficiaries.[168]

---

162 (1972) 6 CCHCJ 1.
163 Note - Fee Simple Estate has been abolished by Land Use Act 1978. See note Nos. 15 & 16 (above) and s. 1 Abolition of Registration of Instruments Conveyancing Fee Simple Estate No. 2 (1979) (Lagos State). Fee Simple interests in land have been converted to Rights of Occupancy.
164 Ibid at 3-6. Italics supplied.
165 Under Intestate Estate Act 1890.
166 Okesuji v. Lawal (above), Shonekan v. Smith (1964) NMLR 59 at 60 & *53*.
167 Thomas v. Nabham (above), Alakija v. NBN (above).
168 Nasr v. FBIR (above).

In this line, life tenancy is not an estate of inheritance but may be a freehold or leasehold estate, though the grant may be free or subject to rent and other limitations specified in the instrument creating it.[169]

10. The Powers of Tenant for Life and the Impact of Statutory and Judicial Controls

The powers of the TFL are many but they can either be limited, restricted or curtailed by the settlor directly or indirectly[170] but it cannot be contracted out in favour of any other person by TFL.[171] The vital powers provided by the statutes are to manage, lease,[172] sell,[173] exchange[174] mortgage or charge[175] or otherwise deal with the settled land. In respect to leasing powers, TFL is empowered to grant lease not exceeding 99 years (Building lease), 60 years (Mining lease) other leases 21 respectively[176] including the power to accept surrender of lease.[177] In **ROBERT v. KENNY**[178] the TFL sold the testatrix real property **GEORGEGAN J** held that the Will conferred on D a life estate and as TFL, he is a trustee[179] of the assets – the proceeds of the sale for himself and other beneficiaries such as P2, P3 and P4. As a TFL, he is entitled to invest the monies and proceeds realized from the estate, not in his sole name but jointly in his own name and the names of other beneficiaries and remaindermen. His Lordship was emphatic that whatever trusts attached to the realty namely the house were transferred into the net proceeds of the sale.

169 Onyeche v. Shadiya (1966) 1 All NLR 149 at 151 per Bairamian JSC.
170 S. 51 Settled Lands Act 1882.
171 S. 50 Settled Lands Act 1882.
172 SS. 41, 42,43 Settled Land Act 1925. In Shamshali v. Kadibhai (2007) 1 Ugandan LR 238 at 239 CA held TFL has power to grant lease of the settled land or any part thereof with option to purchase and the same powers are vested in the trustees.
173 SS.38,39,40 Settled Land Act 1925 repealing 3(1) Settled Lands Act 1882, S. 10 Settled Lands Act 1890, Taylor v. Kingsway Stores (Nigeria) Limited (above) and Chadderton v. Chadderton (below)
174 S.40 Settled Land Act 1925 repealing 3(iii)(2) Settled Lands Act 1882, Okesuji v. Lawal (below)
175 SS. 71 Settled Land Act 1925 repealing 18 Settled Lands Act 1882, S. 68 Settled Lands Act 1925, Money raised from such mortgage or charge is treated as capital money and must be applied as such - See S. 11 Settled Lands Act 1890.
176 S. 6 Settled Lands Act 1882, S. 10 Settled Lands Act 1890 Alakija v. NBN (above), Thomas v. Nabham (above). A building lease is defined as one for 99 years or less with obligation to build containing on the face of the lease - See S. 2 (10) (iii) Settled Lands Act 1882.
177 S. 13 Settled Lands Act 1882.
178 (2000) 1 Irish R 33
179 **The trust arose under the operation of the law by virtue of S. 53 Settled Lands Act 1882.**

In addition, the court can on the basis of salvage, order and direct TFL to sell settled land, to invest and re-invest the proceeds of sale, subject to supervision by the court, from time to time.[180] In **CHADDERTON v. CHADDERTON**[181] **WARD J** ordered the sale of the settled land owing to its deteriorated and depreciated state. His Lordship emphatically held thus: -

> ….''Since the death of the testator, 'Ilfracombe' and Chadville have fallen into **disrepairs and the rents obtained from these properties are insufficient to pay outgoings and to keep the properties in in proper repairs**. It has been estimated $80, 000 is necessary to put Chadville in good condition and to repair and convert Ilfracombe' into flats so that they can become viable entity again. If nothing is done the properties are going to get worse and the rents less, thereby further reducing the chance of effective repairs. As a result of the **existence of the contingent remainders of the grandchildren**, it has become necessary to **apply to court for direction** as to what should be done to preserve the properties. Although, there is **no specific powers given to TFL to mortgage under Settled Estate Act 1906, the court has right to order sale and the re-investment of the proceeds for the benefit of the benefits** of the beneficiaries. There is inherent jurisdiction in the court in cases of salvage, to adopt any scheme to salvage the properties which is beneficial to the present and future owners. The court ordered the sale of the houses and TFL shall re-invest the proceeds in such investments approved by the court from time to time.[182] Similarly, the dilapidated state of the settled land may influence the court to grant the permission to order sale, where the instrument contains no express power to that effect.[183]

Similarly, in **McCONNEY v. PUBLIC TRUSTEES**[184] **DOUGLAC CJ** held the dilapidated condition of the trust property and the damage done to the two buildings by fire, were the factors which made it expedient for the court to empower the Public Trustee to sell the properties, on terms and conditions that TFL and the beneficiaries relinquish their interests in

180 Chadderton v. Chadderton (below)
181 (1976) 11 Barbados LR 10 at 11-12 Barbados High Court.
182 (above) 10 at 11-12.
183 McConney v. Public Trustees (below)
184 (1981) 16 Barbados LR 90 at 91 (Barbados High Court)

exchange for a corresponding interest in the net-proceeds of the sale together with insurance monies.

Sometimes, the TFL with the concurrence of the beneficiaries, may apply to court for the order to sell the settled land.[185] The application for leave of the court may be dispensed with, where the trustees under the settlement are authorized with the power to sell lands comprised therein. In **GRANT v. WOOD**[186] an originating summons, filed by the trustees of the settlement sought to determine whether they need the sanction of the court. Answering in the negative, **RUSSELL J** held that the trustees of the settlement don't require order of the court to implement what the settlement expressly authorized them to do as they require the court's permission or approval only in respect of what the settlement did not authorize.[187]

11. The Powers of Infant Tenant for Life are Exercisable by Trustees on his Behalf

In case of infant TFL, his powers are exercisable on his behalf by the trustees of the settlement;[188] if there are none, or then by such person and in such a manner as the court can order or appoint on application of a testamentary or other guardians or next friend of the infant either generally or in a particular instance.[189]

In **NASR v. FEDERAL BOARD OF INLAND REVENUE**[190] it was held that in' absence of named trustees in the settlement and until they are appointed by the court, there is no person to exercise the powers of the infant TFL and consequently there is no person in whose hand the income accruing from the settled property could be assessed for tax purposes. Consequently, trustees of the will cannot be the trustees of the settlement for the purpose of

185 Pratt v. Haffner (1956) LLR 5 at 6
186 (1917-1918) 3 Trinidad & Tobago LR 2 at 3
187 Relying on S. 38 Settled Lands Ordinance (Trinidad & Tobago), the equivalence of S. 59 Settled Lands Act 1882.
188 Which must be appointed under S. 38 Settled Lands Act 1882 to exercise his TFL powers, see NASR. v. FBIR (above), Alakija v. NBN (above), Thomas v. Nabham (above). Note under S. 58 SLA 1882 every one of the minors would be entitled even (as if he was an adult) to exercise the powers of TFL.
189 S. 60 Settled Lands Act 1882, S. 38 Settled Lands Act 1882.
190 (1964) Lagos LR 1 at 8.

settled Land Acts and if they purport to exercise any of the powers of the infant TFL, it would be void and of no effect whatsoever.[191]

In **THOMAS v. NABHAM**[192] guardian trustees of a will granted 55 years lease of a property devised by will of the testator for life remainder to their children in common. At the time of the testator's death, the devisees were minors. It was held (i) the guardians of an infant TFL could not go outside the Settled Lands Act in the disposition of the property (ii) the executors or trustees of a Will, unless the Will created them trustees also of the settlement, cannot exercise the powers of an infant TFL without the order of the court and accordingly the lease was void.[193]

Similarly, in **ALAKIJA v. NATIONAL BANK (NIGERIA) LIMITD.**[194] the trustees exercised the powers of the TFL minor to grant a long lease of 99 years in 1945. The court invalidated the grant because their appointment as trustees of the Will did not make them trustees of the settlement and therefore no power to make the grant.

12. The Investments Powers of Tenant for Life and Controls by the Trustees

The exercise of the power of investments by the TFL and trustees, in certain circumstances, would require the sanction of the court. This discretionary power to invest the proceeds of the sale of settled land and other properties including dividends, it should be investigated and satisfactory evidence led to the satisfaction of court to ascertain whether, it would benefit and not prejudice the interests of the beneficiaries and once there is no such negative evidence, the court would be inclined to grant it.[195] In carrying the investments duties, the trustees must

191 Alakija v. NBN (above).
192 (1947) 12 WACA 229 (West African Court of Appeal).
193 Trustees of the settlement under S. 2(8) Settled Lands Act 1882 & S. 16 Settled Lands Act 1890 is those expressly appointed in the settlement. Note whether or not the legal estate is vested on trustees, they have no real control over the land except to receive capital money when settled land is sold.
194 (1974) 5 CCHCJ 649 (Lagos High Court case Nigeria)
195 Juarez v. Sands (1965-70) 2 LR Bahamas 353 at 354 CA unanimous decision per Sinclair P, Bourke and Archer JJA

not engage in self-dealing in order to avoid the inevitable conflict of interests.[196] The trustee must never invest trust funds in its own company unless done with the acquiescence and approval of the beneficiaries – only at higher rate and on better terms than those available elsewhere – in this case evidence of the approval of the trustees' conduct, was established which precludes the beneficiaries from nullifying the trustees' actions.[197] In **RITA-MARLEY & OTHERS v. MUTUAL SECURITY MERCHANT BANK & TRUST COMPANY LIMITED**[198] the Respondent as the Administrator/Trustees of the estate of Bob Marley (Deceased Reggae Super-star) applied to court for direction because Appellants/Widow/children/beneficiaries opposed its investment of the estate funds in transactions outside the prescribed areas. The trustees sought declaration as to the future deployments of the trust funds claiming the adult beneficiaries had acquiesced to it taking these actions. There was never allegation of breach of trusts. Both parties appealed and cross-appealed the decision of the court below. The **Jamaican Court of Appeal unanimously set aside** the decision of **Theobald J,** dismissed the appeal and allowed the cross-appeal and held;

(i) Where there are deposits with the trustee/bank, it is obvious that conflict of interests could possibly arise in determining the rate of interests to be paid as against the rate which the bank needs to make in its own interests. However, since the Respondent had shown from the rates of interest paid and the securing of the acquiescence of the beneficiaries, that it was careful to act justly in the circumstances, it escaped the rule against self-dealing. The Respondent should not be excluded from the lists of securities in which the trust funds may be invested. But in granting approval to include the Respondent, a greater percentage of the funds that as now exist, should be invested in reputable trustees' investments other than the large percentage now with the Respondent

(ii) Where there is agreement and the interest on the deposit goes to the beneficiaries, there is no liability to account.

196 Rita-Marley & Others v. Mutual Security Merchant Bank & Trust Company Limited (below) at 390
197 Rita-Marley & Others v. Mutual Security Merchant Bank & Trust Company Limited (below) at 390
198 (1986) 39 Jamaican LR 237 at 390.

The TFL and trustees, in order to carry out major investments of trust property, must seek the approval of the court. They must obtain the **requisite expert advice** and **valuation reports** and place both fully and fairly before the court to enable the court to appraise all the circumstances and grant or refuse the order[199] as there is no express provision authorizing that intestate should be held under trust for sale.[200] Where the trustees' investment proposal is opposed by the beneficiaries, the test of the validity of their objections must not be allowed to obscure the real question in issue - what directions ought to be given in the interests of the beneficiaries and whether the court has before it, all the materials appropriate to enable it give those directions.[201]

Any court which is called upon to consider whether the proposed investment bargain which has been negotiated, is the best reasonably obtainable in the interest of the beneficiaries, would normally, as a minimum, require to be satisfied by evidence[202], to the following: -

(i) the appropriate value of the property concerned,
(ii) where the value depends on accounts, the accuracy of those accounts
(ii) whether, on the informed professional view, the proposed sale has been accepted has been affected under the most favourable conditions and
(iv) what efforts have been made to explore the market and what advice has been received with regards to marketing of the property to the minimum advantage.[203]

In **JOHNESTA-MARLEY & 11 OTHERS v. MUTUAL SECURITY MERCHANT BANK & TRUST COMPANY LIMITED**[204] P as the Administrator/Trustees applied to court for direction – whether it has the right to sell the musical rights and invest its proceeds or retain them unsold. At the preliminary[205] it was declared the trustees were under the duty to sell. The facts and judgement can be summarized as follows: - The trustees engaged the services of Reid Bingham US New York/Florida Ancillary Estate administrator/Attorney who

199 Johnesta-Marley v. Mutual Security Merchant Bank & Trust Company Limited (below) at 327.
200 There is no express provision under the Intestate Estates and Property Charges Act 1970 (Jamaica) incorporating Trust for Sale
201 Johnesta-Marley v. Mutual Security Merchant Bank & Trust Company Limited (below) at 237
202 Johnesta-Marley v. Mutual Security Merchant Bank & Trust Company Limited (below) at 237
203 Johnesta-Marley v. Mutual Security Merchant Bank & Trust Company Limited (below) at 237
204 (1986) 39 Jamaican LR 237 at 238-240.
205 Morgan J

ISSN 2581 3382
Annual Volume 10 – 2024

negotiated the sale of tangible bulk of assets were Bob Marley Museum at 56 Hope Road Kingston, Recording Studio at 220 Marcus Garvey Drive Kingston, , the deceased private resident at Stuart Place St. Mary. They have great value, additional intrinsic value attached to the property of a local celebrity -, arrived at US$8, 200, 000 and entered conditional sales contract with Island Logic Inc, - a New York Corporation, pending the approval of the court. The valuations of the tangible real estate assets in Jamaica (excluding the deceased's personal residence) produced J$5, 300, 000 and musical equipment/furnishings in the studio was valued US$419, 000. The trustees sued Widow, her own children who were of full age and other 11 beneficiaries by their guardians' ad litem. The originating summons issued sought order of the court to approve the conditional sale subject to such modifications, the court might think fit. the widow and 11 children of Bob Marley (Deceased Reggae Super-star) opposed the investment proposals of the trustees in respect of assets of great value comprising songs, copy rights relating to musical songs and real estates. Alternative offer from a French source was also put in evidence. Another judge of the High Court **WOLFE J** who heard the case, over-ruled the objections of the beneficiaries and authorized the sale on the ground that the conditional sales contract was the **best offer reasonably obtainable**. His Lordship held that if the beneficiaries seek to impeach the price agreed on the conditional contract, the onus is on them to satisfy that a better price is available.

The **Court of Appeal Jamaica** nevertheless **unanimously** dismissed[206] the appeal but was of the view that the trial judge wrongly concluded that the terms proposed in the offer were the best reasonably obtainable. Their Lordships could not predict whether or not the proposed purchaser would agree to the modifications which the court might impose. The **CA** was the view that the learned trial judge's logical course would have been to **adjourn the hearing** for the **agreement to be re-negotiated** and direct the restoration of the summons when it had been ascertained whether or not, the suggested new terms would be agreeable and this would have had the advantage of enabling the alternative offer to be properly investigated, considered and the purchasers to the modifications proposed by the court.[207] Subject to the outcome of further appeal, the contract had provisionally been carried out – the purchase price

[206] per Rowe, Forte and Downer JJA
[207] Johnesta-Marley v. Mutual Security Merchant Bank & Trust Company Limited (below) at 239-240.

has been deposited on special account with the court because of the pressing needs of the parties and the uncertainties surrounding future dispositions of the assets of this very substantial estate should be dispelled without further. Further dissatisfied, the widow and beneficiaries, appealed.

The **Privy Council** who allowed the appeal and held the matter should be remitted back to the Jamaican High Court for further consideration with the liberty for all parties to file such further evidence as they might be advised. **LORD OLIVER** was emphatic when he stated **two general propositions** to guide the **position and duties of the trustees** thus:

(i)….''A trustee who is genuine doubt about the propriety of the contemplated course of action in exercise of his fiduciary duties and discretion, is always entitled to **seek proper professional advice** and to **protect his position by seeking the guidance and approval of the court,**… it is of highest importance that the court should be put in possession of all materials to enable that discretion to be exercised. Here the proper execution of the discretion of the trustees, involves **obtaining expert advice or valuation** – it is the trustees' duty to obtain this advice and **place it fully and fairly before the court**. The court ought no to be asked to act on incomplete information, if it is so asked, the proper course is either to dismiss the application or to ask for adjournment until full and proper information is provided.''[208]

(ii) ….''the court in exercise of its jurisdiction to give directions on trustees' application, it is engaged solely in determining what ought to be done in the best interests of the trust estate and not the rights of adversarial parties. Here the application has been conducted as if it were hostile litigation losing sight of the primary, legitimate purpose – which the court would consider whether the objection is well founded not to obscure the real purpose.

His Lordship criticized the **hostilities which the beneficiaries approached the trustees' application, like that of the non-existent misconduct and breach of fiduciary duties** rather

[208] Johnesta-Marley v. Mutual Security Merchant Bank & Trust Company Limited (below) at 240.

than in-dept consideration of the sufficiency of the evidence required to enable the court to give full and properly informed direction to the trustees.

13. Statutory and Judicial Controls Imposed on the Powers of Tenants for Life

The power of TFL is subject to many statutory and judicial controls. In exercising the power of sale, he is deemed to be a trustee for other beneficiaries and must have regard to all the interests of all the parties entitled under the settlement.[209] This is a somewhat abnormal trustee; a highly interested trusteeship[210] in view of the fact that he is also a co-beneficiary of the interests in the settlement. Consequently, he must sell at best price and not at a gross under value.[211] Strictly, a sale by TFL will not be set aside merely on the ground that exercised the powers from motives of selfishness and personal aggrandizement with the object of securing a larger income to meet his debts or to indulge in expensive taste or sells in hostility to the remainder man that he can hardly be described as an upright, independent and righteous man would act in dealing with the affairs of others where the tenant obtains the best price reasonably obtainable and has otherwise complied with the requirement of the act. **In WHEELWRIGHT v. WALKER[212]** injunction was sought to restrain TFL from exercising his powers of sale in a manner which would prevent someone to whom the remainder man had sold his interest from actually getting possession of the land.

The court rejected the complain because it cannot enquire or question into TFL's motive as the TFL is entitled to sell on any motive, caprice or laziness to manage the land. But here P succeeded because trustees were not appointed as required by the Settled Land Acts and therefore TFL could be not allowed to sell until the trustees were appointed.

What matters in the exercise of the powers of TFL is that the transaction must be a proper one, and so long as this requirement is satisfied, it would not be invalidated merely because the

209 S. 53 Settled Lands Act 1882, S. 107(1) Settled Lands Act 1925 (England), Okesuji v. Lawal (below).
210 Cheshire & Burns Modem law of Real Property (1982) (infra).
211 Re Earl of Stanford & Warrington (1915) 1 CH. 404 at 420 per Younger J.
212 Wheelwright v. Walker (below).

motive of TFL is not commendable; that he is selling out of ill-will or caprice or because he does not like the remainderman or desire to be relieved from the trouble of attending to the management of the land etc.[213]

The modern trend is that an improper exercise of the powers of TFL can be questioned and restrained by injunction especially if he makes undesirable investment beyond his powers[214] or investment though within his powers but prejudicial to the interests of other beneficiaries.[215] In **Re Earl Somers (Deceased)**[216] a total abstainer TFL was restrained from leasing a hotel (tavern) on condition that no acohol should be sold there because that would reduce the value of the settled property?

Similarly, in **MIDDLEMAN v. STEVENS**[217] a greedy widow TFL entitled to property under late husband's will until remarriage, purported to grant long lease to her intending husband. The remainderman asked the court to intervene because her purpose of exercising SLA powers was not bona-fide. Granting injunction, the court held that the circumstances were not merely suspicious but it was obvious she was acting mala-fide because the long lease was a device to enable her continue in possession of the settled property longer than intended by the settlement. She was using her TFL powers to prolong her interests.[218]

The Nigerian courts adopted this fair and just development in **OKESUJI v. LAWAL**[219] where testatrix by will dated 13/11/47 devised land properties to her children A, B, C, and also appointed them executors. The devices of real property situate at No. 178 Bamgbose Street Lagos was made to B for life remainder to his children in equal shares absolutely. By a deed of conveyance dated 2/12/48 (Exhibit No. 2) A, B, C, of one part purported to transfer the property to B of the other part in fee simple when the will clearly showed B should have only a life interest. B on 31/1/51 sold the property (Exhibit No. 3) to X who subsequently sold same

213 Wheelwright v. Walker (1883) 23, CH. D 752 at 761-2 Cardigan v. Curson Howe (below). This appears to be a very robust and bogus preposition, which cannot stand the test of the modern trend - See Okesuji v. Lawal (below), Middleman v. Stevens (below)
214 Okesuji v. Lawal (below), Middleman v. Stevens (below)
215 Cardiggn v. Curson-Howe (1985) 30 CH.D. 531 at 540 per Chitty J.
216 Re Hunt (1905) 2 CH 418 (1906) 2 CH. II.
217 (1901) 24 CH.D. 754.
218 Note - a lease may be validly granted to the spouse of the TFL, See Gilbey v. Rush (1906) 1 CH. 11 at 16-20 at proper value without intention to deprive or prejudice the remainder man.
219 (1986) 2 NWLR (Pt. 22) 417 at 419-421, 427-432 CA Aff'd by SCN (1991)1 NWLR (Pt.170) 661-665, 676-677.

(Exhibit No. 4) to Z (Appellant). The remaindermen (grand-children) of the testatrix sued for a declaration that the purported transfer of the settled property to B in fee simple and latter to X and Z were-null and void on the ground of fraud and calculated to defeat their reversionary interests as the beneficiaries.

The trial judge found in their favour and Court of Appeal affirmed the decision and held that TFL conspired with the executors/trustees to commit fraud on the remainder men/reversioners.[220] The Nigerian-Supreme-Court upheld the concurrent findings by the High Court and Court of Appeal and unanimously held that even though the TFL has the power to sell-off the legal estate in the settled property, a court of equity can intervene to avoid a situation whereby the remainder men would be disinherited of the estate which they are rightly entitled. SC was emphatic that; -

(i) Since B had only a life interests in property, exhibit No. 2 which purports to transfer the property to him in fee-simple and thus defeat the interest of the reversioners is based on fraud and therefore null and void.

(ii) Exhibits No. 3 and 4 respectively were designed to perpetrate fraud and disinherit the reversioners and were void ab-initio.[221]

(iii) Although by virtue of S. 38 (i) SLA 1925, a TFL has power to sell or exchange the settled property, he must observe all the duties normally impose upon a trustee;

(iv) a TFL is in a fiduciary position as regards the remainder men and thus he must take care to ensure (a) when selling the settled property, he does not sell to himself (b) he must not put himself in such a position whereby his personal interests' conflict with that of the remainder men.

(v) In this case, B who purchased the trust property from himself as a trustee having duties of fiduciary nature to discharge should not enter into transaction in which his personal interest conflict with those of the beneficiaries.[222]

---

220 Per Kolawole JCA who delivered the Unanimous lead judgement.

221 Hampdens v. Earl of Buckinghamshire (1893) 2 CH. 531 at 544, Middleman v, Stevens (infra), Okesuji v. Lawal (below).

222 Akpata JSC who delivered the lead-judgement which affirmed the decision, adopted the views in Weston v. Henshaw (1950) CH.510.

14. The Sale of Settled Land and its Effect on the Doctrine of Conversion or Over-Reaching

If the transaction relates to mansion house, TFL must obtain the consent of the beneficiaries or order of the court before sale.[223] He is required to notify the trustees of his intention to deal with settled land.[224] The rent realized from the lease or purchase money realized from the sale of the settled land must be paid into court or at least to two or more trustees[225] of the settlement in order to be able to give effective receipt.[226] In **OLUWOLE-COKER v. GBADEBO-COKER**[227] it was held that payment of capital money to a sole trustee in breach of statutory provision renders the assignment of the leasehold (settled property) void. Emphasizing that two trustees were necessary to receive purchase money realized from the sales of the settled property **Hubbard J.** observed thus:

> ….. "what is the position of…the purchaser? The obvious fact is that in view of the second recital in Exhibit P1 (Deed of Assignment) to which he was a party, he cannot be heard to say that he did not know 2nd D. held the property as a trustee under a testamentary settlement.

He was put on enquiry and it was his duty to ascertain before buying the property whether the vendor was acting within her powers. If he had made proper enquiries and sought legal advice, he would have found that by **S. 39 (1) SETTLED LANDS ACT 1882**[228], he was expressly prohibited from paying to a sole trustee the capital money arising from the sale of the property…it is a pre-emptory statutory prohibition enacted to protect the rights of the beneficiaries and in my view a payment in breach of it renders void the purchase for which it was made when that purchase was a sole trustee….both the vendor and purchaser are parties

223 SS. 15 Settled Lands Act 1882. See Sogbesan v. Federal Public Trustees (1959) LLR 125 where it was held that trustees may consult the beneficiaries but it is not obligatory provided the rent secured in the lease is reasonable. See also s. 16 settled Estate Act 1877 which empowers court if it deems proper and consistent with due regard to the interests of all parties under the settlement and provision of the Act to authorize sale of the settled land.

224 S. 45 SLA 1882.

225 SS. 22(5), 39(1) Settled Lands Act 1882, Lasore v. Fashore (1974) 4 ECSLR 568 (Ilesha Ogun State Nigeria) Alakija v. NBN (Supra).

226 Shodipo v. Coker (supra).

227 (1956) Lagos LR 27 at 28-29, Shodipo v. Coker (above).

228 Now replaced by S.94 Settled Land Act 1925 (UK).

to a deliberate breach of the statutory prohibition and the beneficiaries under the settlement are entitled to ask the court to set aside the sale.[229]"

The doctrine of conversion or over-reaching is specifically imported into these transactions.[230] It protects the purchaser to enable him procure legal estate free from and without being affected by the equitable intertest belonging to the beneficiaries, whether or not, the purchaser has notice of these equitable interests, provided the purchaser complied with the conditions laid down by the statute. The object is to aid conveyancing as the purchaser is spared of the trouble of ''going behind the curtain'' to investigate legal or equitable interests over-reachable by the statute. It also protects the rights of the beneficiaries of a settlement by shifting their interests from the land,[231] (through the doctrine of conversion or over-reaching) into the corresponding interests in the purchase money.[232] The conditions laid stipulated by the statute are that the purchase money must be paid into court or into the hands of two or more trustees to give an effective receipt for the conversion or over-reaching[233] to the property to lawfully occur.[234]

The Nigerian courts adopted this faultless jurisprudential line of reasoning In **YETUNDE-COKER v. FOLARIN-COKER[235]** the testator by his Will settled certain properties which were subsequently sold and its proceeds used to purchase leasehold of another property. Later, the sole trustee of the settlement, assigned the leasehold to a third party and received the purchase price from him. The beneficiaries under the settlement brought action to set aside the assignment. It was held that **the payment of capital money to a sole trustee was in breach of S. 39 (1) Settled Lands Act 1882** and rendered the assignment void and liable to be set aside

[229] Hubbard J. advised the plaintiffs to apply for the appointments of another or other trustees. See also S. 40 Settled Lands Act 1882 to the effect that at least two trustees of the settlement are required to give effective receipt as a complete discharge of the purchase of settled land and the purchaser is not answerable for loss or mis-application of the purchase price. Under S. 22(3) SLA 1882 the trustees are required to invest the capital money.

[230] Peter Bennet MA(Oxon) - LLB Classroom notes1981/82 at Ealing College (University of West London).

[231] S.7 Settled Land Act 1925 (UK)

[0]00 Except Western States where pre-1990 English Statute of General Application ceased to apply - See Law of England (application) Law Cap. 60 (1959).

[233] Okesuji v. Lawal (above) at 433 per Kolawole JCA & Aff'd by SC (supra) at 676-677 per Akpata JSC.

[234] In Oluwole-Coker v. Gbadebo-Coker (above) it was held that payment of capital to a sole single trustee was a breach of this statutory provision and renders the sale/purchase void and the purchaser cannot claim protection because he did not comply with condition stipulated by the statute.

[235] (1972)6 CCHCJ 1 at 27 – 29 (Lagos High Court Nigeria).

under S. 39 (1) which protects the right of beneficiaries and expressly prohibits payment of capital money arising from the sale of settled land, to a sole trustee. **HUBBARD J** summed the legal position thus; -

….''where the sale is not by the trustees of the settlement but by TFL, then the purchaser gets a good discharge for the payment of money, unless the payment of money is made to two trustees, the conveyance by TFL will be ineffective to pass legal estate, free from equitable interest.[236]

This defect, could be cured, if a second trustee,[237] is appointed, in order to give necessary and effective receipt to make for the purchase money realized from the sale of settled land, valid and give the purchaser effective receipt for the legal estate, with the necessary protection.

In **LASORE v. FASHORE**[238] a widow, co-administrator, co-grantee of the letters of administration, sold the land of the late husband, alone in contravention of the S. 4(2) Administration of Estate Act which require the Personal Representative (PR) to join in the sale of the deceased real estate. The court held that only the PR[239] could transfer land by conveyance, assent, and vesting deed - they must all join in order to give good title and the purported solo transfer is therefore invalid. Similarly, in **DAVIES v. RANDLE**[240] the **Ghana CA** held that a sale by one administrator without the appointment of a second joint-administrator, would not protect a purchaser and he cannot acquire good title.

The effect of the sale of the settled land is to over-reach the interests of the beneficiaries[241] by converting it into corresponding money.[242] Strictly, money is substituted for land and the interest of the beneficiaries are transferred or shifted into the purchase money.[243] In **TAYLOR**

236 Yetunder-Coker v. Folarin-Coker (above) at 28-29.
237 See also Alakija v. NBN (above).
238 (1974) 4 East Central State LR 568 (Ilesha-High-Court-Nigeria)
239 S. 40 Administration of Estates Act 1959.
240 (1964) Ghana LR 318
241 SS. 20(1)(2), 39 Settled Lands Act 1882, Shodipo v. Coker (above).
242 Re Walker (1908) 2 CH. 705, Stevens v. Hutchinson (1953) CH. 299.
243 Shodipo v. Coker (above), Hampden v. Earl of Buckinghamshire (1893) 2 CH. 531 per Lindley L.J.

v. KINGSWAY STORES (NIGERIA) LIMITED.[244] it was held that the sale was enough to pass the property to the purchaser completely free from the provisions of the settlement. This is also the position in the West[245] Indian[246] jurisdiction.[247]

In the exercise of his powers, the tenant for life, is a trustee of the remainder man and must protect his interests. In **ROBERTS v. KENNY**[248] **GEOGEGHAN J** held that by virtue of the operation of the statute - S. 53 Settled Land Act 1882, TFL was a trustee of the remainder man and having sold the settled property which testatrix devised, the realty has been converted into the net proceeds which he would accountable to the remainder man and provided bona fide to protect the assets, he would not be liable unless he negligently the assets including the proceeds. They have the power to re-invest the proceeds and sometimes with the permission of the court in order to protect the interest of contingent remainders men[249] and sometimes investment of the property in unit trusts funds may be permitted.[250]

15. The Irregular Exercise of Powers of Tenant for life and the Effects on Purchasers and Remedies

The title of the purchaser is not affected if the TFL exercises any of his powers irregularly but TFL is personally liable for pecuniary losses arising therefrom to the beneficiaries.[251]
If the TFL acts as a trustee, the Rule Against Perpetuities shall not operate to invalidate the power conferred on the trustees or any other person to sell,[252] lease, exchange or otherwise dispose off any property for full consideration or to do any other act in the exercise of his administration powers (as opposed to the distribution) of any property and shall not prevent the payment to trustees or any other persons of reasonable remuneration for their services.

244 (1962) 2 All NLR 154 at *155*, 162-163, Aff'd by SC (1965) 1 All NLR 19 (1965) NMLR 103.
245 Sampson Owusu – Commonwealth Caribbean Land Law pp262-265 (Routlege-Cavindish 2007)
246 S.7(1) Property Act 1979 (Barbados)
247 S. 44(1) Land and Conveyancing Act 1981 (Trinidad and Tobago.)
248 (2000) 1 Irish R 33 at 34
249 Chadderton v. Chadderton (1976) 11 Barbados LR 10 per Ward J.
250 Re Estate of Yong Wai Man (1994) 3 Malaya LJ 514 per Chin J.
251 Re Marquis of Ailesbury (1892) 1 CH 506 at 536 per Lindley L.J.
252 **S. 14 Perpetuities (Amendments) Act 2004 & 2006 (Bahamas)**

To be entitled to this protection the purchaser must act in good faith and must have no knowledge of the misdoings of the TFL[253]. Consequently, if he is aware or conspires or becomes a party to the fraud committed to TFL, his title would be invalidated by the court.[254]

If the remainderman wants to set aside the sale by the TFL he must act timely by instituting a suit to that effect as unexplained delay would enable a purchaser defeat his interest by invoking the defense of laches-standing by and doing nothing.[255] In **TAYLOR v. KINGSWAY STORES (NIGERIA) LIMITED[256]** the plaintiffs case being that they have a tenancy in common in remainder but they could have sued in 1938 to assert their estate and prevent laches being set up latter by the purchaser who rebuilt the land believing it to be free from encumbrances. The court held 20 years was too late.

Furthermore, if the remainderman out of indolence allows the TFL to do as he pleased for a long time, the court is unlikely to hear his complain that the provisions of the Settled Land Act were not observed.[257] In spite of the fact that TFL may be absolved from liability for negligence provided he acted bona fide with due regards to the protection of asset, nevertheless, it would not exempt him from deliberate dissipation of any part of the assets.[258]

16. The Duties of Tenant for Life/Trustee to Renovate, Preserve and Rehabilitate Trust Property and Liability for Breach

It is necessary to examine the duties of the tenant for life (TFL) as a trustee to renovate, preserve and rehabilitate trust property and his liability for breaches. Strictly speaking. The TFL not only have the power and duty to manage the trust property but to maintain, renovate, preserve and rehabilitate it at the appropriate standard which the property was at the time

253 S. 54 Settled Lands Act 1882, S. 110(2) Settled Lands Act 1925, Oluwole-Coker v. Gbadebo-Coker (1956) Lagos LR 27 at 29, Tailor v. Kingsway Stores (above) Okesuji v. Lawal (above).
254 Okesuji v. Lawal (above) at 433 per Kolawole JCA
255 Taylor v. Kingsway Stores (above).
256 (above).
257 Shodipo v. Coker (above).
258 Robert v. Kenny (above)

TFL took possession.[259] In addition, TFL as a trustee has the duty to account and give information to the beneficiaries and breach of these duties would make the TFL liable to refund because the beneficiaries would be entitled to equitable relief of restoration to the trust fund, for the deficit.[260] In **DAVIES v. ADMINISTRATOR-GENERAL**[261] by his Will the testator devised landed property to two of his natural children remainder to D upon trust to sell the same and apply the proceeds to the lawful children of his late two brothers as joint tenants. D as TFL sold the trust property for 57,200 pounds and paid commission of 2, 860 pounds to AA. P as a beneficiary complained that the payment of commission on the sale of the property was wrongful, fraudulent and alleged several breaches of trust and dilapidation of the property. D denied the allegation but averred that even if there was any breach, he acted honestly, reasonably, fairly in the discharge of his duties as a trustee and ought to be excused and relieved from liability. It was held thus; -

1.On the evidence. AA was not entitled to the commission he received because he did not introduce the purchaser but merely engaged to show him the property and therefore reasonable remuneration would have been 50 pounds.
2. The D was in clear breach of duty to give information and render proper account to P.
3, D did nothing to supervise workers and had allowed the property to continue its decline. For all trustees so many failings are deplorable – in a public trustee for remuneration, these constituted unreasonable inexcusable conduct.
4. As regards the loss to the trust fund, the price of 57, 200 obtained for the sale of the trust property was a very good one and it could not be concluded that the price would have been enhanced had D had maintained the property in the condition it was when he took it over.[262]

Applying the **Equitable Relief of Restoration** of trust fund, **DOUGLAS CJ** emphatically ordered D to **restore the commission** together **with bank interests** on the ground that D did not display time and responsibly in the management of the trust property. **His Lordship** ordered D to pay from his pocket 90, 12s.8p charged as commission on the receipt of

259 Davies v. Admin-General (below)
260 Davies v. Admin-General (below)
261 (1965) 9 Jamaican LR 200 at 201
262 Davies v. Admin-General (below)

ISSN 2581 3382
Annual Volume 10 – 2024

pasturage, produce, salvage materials and rentals and the 2, 810 unreasonably paid as commission. **His Lordship** further ordered D to **wind-up the trust** and **pay all the beneficiaries** all their entitlements. For his **misconduct** and failure to exercise **higher diligence**, D was ordered to pay P the cost of this litigation.

17. The Impact of Land Use Act 1978 on Strict Settlements and on the Powers of Tenant for Life

It is necessary to probe the effect or impact of Land Use Act 1978 on strict settlement and the impact thereof on powers of the tenant for life. This would guide conveyancers and other legal practitioners involved in Real property practice. We already argued that strict settlement has not been abolished by virtue of **S. 25 Land Use Act 1978** provided it involves disposition of the entire and fractional part (s) of the interests comprised in the landed property sought to be disposed to the settlor's objects/beneficiaries via settlement. In further support of this line of argument is

S.48 LAND USE ACT 1978 which provides:

> "**....** All existing laws relating to the... transfer of title to or interest in land shall have effect subject to such modification (whether by way of addition, alteration or omission) as will bring those laws in conformity with the Act and its general intendment."

No doubt, settlement involves a transfer of title or interest in land to the trustees for the beneficiaries/objects by the settlor.[263] With the apparent preservation of all the existing laws relating to settlement (whether statutory or common laws) pursuant to **S. 48 LAND USE ACT 1978**; the only thing remaining is their modifications to suit the intendment of the Land Use Act.

[263] Okesuji v. Lawal (above).

It is submitted that the settlor can dispose his Right of Occupancy interest in land via settlement only with or without the consent of the Governor in respect of urban land or the Chairman of Local Government Authority in case of Rural Land.[264] Similarly TFL in exercising powers of sale, exchange mortgage, charge, lease, pledge etc which fall within the transactions constituting alienation need to apply for necessary consent this leads to double consent after the procurement of initial one by the settlor creating the settlement. This is justifiable since the creation of settlement and the disposition of interests created therein by TFL involved two separate unrelated transactions. Short leases of 5 years duration or less and other dealings on the settled land of temporary nature would enjoy a waiver of this consent provisions.[265] It is further submitted that the provisions of the Settled Land Acts. 1882-1890 and the Common Law Principles outlined above are saved and would continue to apply, there being nothing inconsistent between them and the provisions of the Land Use Act. Prospective settlor or testators wishing to device real property to dependents and favourite objects through settlements are free to do so today. There would be no infringement of consent provisions for an agreement to create strict settlement of Right of Occupancy (agreement to alienate) as opposed to actual alienation[266].

This is because **S. 22 (2) Land Use Act 1978** which provides that the Governor may require prospective transferor (settlor or testator creating settlement) so submit an instrument of execution (deed of settlement) in evidence of the transfer (settlement) on which consent can be endorsed recognized some form of agreement before consent is sought subsequently[267]. A form of initial preparation, execution of the deed of settlement distributing real property to objects in succession is feasible by the settlor and his lawyer before consent is eventually applied for; as consent cannot be given in vacuum of the deed of settlement on which it can be endorsed.[268]

264 See note 17 (above).
265 SS. 1 & 2 Land Use (amendment) Law No. 3 (1979) (Lagos State) which provide that consent is not required for a lease of 5 years or less. This is another obvious modification envisaged by S. 48 Land Use Act 1978.
266 Niger Mills Co. Ltd v. Nigeria Port Authority (1974) 6 CCHCJ 705, Rhodes v. Dalby (1971) 1 WLR 1325, Solanke v. Abed (1962) 1 All NLR 230, Abubakar v. Edematie (1950) 17 NLR 75, Motunde Properties (Nigeria) Limited. v. Kanu (1974) 10 CCHCJ 1507.
267 Prof. J.A. Omotola - Essays on Land Use Act p. 31, Dennings v. Edwards (1961) AC 245.
268 See notes 97 and 98 (supra).

Nigerian military rulers passed the LAND USE ACT 1978.[269] It is the fundamental legislation in the property law which has nationalized all the radical title of all the land in each of the 36 states of Nigeria. The legal effect is that the radical title and management of all land have been removed from individuals and vested on the State Governor in accordance with the provisions of the Act.[270] Similarly, under **S. 3 LAND ACT**[271] the whole land of the main land Tanzania (Tanganyika) whether occupied or unoccupied were declared public land. All freehold lands were extinguished[272] in the past, in the past 1963, first, in July and the ownership of the whole land of Tanzania became public and individuals could no longer, in a general sense; own land[273]. All Government leases[274] and the whole of the land were converted to Right of Occupancy. While the Tanzanian land Act vests the entire land on the president for the use and benefits of Tanzanian people the Nigerian Land Use Act vests all the land comprised in each state on the Governor of that particular State. Strictly, the Governor is not a beneficial owner[275] but holds the land on trust and administers same for the benefit of all Nigerians[276]. Former estate owners in free simple have been stripped of absolute[277] ownership and demoted to an inferior owner of a kind of estate in a diminutive form called a Right of occupancy.[278] This diminished estate in land called Right of Occupancy can only be alienated with the consent of the State Governor[279] and consent of President of Tanzania.[280]

269 S. 1 Land Use Act 1978, Nkwocha v. Governor Anambra State of Nigeria (1984) 6 SC 362 at 403, Mohammed v. Lang (2001) 3 NWLR (Pt. 700) 389 to the effect that Land Use Act nationalized on lands in Nigeria.

270 Nnadi v. Okoro (1998) 1 NWLR (Pt. 535) 573 at 579-580

271 1923 Now Cap. 113 (Laws of Tanzania) 1999.

272 Freehold Titles Conversion Act No. 24 1963 (Tanzania).

273 Zebron S, Godwe (Dr.) Manual of Transfer of Right of Occupancy in Tanzania (2001) pp. 3-20 (Mkuki Na Nyota Publishers) Dar es Salaam.

274 Government Leaseholds (Conversion of Rights of Occupancy) Act Cap. 44 1969 (Tanzania).

275 Savannah Bank Ltd. v. Ajilo (1989) 1 NWLR (Pt. 97) 305 at 309 (SCN).

276 Abioye v. Yakubu (1991) 1 NWLR (190) 130 at 256 (SCN).

277 Obikoya & Sons Limited. v. Governor Lagos State (1987) 1 NWLR (pt. 50) 285 at 390 (CA), Adenipekun v. Onigemo (1983) 1 ODSLR 85 at 88.

278 SS. 1, 2, 5, 6, 34 and 36 Land Use Act 1978, Otti v. Attorney General Plateau State (1985) HCNLR 787 Aff'd (1986) 3 CA (Pt. 2) 235 at 340.

279 SS. 21 & 22 Land Use Act 1978, NITEL PLC v. Rockonoh Property Co. Ltd (1995) 2 NWLR (Pt. 378) 473.

280 SS. 11 (1) (7) Land Act 1999 (Tanzania).

18. Conclusion and Proposals for Reforms

In spite of the clumsy and awkward nature, Strict Settlement is still very useful device to make provisions for members of the Settlors' family and his desired objects in the larger society. The rules against perpetuities, are also useful concepts which the common law invented to remove the fettering of lands or its inalienability which would lead to waste. The promotion of marketability of land in turn influences free economy and forestalls the concentration of wealth in the hands of the privileged few. The distribution and redistribution of prosperity/treasures to all and sundry in the Countries while imposing some control over the remoteness of vesting of real property, are very advantageous in the context of trust, settlement, grants of future easements and commercial option to purchase freehold reversion of a building lease.[281] The intention is similar to that of Land Use Act 1978 (Nigeria), Land Ordinance 1919 (Tanzania)[282] whose main aim is to redistribute land and make it more available to everybody rather than concentrating it in the hands of privileged few families' land owners. The real property market in turn aids conveyancing practice. The anticipated economic danger that is being removed by the rules were appreciated.[283] Facilitating alienability also yields taxes and revenues to the government who have to charge consent fees for each and various categories of assignments and alienation of interests in land - collect the various taxes such as estate duties, inheritance tax, gift tax, capital transfer tax and capital gains tax. The proposal for reform is for the various States to consider its reintroduction because the perceived complication, misconception and difficulties leading to its abrogation, do not exist anymore, from the forgoing. The rules against perpetuities, despite fulfilling economic and social functions, serve as a guide and caution to unwary conveyancers[284] and helpful to property lawyers to avoid arrays of traps and pitfalls. This is because the non-observance of the rules in the real estate conveyancing transactions may not only defeat the testamentary dispositions but would lead to series of litigation in future. It is just the fear of the unknown. In spite of all the criticisms, it is a useful rule disapproving constraints,

[281] Option to develop/purchase in a building lease of undeveloped vacant land
[282] Now Land Act 1999 (Tanzania)
[283] Lewis N. Simes – The Policy Against Perpetuities (1955) 103 Pa. L. Rev.707 at 708-710 and Ronald H. Maudsley – The Modern Law of Perpetuities (London Butterworth 1979) pp 29-33

[284] Lucy-Ann Buckley – Perpetuities Reform in Ireland (2002) 37(1) The Jurist pp.143-166

impediments and restrictions on property rights,[285] - it is vital because it enhances the marketability of interests in land by limiting its remoteness and as a public policy it is a legal prohibition not waivable.[286] Many others who interpreted this doctrine are in agreement that common law favours early vesting of interests/estates/rights in property.[287]

On the overall assessments, the study addressed th research problems for example, it guides and grabs he attention of the international business law jurist, academics and investors, to know how to handle land matters mostly when it comes to direct investment in many countries around the world. It is noteworthy to observe that strict settlement corrected the ills committed by the testators in holding lands in a wasted manner. Wider readership is promoted by the voluminous nature of this paper as it covers vast area of land issues and the citations promote wider understanding of the idea that land ownership in Africa is perceived differently from that of many parts of the world.

[285] Cole v. Peters 3 S.W.3d. 846
[286] Wedel v. American Electric Power Service Corp 681 N.E. 2d 1122 (Ind. App. 1997), Estate of Kreuzer 243 A.D. 2d. 207, 674 N.Y.S. 2d. 505 (N.Y.A, D). 3d Dept. 1998)0
[287] Symphony Space Inc v. Pergola Properties Inc 88 N, Y,1996

ISSN 2581 3382
Annual Volume 10 – 2024