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OFF PLAN PROPERTY PURCHASE – WHAT PROSPECTIVE BUYERS/SELLERS SHOULD CONSIDER

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Background

The importance of housing as a basic necessity for civilized living cannot be over emphasized. Unfortunately, access to affordable housing has continued to elude the average Nigerian. As such, various schemes have been devised to make ownership of houses better affordable and flexible than the typical conventional sale. One of such schemes is the “Off-the-Plan” or “Off Plan” sale of properties.

The affordability and relative flexibility that this scheme offers has led so many unwary buyers to purchase Off Plan properties without much consideration about the legal and practical implications of such a purchase.

This article discusses the major features of an Off Plan sale/ purchase and gives practical guide to buyers/sellers on the key legal and practical issues to consider in purchasing/selling a property Off Plan.

1.0 Introduction

The real estate sector in Nigeria has witnessed a boom in recent times which may not be unconnected to the surge in the demand for properties offered for sale off plan (hereinafter referred to as Off Plan properties). Off Plan properties is a term used to describe real properties which are not in existence at the time of sale/ purchase. In other words, interested buyers enter into a contract to purchase a real property pre - construction based on, amongst other things, the building plan, designs and track record of the developer/seller.

2.0 Off-Plan Structure

In Nigeria, the structure involves the collaboration of two or more parties. The first is the land owner who may or may not be the developer of the property. The second is the developer, who is charged with the responsibility of developing the property to completion. Lastly, is the prospective buyer who enters into a contract of sale under which he makes instalment payments usually based on milestone achievements until completion; when the property and title documents are delivered to him.

Advantages abound in favour of the parties alike. For the landowner/ developer, it affords an opportunity to develop the property with less financial constraints due to “certainty” of availability of cashflow for the project on account of the agreed payment plan with offtakers/ buyers. It further assures a set of committed buyers. On the other hand, it gives prospective buyers a chance (to the extent permissible) to personalise their property by making internal structural refinements, and determine the quality of fittings and fixtures of their properties. More importantly, the payment structure affords the buyers convenience and flexibility in payment. Also, considering the potential appreciation in the value of the property post- completion, buyers may be saving on costs when compared to the purchase of completed properties.

3.0 Risks of an Off Plan Structure

The uniqueness of the structure is not without risks. These risks include; documentation risks – inherent, *inter alia*, when the parties enter into non-comprehensive contracts; legal risks such as the buyer not obtaining good and perfect title to the property or non-compliance with planning and building regulations; political risks such as a government takeover / revocation of title to the property due to overriding public policy; construction risk of the property not reaching completion etc.

Indeed, the risks inherent in an Off Plan purchase are immense in comparison to the conventional purchase of real property. Interested buyers are often persuaded to conclude their decision to purchase a property merely by visiting the site, viewing its designs, models and building

plans as against inspecting a completed property. Thus, beyond viewing the building designs and plans, there are certain legal and practical considerations to note before a prospective buyer enters into an Off Plan contract of sale.

4.0 Legal and Practical Considerations

4.1 Proper Party – Land Owner/ Developer

One of the key points to consider is the proper party with whom the Contract of Sale should be executed. In a conventional sale, the status of each party is quite clear and a prospective buyer would typically conclude the transaction with the legal/beneficial owner of the property. However, having regard to the structure of an Off Plan sale, complications may arise as to the proper party with whom a contract should be executed.

It is worthy to note that only the legal/beneficial owner of a property can pass good title to a prospective buyer. In other words, entering into a contract of sale with a developer who has no title to the property may have grave consequences for the buyer. Thus, it behoves on the prospective buyer to confirm the role of the party with whom it is dealing i.e. whether it is the developer or the owner of the property.

Furthermore, in dealing with a developer who is not the owner of the property, it will be wise to clarify the relationship between the developer and the land owner; and request for perusal, the contract between the developer and the land owner. This will enable the buyer and/or his advisers to *inter alia* confirm; that indeed, an agreement to develop the property does exist between the parties; the scope of powers of the developer to deal with prospective buyers; and the developer’s entitlement out of the completed buildings. From our experience, whilst some developers may have a power of attorney to develop and sell the property, the scope of powers of other developers are restricted solely to the development of the property.

4.2 Conducting Due Diligence

Besides a physical inspection of the property, it is important to confirm the status of the property at the relevant lands registry to *inter alia*: ascertain the title and ownership of the property; confirm that the requisite building approvals have been obtained; and confirm that the property is not encumbered. Where the owner/developer is a corporate entity, due diligence should be extended to the Corporate Affairs Commission, to amongst other things, determine the ownership structure, board membership, particulars of charges (if any) and the status of the Company (i.e. whether the company is a going concern).

Having regard to the cost intensive nature of the development of Off Plan properties, it is not unusual for such properties to have been mortgaged in favour of financiers. Furthermore, the fact that the developer promoting the sale of the property is “renowned” is not a substitute for the prospective buyer’s obligation to conduct a detailed due diligence on the property. At best, it should only persuade the buyer of the standard of the property to be constructed on the Off Plan site.

4.3 Deposit or Part Payment – Much ado about nothing?

In making the initial payment for the Off Plan property, it is useful to note how the payment is described in the Contract of Sale i.e. as a “deposit” or as “part-payment”. Although used interchangeably, both terms however have different implications in law. A deposit is some token payment made by a buyer which is non-refundable in the event of default by the buyer. On the other hand, a part payment is a portion of the purchase price agreed between the parties and set out in a contract of sale; the balance of which is subsequently paid by the buyer. In the case of *Eka v. Kuju* (2013) LPELR

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-22124 , the Court held that where part payment was paid, the contract and purchase are absolute and complete for which each party can be in breach for non-performance and an action can be made for specific performance. A prospective buyer can, upon a breach and subject to the express terms of the contract recover the part payment as a debt;Tafida &Anor v. Garba (2013) LPELR- 22076 (CA). Thus it is always safe and advisable to insist on an initial payment being recorded as a part payment in the Off Plan property contract.

4.4 Offer Letter/ Contract of Sale

Often, in executing a preliminary documentation leading to a sale agreement, the prospective buyer is made to execute an offer letter or a contract of sale (or both).

An Offer Letter which is usually made “subject to contact” is essentially a letter prepared by the seller which sets out the preliminary terms and conditions upon which an agreement may be made between both parties which the prospective buyer may choose to accept by endorsing accordingly. A Contract of Sale, on the other hand, is a contract between the seller and buyer by which both parties express their intention to be bound; making it legally binding and enforceable by either party.

Whilst both documents may reflect one or more of the various elements of a valid contract in law, a contract of sale is preferred as it is a crystallisation of the intention of the parties to enter into a sale agreement. Furthermore, unlike an offer letter, a Contract of Sale is a more comprehensive document which addresses, in depth, the rights and obligations of both parties.

4.5 Terms of Contract of Sale

Another point worthy of consideration is the adequacy and/or comprehensiveness of the terms of the Contract of Sale. Experience has revealed that most Contracts of Sale do not sufficiently address key issues bothering on insurance, completion, delivery of property, insolvency of the developer, termination etc.

Indeed, what is the fate of a prospective buyer in the event that the construction of the property is delayed; or upon a failure to deliver the property within the stipulated period; or where the developer becomes insolvent and thus does not have the financial wherewithal to complete the property; or where the buyer fails to make payments on due dates or simply decides to walk away from the Purchase? The point to note is the importance of seeking sound legal advice by the Developer and the Buyer in the course of negotiating the terms of the contract.

4.6 Root of title - Involuntary joining at the Hips

As is common with Off Plan properties, several units of properties are covered under one global title i.e. Certificate

of Occupancy or registered Deed of Assignment. How then can the interest of a prospective buyer in, for instance, a unit of the property be protected? The practice is for a Deed of Assignment or Deed of Sublease to be executed by the respective parties upon completion. Also, copies of the title documents will be delivered to the buyer, and an assurance be recorded in the agreement that the originals will be provided when required for registration of the buyer’s interest. However, most buyers will still seek to partition their interest from those of other buyers, which is advisable.

4.7 Certificate of Occupancy after 99 years...

Another and perhaps the most debatable issue to consider, is what happens to a buyer’s interest after 99 years or less depending on the date of issuance of the global Certificate of Occupancy. Indeed, there are several unresolved questions in this regard surrounding the interest of an original owner of a Certificate of Occupancy vis a vis an assignee under a Deed of Assignment with an original owner. Whilst this discussion is not within the purview of this article, the point to note is that the interest of the prospective buyer should be adequately protected by envisaging possible outcomes upon the expiry of the tenure granted under a Certificate of Occupancy and wording the Deed of Assignment or Sublease appropriately to protect the interest of the prospective buyer accordingly.

4.8 Change in Circumstances of a Buyer & Request to Opt Out

It is vital to consider the fate of a buyer who after undertaking to purchase a property Off-Plan decides to opt out of the plan. What happens to the buyer’s investment? More often than not, this situation is usually taken into consideration when preparing the Contract of Sale. Usually, it is agreed between the seller and the buyer that if the buyer opts out or defaults, a refund of all payments will be made less an administrative fee. Experience has shown that it is usually difficult to reach a consensus on the amount of administrative fees to be deducted and the time within which the refund is to be made.

5.0 Conclusion

In deciding whether or not to purchase a property Off-Plan, whilst it is not uncommon for buyers to merely rely on the “reputation” of the seller, without paying adequate attention to proper documentation where each party’s rights and obligations are specifically defined; the risks surrounding such transactions make it imperative for prospective buyers/ sellers to seek sound legal advice in order to protect their investments.



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