Privity of Contract and Continuing Liability of Tenants in Leases: Need for Reform in Nigeria

I. O. Smith

Mr. I. O. Smith*, LL.B., LL.M., Barrister-at-Law is a Senior Lecturer at the Lagos State University Lagos.*

Introduction

The basis for enforcement of covenants in leases lies in privity either of contract or of estate. On the principle of privity hinges the running of covenants with the lease or with the reversion for the duration of the term[1]. Although a lease generally creates privity of estate[2] between the original parties to the lease, or between the assignee of the lease or of the reversion and the original landlord or the original tenant respectively; privity of contract[3] is applicable as between the original parties to the lease only.

The privity of contract makes the original parties to a lease bound by any form of covenant there under[4] for the duration of the term in accordance with the normal rule of the law contract. This accords with the reasonable expectation of parties and, as a matter of law, wholly unexceptionable. What is rather astonishing is that at law, the obligations of the original parties under the lease agreement continue after an assignment of the lease or the reversion thereby disappointing the reasonable expectation of parties to the lease. The common law principle has been given statutory recognition in some states in Nigeria[5] with very slim remedies open to the parties. The effect especially on tenant's liabilities is drastic and far-reaching.

This paper examines the application of this ancient principle against the background of recent development in some common law jurisdictions and in the context of modern concept of tenancy. The central thesis is a query on the full application of the consequences of a concept which has become anomalous in view of the peculiar circumstances of the relationship of landlord and tenant; circumstances which the law must recognise and cater for[6].

The Privity of Contract Principle

The privity of contract principle in relation to leases is that a landlord or tenant who covenants to be bound by obligations in a lease for the duration of the term created by the lease remains liable for breach of covenant which occur after he has disposed of his interest in the leasehold property[7]. This anachronistic and unjust principle of the common law applies in all cases where there is an assignment of the lease by the tenant or the reversion by the landlord notwithstanding that in such cases, the assignor has transferred the totality of his interest to the assignee over whom he has neither control as regards observance of the covenants nor the opportunity of rejecting him as financially unsound.

Although designed to operate between the two original parties to the lease (the landlord and tenant), it has served the interest of the landlord mainly; always working to the detriment of the tenant in cases where the assignee of the lease is either insolvent and unable to pay his rent or otherwise failed to perform some other obligation under the lease. In the words of Lord Nicholls in the recent English case of *Hindcastle Ltd v. Barbara Attenborough Associates Ltd*[8]:

> "Sometimes, in post assignment cases, the landlord's protection may be achieved at an unreasonably high price to others. The insolvency may occur many years after the lease was granted, long after the original tenant parted with his interest in the lease. He paid the rent until he left, and then took on the responsibility of other premises. A person of modest means is understandably shocked when out of the blue, he receives a rent demand from the landlord of the property he once leased. Unlike the landlord, he has no control over the identity of the assignee down the line. He had no opportunity to reject them as financially unsound. He is, even more horrified when he discovers that the rent demanded exceeds the current rental value of the property"[9].

Precarious as the position of the original tenant may be courtesy of the privity of contract principle, liability of the insolvent assignee may be discharged through a disclaimer by the trustee in bankruptcy (in the case of the individual) or the liquidator (in the case of the company) to the detriment of the original tenant who will lose his right of indemnity against such assignee[10]. The liability of the original tenant is not that of guarantor arising after an unsuccessful pursuit of claim against the assignee; it is a primary liability directly falling on the tenant whenever the assignee defaults.[11]

The common law principle of privity of contract has received statutory recognition in relation to former tenant's liability for rent in Nigeria. In both Rivers and Kaduna States, for example, the Landlord and Tenant Edicts[12] with similar provisions reaffirm the liability of the original tenant for rent after assignment of the tenancy. For example, section 91(3) and (4) of the Landlord and Tenant Edict of Rivers State provides as follows:

> "91(3) Assignment by a lessee to a third party shall not affect the existence of privity of contract between the sublessee and the sublessor and accordingly, the sublessee shall continue to be liable to pay rent under the sublease notwithstanding that the sublease has been assigned and the privity of estate no longer exists between the sublessee and the sublessor.
>
> (4) Where a sublease is assigned by the sublessee, the sublessor shall have a right to recover the rent payable under that sublease from either the sublessee or the assignee, or partly from the sublessee and partly from the assignee notwithstanding the assignment and notwithstanding that the sublessor may have consented to the assignment"

The above provision restate the position at common law with regards to liability of former tenants for rent owed by the assignee of the lease. It is worthy of note however that the terms "sublessor" and "sublessee" are not substantially different from the terms "Lessor" and "Lessee" at common law; they are terminologies arising from the special circumstances existing under the Nigeria land tenure system. Unlike the position at common law where the lessor has a freehold interest, the lessor under the Land Use Act is believed to have a leasehold interest since the radical title has been vested in the Governor.[13] As a holder of a leasehold interest, what can be created out of that interest is a sublease[14] which is the same as a lease at common law, so that the holder becomes a "sublessor" (same as "lessor" or "Landlord" at common law) and the person in whose favour the lease is created becomes the "sublessee" (same as "lessee" or tenant at common law).[15]

In other states where no legislation like those in Kaduna and Rivers State exist, the common law remains applicable and shall be applied by the courts.[16]

Future liability of former tenants is not restricted to arrears of rent owed by assignee of the lease but also includes breach of other covenants such as covenants to repair for which the lessor can claim damages from the former tenant or the operation of the rent review clause agreed between the lessor and assignee of the lease. The common law position applies in Nigeria in the absence of contrary provisions of any statute.[17]

Scope and Application of the Principle

Liability of former tenants for future liabilities continues for the duration of the lease.18 For example, if the original tenant T1 who had a ten-year lease in January 1 1990 assigned the remainder of the term to T2 in 1995, T1 remains liable for any arrears of rent or breach of any other covenant in the headlease until an inclusive of December 31, 2000. This is so notwithstanding that the assignee i.e. T2 subsequently assigned to T3, T3 to T4 and so on. The liability may also arise in relation to any assignee in the chain and need not particularly relate to T2, the only assignee known to T1.[19]

Where the headlease conferred an option to enlarge the term on T1, and the latter never exercised the option before assigning to T2, T1 is nonetheless liable for the enlarged term where T2 or any subsequent assignee exercised the option20 and again, it is immaterial that any such assignee is unknown to the former tenant.

Sometimes, a post-assignment variation may arise leading to the knotty question: To what extent does the privity of contract subsisting between the former tenant and the lessor after assignment of the lease empower the assignee to deal with the estate so as to increase his liability and that of any successor with the consequent implication on the liability of the former tenant?

Before the recent decision of the English Court of Appeal in *Friends Provident Life Office v. British Railway Board*21 the principle deduced by the Courts from the old case of *Baynton v. Morgan*[22] was that a bona fide post assignment or variation leading to an alteration of the lease would bind the original tenant[23] and that would be so notwithstanding that the variation has resulted from an agreement between the lessor and an assignee of the lease mainly and exclusively.[24] In *Centrovincial Estates Plc v. Bulk Storage*[25], a substantial increase in rent resulting from the operation of the rent review clause in the original lease was held binding on the former tenant under the privity of contract rule. Although a rent review was not uncontemplated by the terms of the lease, the court acted under the deluded assumption that in all cases where an assignee altered a lease, the estate as altered was binding on the original tenant. The reasoning of the court as explained by Harman J. was that:

> "...each assignee is the owner of the whole estate to and can deal with it so as to alter it or its terms... The estate as altered then binds the original tenant, because the assignee has been put into the shoes of original tenant and can do all such acts as the original tenant could have done".[26]

That assumption informed the subsequent decision of the court in *Selous Street Properties Ltd v. Oronel Fabrics*[27] where it was held that the original tenant was bound by the higher rent payable consequent upon a rent review resulting from the agreement between the landlord and assignee of the lease which allowed improvements otherwise prohibited by the terms of the original lease.[28]

In the subsequent and the most recent decision of the Court of Appeal on the subject, the fallacy of the assumption in *Centrovincial* and *Selous Street Property* cases were exposed in *Friends Provident Life Office v. British Railway Board*.[29] In that case, the original tenant T1 who had a 21-year term of lease assigned the lease to T2 after six years. The following year, T2 executed a deed of variation with 'L' which substantially increased the rent and altered the covenants against alienation and user so as to facilitate the grant of tenancies and licences by T2. T2 further assigned to T3, a company which subsequently went into liquidation. 'L' sued T1 under privity of contract claiming rent which had accrued after the deed of variation. The Court of Appeal held that T1 was not liable for the higher rent. The reasoning of the Court of Appeal as expressed by Sir Christopher Slade was that:

> "If ...an assignee of the lease, by arrangement with the landlord agrees to undertake some obligation not contemplated by the contract contained in the original lease, the estate may be altered, but the variation does not affect the obligation of the original tenant"[30].

The Court gave the decision in *Baynton v. Morgan*[31] a restricted interpretation to the extent that while an assignment may empower an assignee to deal with the estate so as to increase his liability and that of any successor, it does not ipso facto amount to a variation in the contract between the original tenant and the landlord as contained in the headlease. The decision in *Centrovincial* case was held justified on the peculiar facts of that case since T1 in that case had bound himself to the terms as subsequently varied.

The position at common law as regards post assignment variation is that it does not affect the obligations of the original tenant unless it is contemplated by the contract contained in the original lease.[32] The same position holds under the statute in the absence of any provision to the contrary. It is important however that the variation be made bona fide and not out of malicious motive or fraudulent intent through collusion with the assignee who has no intention or means of meeting the said obligation.[33]

Limitations

The privity of contract liability is not open-ended. For example, since the basis for such liability is contractual, it only operates so far as the contractual term under the old tenancy subsists; it does not operate in the area of statutory tenancy such as where the assignee holds over and becomes a protected tenants under the statute.[34] Thus, in different parts of Nigeria where the statutes protect tenants of residential premises whose contractual tenancies have expired, the liability of the original tenant ceases where statutory protection commences. The policy behind these statutes as explained by the Supreme Court in a plethora of decisions is to provide security of tenure for occupying tenants[35] and not to impose future liability on original tenants.

The liability of the original tenant is limited to the duration of the original lease and presupposes that the original lease subsists. Where there is a surrender of the old lease and a regrant of a new one either by the act of parties[36] (i.e. between the landlord and the assignee of the lease) or by operation of law[37], the liabilities of the original tenant ceases. An express grant of a new lease by the landlord to the assignee of the original lease operates by way of a surrender of the old lease and a regrant of a new one. A surrender and regrant may also come about by operation of law if the new arrangements made between the landlord and assignee of the lease "can only be carried out so as to achieve the result which they have in mind if a new tenancy is in fact created."[38] A good example is where the arrangement has changed the estate either by extending the term or changing the physical extent of the premises.[39]

A release either by virtue of an agreement under the old lease or by an accord and satisfaction may put an end to the original tenant's liability. In the former case, there may be clause that "upon an assignment of the lease, the original tenant shall be released from further liabilities"[40]. To be effective, it has to be by deed otherwise, consideration must have been furnished by the original tenant. "Accord and satisfaction" is usually deduced from the conduct of the landlord such as where an assignee of the lease surrendered the lease and the landlord accepted certain goods in full and final settlement of all claims and demands against him. Such acceptance is sufficient accord and satisfaction which releases the original tenant from further liability on the principle of equity that a release of one joint or one joint and several contractor releases all others.

Options open to the Original Tenant

Outside the limitations set by the law perhaps to confine the application of the principle within contractual bounds, the original tenant is left either to adopt conveyancing techniques as a means of protection against liability or to pursue the limited remedies at law.

Conveyancing devices

Since the basis of liability of the original tenant lies in the existing contract between the latter and the landlord, the lease may exclude or restrict liability of the original tenant subsequent to the assignment of the leasehold interest or contain a clause compelling the landlord to take a direct covenant from the assignee. In the alternative, the original tenant as the first assignor may take express indemnity from the assignee who upon a further assignment would have taken an indemnity from his assignee with subsequent assignments taking the same pattern to form a chain enabling liability to be ultimately visited on the defaulting assignee.

In the old Western and Mid-Western States of Nigeria[41], there is an implied indemnity covenant upon assignment of the lease. This statutory covenant is guaranteed under the Property and Conveyancing Law[42] as contained in the schedule to the Law[43]. It imposes obligation on assignee or the person deriving title under them to pay rent and observe and perform all covenants contained in the lease and to indemnify the assignors and their estates and effects from and against all proceedings, costs claims and expenses on account of any omission to pay rent or any breach of any of the covenants[44]

One significant feature of the different conveyancing safeguards is that they are premised upon the risk of assumption or wishful thinking and the weakness is exposed when the assumption fails or the thinking of the original tenant proved wrong. The landlord's agreement to an excluding and limiting terms in the lease or the extraction of direct covenant from the assignee is a mere possibility which runs short of reality. The protection afforded the landlord by the privity of contract principle will not easily be traded off without other equal means of protection. The difficulty in finding a solvent defendant in times of recession is too high a price to pay for the concession. In long term leases with assignments subject to consent which cannot be unreasonably with held45, the landlord's solicitors is bound to take the practicality of the situation into consideration when drafting the lease. In leases of residential premises involving individual tenants, there is usually unequal bargaining power and more often than not, the tenant takes what he gets.

The effectiveness of express indemnity extracted from an assignee hinges on two presumptions—first, the existence of an unbroken chain of indemnities and second, the solvency or availability of the assignee. If it turned out that an indemnity was not taken at a stage, the original tenant is not covered by the earlier indemnity extracted from the first assignee and remains liable to the landlord46. In the event of the assignee's insolvency, the original tenant is at best an ordinary creditor with a dull prospect of restitution. Where the trustee in bankruptcy disclaimed the lease, the assignee and his guarantor would be discharged from liability with no relief to the original tenant[47]. In any case, where there is a chain of assignment and the original tenant's (A) immediate assignee (B) becomes bankrupt or disappears, the former cannot proceed against the next assignee (C) down the chain for a breach by the current tenant in possession unless (B) has assigned to him the benefit of C's covenant[48]

A claim against assignee in quasi contract

The original tenant made to pay for the default of an assignee may sue the latter in quasi contract to recover the sum so paid without having to prove any contractual nexus. This old principle of restitution formulated by Cockburn CJ in *Moule v. Garrett*[49] is a general proposition in all situations "where one person is compelled to pay damages by the legal default of another"[50]. But it has its limitations in relation to the original tenant reimbursement, for the assignee will only be liable for those breaches which have been committed during his tenancy as opposed to breaches committed throughout the remainder of the term.

This limitation was the basis of the court's refusal to make an order of reimbursement against an assignee in *RPH Ltd v. Mirror Group (Holdings) Ltd*[51]. In that case, the landlord sued the original tenant for arrears of rent in respect of a lease granted in 1970 and assigned in 1972 to T2. In 1979, T2 further assigned the lease to T3 who subsequently assigned to T4 in 1987. At the time of the action, only T3 was solvent but the Court refused to make an order of reimbursement against it since the rent being claimed did not relate to their period of tenancy. The Court also held that T1 could not compel T2 to enforce the benefit of its covenant against T3.

Another limitation to the original tenant's claim in quasi contract is that the assignee will only become liable to reimburse the original tenant where the breach is of a covenant which touches and concerns the land and not one which is merely personal or collateral. The basis for this is that the relationship between the original landlord and the assignee of the lease is that of privity of estate which makes the latter liable only for covenants having direct reference to the subject matter of the lease or affecting landlord and tenant qua tenant.

The effectiveness of a claim in quasi contract like indemnity covenants depends on the solvency of the assignee of the lease and whether the trustee in bankruptcy is disclaiming liability or not.

Action Against Assignee's Guarantor

One obvious advantage of having the assignee's obligations guaranteed is the measure of relief afforded the original tenant in the event of the assignee's insolvency. Upon settlement of the landlord's claim in rent or other damages, the original tenant may sue such guarantor claiming to be indemnified to the extent of pecuniary loss.[52] The claim may be made against the guarantor of the first or subsequent assignee without recourse to the defaulting assignee[53]. The effectiveness of this measure of relief however depends on the always looming question whether the guarantor is solvent or not.

Rationality of Application

The application of the privity of contract principle to leases has been known to have caused tenants a lot of nightmares over the years in spite of its equal application to their landlord counterparts. The reason is not far-fetched. Many covenants in leases create obligations for tenants especially in the areas of payment and review of rent as well as repairs or indemnity for repairs while generally, the landlord's obligation are mainly restricted to protection of the tenant's tenure and assurance of peaceful enjoyment of the leasehold property by the tenant. In most cases therefore, the tenant's obligations usually have financial implication which the assignee of the lease may not be disposed to or willing to meet, whereas the landlord's covenants mainly revolve around good and responsible conduct towards ensuring peaceable exclusive possession and the general welfare of the tenant with less emphasis on payment of money and consequently, lesser burden on the assignee of the reversion. In practice, case law has shown that almost all the cases on enforcement of covenant via the principle, it has been the lessee's covenant which were brought to be enforced and only in very few cases had the tenants a way out of the onerous and sometimes unanticipated liability. What then is the rationale behind this ancient principle of common law?

One obvious rationale can be found in the sanctity of contract. It is presumed that the tenant voluntarily assumed contractual liability when he entered into the lease agreement with the opportunity to bargain for his liability not to survive an assignment of the lease, or at least to limit such potential liability. However, the practical situation in modern times is that equality of bargaining power largely assumed between landlord and tenant is an illusion especially with regards to individual tenants; a fact which has since been recognised by statutes in many common law countries including Nigeria. Also, in a country like Nigeria where there is a high level of illiteracy and low level of information and inadequate mass education on issues such as this, there is widespread ignorance amongst tenants as to the nature of the doctrine and its applicability to them.

The growing importance of institutional leases in the commercial property market appears to be a stronger rationale for the application of the principle in modern times. The domination of the commercial property market by institutional investors like the banks and insurance companies for whom property is an investment medium with the need for a secure income stream has made the principle more relevant than ever before in guaranteeing security of income and an assurance that real property maintains its competitive edge over gilts and equities[54]. It has been argued that an abolition may result in "damage to the investment value of existing leases; a diminution in the development of properties let thereby stifling new development; a compensatory rise in rent levels and a slowing down of assignment negotiations"[55] as landlords would need more time to select assignees. But while the predicted consequences of abrogation of the principle remains a matter for speculation, such consequences may be averted by the landlord insisting on a guarantee from the assigning tenant covering the performance of covenants in the headlease by the assignee as a condition of consent to a proposed assignment. The lessee's liability in such cases would have been contemplated and anticipated carrying with it the option to accept or reject prior to such assignment.

Another argument being put forward as the basis for making the original tenant liable under the privity of contract principle is that "the assignee has been put into the shoes of the original tenant and can do all such acts as the original tenant could have done."[56] This argument is absurd to say the least. If the assignee of the lease stepped into the shoes of the original tenant, it should follow that all contractual obligation hitherto borne by the tenant would be borne by the assignee who should be primarily liable to the lessor for any breach in contract. On the contrary, the effect of the operation of the privity of contract principle is that the tenant and not the assignee remains directly and primarily liable to the landlord for the whole of the term[57] and the latter cannot be compelled to exhaust his remedies against the defaulter-assignee.

Modern Trend

In recent times, attention has been drawn in some common law jurisdictions to the resultant hardship to the original tenant from the invocation of the privity contract principle[58] and varying incursions have been made or proposed in response. For example in Newzealand, the Residential Tenancies Act was promulgated in 1986 releasing residential tenants from liability on lawful assignment of his interest while the assigning tenants in commercial leases remain liable throughout the lease[59]. In the Canadian province of Manitoba, the position in Newzealand has been followed with a further step taken by its Law Reform Commission in 1995 proposing that a tenant of a commercial lease should not be primarily liable subsequent to assignment, but as a guarantor[60]. A major incursion into the application of the principle to commercial leases was made in England in 1995. The Landlord and Tenant (covenant) Act which came into force on 1 January 1996 provides that for leases granted on or after 1 January 1996[61], the original tenant will generally be released from covenants in the lease once the lease has been assigned[62]. Unlike the position in Newzealand and the Canadian province of Manitoba which protects former tenants of residential premises from future liabilities, the English Landlord and Tenant (Covenant) Act 1995 protects former tenants of commercial leases exclusively. Although in none of these jurisdictions has the existing law covered both residential and commercial leases, the abrogation of the privity of contract principle in relation to one form of lease or another is suggestive of the fact that all is not well with this principle.

Towards Reform in Nigeria

As between parties to a lease agreement, the landlord is always at a vantage position. Not only does he dictate many of the terms in the agreement, he usually reserves for himself that effective weapon of forfeiture to which recourse may be had for breach of covenant. The Landlord always have the opportunity not only of prescribing qualifications to assignment at the time of creating the lease which may include the type of assignee and his financial standing, but also of exercising control over assignee and the other subsequent assignees after assignment of the lease by the original tenant. He is therefore in a position to monitor the user of the premises and observance of different covenants including covenants to pay rent and effect repairs by the assignee of the lease. For the purpose of effective monitoring, the right of inspection on a regular basis but at reasonable hours of the day is usually reserved for the landlord in practice. All covenants having direct reference to the estate in existence form the foundation of the relationship of privity of estate between the landlord and the assignee of the lease which privity ceases to exist between the landlord and the original tenant upon an assignment of the lease. It is that privity of estate which makes the difference between a lease agreement and other agreements in contract and on it lies the "true privity" between the reversioner and any person holding an estate created from the larger estate whether as original tenant or as an assignee of the lease. It is this difference that the law should accord recognition in construing rights and liabilities in leases.

The tenant is usually on the receiving end from the inception. It is the landlord's solicitor that prepares the terms of the lease for him to consider and in cases of residential accommodation in urban centres where there is acute shortage, most tenants will not look at the terms twice before signing. The situation is made worse by the low level of literacy and lack of financial means to engage the services of a solicitor to scrutinize the agreement and bargain on behalf of the tenant. This often result in inequality of bargaining power so that the notion that parties are bound by their agreement becomes a farce and remain unrealistic. Whatever control the tenant has on the assignee of the lease becomes a mirage after assignment. He has nothing to do with the subject matter of the lease anymore either as to the manner of user or as regards monitoring the observance of covenants by the assignee and cannot retake possession to mitigate losses or avert further breaches of covenants. The original tenant has no control over the identities of subsequent assignees down the line and has no opportunity of rejecting them as financially unsound: their presence can only exist in the tenant's imagination.

That the privity of contract in leases is a trap for the unwary and unjustifiable in principle cannot be in doubt. In making suggestion for reform through legislation, different options may be considered as follows:

(i) The reverse presumption

One major criticism of the application of privity of contract rule in leases is that tenants are usually ignorant of that presumption of law when entering into lease agreements. An option therefore is to construe the application of the principle in the reverse and introduce the rule that privity of contract principle does not apply unless the lease made it clear that the liability of the original parties continues after they have parted with their interests. The application of the principle will therefore depend on contract between the parties to which, it is presumed, the tenant has the opportunity of accepting or rejecting at the negotiation stage. For commercial lease, that may be true to a large extent since such clauses may be construed accordingly in circumstances under which the tenant has a choice either to accept or reject the terms. The availability of an expert to construe the lengthy and complex provisions of the lease agreement and the competitive nature of the readily available commercial premises in many cities in Nigeria give the exercise of option by such commercial tenants an aura of reality. The situation is different in the case of residential leases. As a result of scarcity of affordable residential accommodation, prospective tenants sign all sorts of onerous terms to secure accommodation and in most cases, without reading same. A request by the prospective tenant to take such agreement away to study it with the assistance of his solicitor spoils his chances of securing an accommodation. While the scenario cannot provide a defence in law, there is the need in modern times to take cognizance of social circumstances as a factor undermining equality of bargaining power in lease agreements. Any reform along the line of reverse presumption must therefore take cognizance of the weaker position of residential tenants and provide adequate safeguards.

(ii) Excluding liability for breach of all covenants 'touching and concerning' the land

Since the privity of estate hitherto existing between the two original parties to the lease became extinguished upon assignment of the lease by the original tenant, the reasonable expectation is that all covenants having direct reference to the estate such as covenants to pay rent or to carry out repairs on the leasehold property will no longer be binding on the tenant. Where there is a breach of such covenants by the assignee of the lease, the latter should become liable primarily and exclusively. To protect weaker tenants, it might be necessary to make provision for anti-avoidance clause in the legislation which will automatically render void any agreement (save for a valid guarantee agreement) which would otherwise exclude, modify or frustrate the provision of the Law on the issue in question.

(iii) Drawing a distinction between residential and commercial leases for purposes of liability

In different common law jurisdiction where in roads have been made into the operation of the principle of privity of contract in leases, the choices has been between residential and commercial leases. Both in Newzealand and the Canadian province of Manitoba, justification was found in protectionism[63]. The need to protect the unwary but desperate prospective tenants in need of residential accommodation made abrogation of the principle imperative. In England, the recession of the property market resulting in many business failures and consequently the exposure of former tenants to liability through the privity of contract principle[64] made parliament to view its application to commercial leases seriously. The moves towards reform in the different jurisdiction were therefore dictated by the social or economic situation at different times.

If experience in Nigeria over the decades is anything to go by, drawing a distinction between the two categories of leases for purpose of protection is the exception rather than the rule. Except in the narrow area of rent control[65], statutory protection has always existed to protect tenants in both category of leases[66]. While proposition under this head is made for the consideration of law reform in Nigeria, exercising the option either to draw this distinction or to prefer a blanket abrogation of the principle in leases requires an analytical view of different operators of the property market such as estate surveyors and valuers, representatives of landlord and tenant associations, lending institutions etc., on the socio-economic implication of either of the two options. It is suggested however that where abrogation is considered in respect of residential accommodation mainly, cognizance should be taken of the proposal of the Law Reform Commission of the Canadian province of Manitoba that a tenant of a commercial lease should not be primarily liable subsequent to assignment, but as a guarantor[67].

Conclusion

The application of the privity of contract principle to leases is fast becoming out of tune with the socio-economic realities of the property market in modern times. In an era where risk bearing has become the trade of specialised institutions and emphasis shifting from contract to protection of status, there is no room for mechanical application of an anachronistic rule designed for an age when market was less competitive and non-complex. In all commercial interest in real property, there has been a paradigm shift from mere adoration of formal agreements and a doctrinaire approach to common law rules regulating such agreements to a consideration of socio-economic implications in formulating rules to regulate contractual relation.[68] In leases particularly, the trend in modern times has been the formulation of regulations meant to protect the tenure and welfare of tenants outside any formal agreement or common law principles.[69] The area of privity of contract should not be an exception.

NOTES

1. For a general discussion of running of covenants in leases, see I. O. Smith: "The Law of Real Property in Nigeria" (1995), The Law Centre, LASU pp. 123-125.

2. Privity of estate arises as a result of the creation of a new legal estate vesting the property in the tenant for a definite period.

3. This follows from offer, acceptance and consideration. But note that a valid lease is not created unless there are certainties of parties, property, time and terms as well as the existence of exclusive possession.

4. Unlike privity of estate which makes parties bound by covenants that 'touch and concern' the land mainly, privity of contract enables parties to enforce other personal or collateral covenants as well. A covenant is said to touch and concern the land when it has direct reference to the land or concens landlord qua landlord or tenant qua tenant. See Hwa Chiao Commercial Bank Ltd. v. Chiaphua Industries (1987) AC 99.

5. Supra.

6. An agreement between two parties to a lease is not merely a contract, it creates an estate which is vested in the tenant. The tenant becomes an owner of the estate for the duration of the term and is said to have exclusive possession. Although there is no privity of contract between the original parties to the lease and an assignee either of the lease or of the reversion, the assignee can still enforce certain covenants touching and concerning the subject matter of the lease.

7. See Rushdens case (1533) 1 Dy. 4: 73 E.R. 10; Walkers case (1587) 3 Co. Rep. 22; 76 E.R. 676; Thursby v. Plant (1668) 1 Wms. Sound 230; 85 E.R. 254. This principle applies in many common law jurisdictions like Australia, Canada and Newzealand; See respectively, Picton-Warlow v. Photo Engravers Ltd (1934) 1 NZLR 412; Fair Investments Ltd v. Mahoe Buildings Ltd (1992) 3 NZLR 734 (Newzealand); Avlor Development Ltd v. Sanford Construction Ltd (1987) 5 ACWS (3d) 239 (British Columbia). The principle also applies in majority of American States: See R. S. Schoshinski, American Law of Landlord and Tenant (Rochester, N.Y. 1980) para 8.12.

8. (1996) 2 WLR 262.

9. Ibid. at 268.

10. See Warnford Investments Ltd v. Duckworth (1979) Ch 127 at 137 per Megarry V-C.

11. Baynton v. Morgan (1888) 22QBD 74.

12. See footnote 5.

13. Reliance is always placed on ss. 1, 5, 8, 10 and 16 of the Land Use Act, 1978 Cap. 202 LFN 1990 for that proposition. But see Obaseki JSC in Osho v. Foreign Finance Corporation (1991) 4 NWLR (Pt. 184) 157 at 192 para G where His Lordship (delivering the lead judgement of the supreme court) held that "the interest of a lessee in land is not the same as that of a holder of a right of occupancy. A holder of a right of occupancy enjoys a larger interest than a holder of a lease although the two interests enjoy a common denominator which is a term of years".

14. See Edict No. 4 of Rivers State, s. 122, Edict No. 17 of Kaduna State, s. 3.

15. Ibid.

16. The old common law principle was received into Nigeria by the Law (Miscellaneous) Provisions Act, 1945.

17. Not that the provisions of Edict No. 4 of Rivers State and Edict No. 17 of Kaduna State do not go beyond continuing liability of original tenant for rent.

18. See Warnford Investments Ltd. v. Duckworth (Supra).

19. Ibid.

20. See Baker v. Merckel (1960) 1 QBD 657.

21. (1996) 1 ALL ER 336.

22. Supra.

23. Centrovincial Estates Plc v. Bulkstorage Ltd. (1983) 46 P & CR 393.

24. Selous Street Properties Ltd v. Oronel Fabrics Ltd. (1984) 270 EG 643.

25. Supra.

26. Ibid. 396.

27. Supra.

28. Both decisions were followed in CUS Property Management Ltd v. Texas Homecare Ltd. (1993) 2 EGLR 6.

29. Supra.

30. Ibid. at 351.

31. Supra.

32. That was the basis of the court's decision in Friends Provident Life Office v. British Railway Board (supra). On the strength of that principle, it is doubtful whether the decision in Selous Street Property case can now be regarded as good law.

33. See Friends Provident Life Office v. British Railway Board (supra).

34. See City of London Corporation v. Fell (1994) 1AC 458. The rationale behind the principle as Lord Templeman put it was that the statute was "intended and expressed to protect occupying tenants".

35. See Oduye v. Nigerian Airways (1987) 2 NWLR (Pt. 55) 145-146; 155.

36. This is usually in writing under seal.

37. Per Russell L. J. in Lewis v. Kerman (1971) ch 477.

38. Per Russell L. J. in Lewis v. Kerman (supra).

39. See Friends Provident Life Office v. British Railway Board (1996) 1 All ER 336, 345.

40. See Deanplan Ltd v. Mahmud (1993) ch 151.

41. Now Oyo, Ogun, Ondo, Ekiti, Osun, Edo and Delta States.

42. See s. 101 of the PCL, Cap 100 LWN, 1959. See corresponding provisions in cap 98, Laws of Ogun State Vol. V 1978; cap 99 Laws of Oyo State Vol. V 1978; cap 100 Laws of Ondo State Vol. V 1978.

43. See parts vii and viii, schedule 2 of all the laws cited in footnote 42 above.

44. These implied covenants bind assignees of the lease as well as assignees of the reversion.

45. See Theodorou v. Bloom (1964) 1 WLR 1152.

46. This is the far reaching effect of the operation of the privity of contract principle in leases. See Hindcastle Ltd v. Barbara Attenborough Associates Ltd. (1996) 2 WLR 262 at 268.

47. Hindcastle Ltd v. Barbara Attenborough Associates Ltd (supra).

48. Selous Street Properties Ltd. v. Oronel Fabrics Ltd. (supra). But where an immediate assignee becomes bankrupt, the original tenant can take from the trustee in bankruptcy or liquidator an assignment of that assignee's right of indemnity against the next person in the chain and can seek recourse from the latter — see Becton Dickinson UK Ltd v. Zwebner (1989) QBD. 208.

49. (1872) LR 79 Ex. ch. 101.

50. Ibid. at 104.

51. (1993) 65 P. & C.R. 252.

52. The reason lies in the fact that the assignee of a lease is not liable in contract by virtue of holding an estate.

53. Becton Dickinson Ltd v. Zwebner (supra).

54. Martin Davey: Privity of contract and Leases — Reform at last 59 MLR (No. 1) Jan. 1996.

55. Martin Davey, op. cit.

56. Per Harman J. in Centrovincial Estates Plc v. Bulk Storage Ltd. (supra) at 396.

57. Baynton v. Morgan (1888) 22 QBD. 74.

58. See Newzealand Property Law and Equity Reform Committee. Final Report on Legislation relating to Landlord and Tenant (Wellington 1986); Manitoba Law Reform Commission, Report No. 86, Covenants in Commercial Leases (Winnipeg 1995); The English Law Commission Paper on "Privity of Contract and Estate: Duration of Liability of Parties in Leases", W.P. No. 95, 1986.

59. Residential Tenancies Act 1986, s.44(6).

60. See footnote 58.

61. Leases created pursuant to a contract entered into before that date or as a result of a court order made before that date are excluded; see s.1(3) of the Act. Where there is any variation of a tenancy, there is a deemed surrender and regrant, and a new tenancy is created for purpose of the Act; See s.1(5) of the Act.

62. The position with regards to the original landlord upon an assignment of the reversion is different. To be released from future liabilities, the landlord must apply to the tenant by service of a notice within four weeks of the assignment informing him of the assignment and requesting a release. If the tenant serves a counter-notice objecting to the release within four weeks of the notice, the landlord may seek a declaration from the court that it is reasonable for the covenant to be released and such declaration will be effective to release the landlord from the date of the assignment.

63. On Newzealand, see the Final Report on Legislation in relation to Landlord and Tenant (Wellington, 1986). See also Manitoba Law Reform Commission Report No. 86 1995.

64. Martin Davey, op. cit. at 85.

65. See for example, Edict No. 5 of Lagos State, 1996.

66. Recovery of premises statutes in different parts of Nigeria sought to protect the tenure of tenants in both residential and commercial premises. See for example Cap. 118 Laws of Lagos State of Nigeria.

67. See footnote 63.

68. Rules relating to equity of redemption in mortgages on land are characterised by this phenomenon.

69. Different pieces of legislation on rent control and recovery of premises were designed to meet this end.