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Franchising is not a business in itself but rather a mode of doing business. It is business style where a business owner (franchisor) grants another person (franchisee) the authority to use its name and style for a fee. It can be deemed a marketing tool as it enhances business expansion. It provides wider outlets for products and services enabling the franchisor have a wider (inter)national reach of customers using the network of outlets. Franchising can be an exciting business model if it is properly structured as it allows entrepreneurs to expand without the risk of debt or cost of equity, with prospect of earning returns by way of royalties or franchise fees. Franchising can allow a business to grow with a reduced capital outlay but there are issues to consider, especially as relates to Real Estate (RE) and Intellectual Property (IP) aspects.

**Obstacles Facing Franchising:
Intellectual Property Aspects**

Franchising is yet to blossom in Nigeria for a plethora of reasons¹, chief among them being the lack of proper legal structure governing franchise operations, typified by absence of franchising-specific Nigerian legislation. Furthermore, the limitations in the registration of service marks in Nigeria also constitutes an obstacle. IP is at the

heart of franchising - given that franchisors 'lease' their tradenames and style for a fee. Companies spend significant financial and other resources to get consumers to patronize their goods and services. Once a customer develops a positive relationship with a company, it is important to prevent brand confusion.

Where there are no strong Trade Mark protection and implementation laws, franchising encounters an even greater huddle especially in the case of Service Marks. A Service Mark is in the same category as a Trade Mark, but Service Marks distinguish the services of one company from those of another provider. A Service Mark is a brand name or logo that identifies the provider of a service. A form of IP protection, the Mark prevents competing businesses from using names and insignias that could potentially confuse consumers: **Procter and Gamble Co v. Global Soap and Detergent Industries Ltd & Anor.**²

Many companies use both Trade Marks and Service Marks because they provide both goods and services. Service Marks helps protect IP by restricting others from using that name or symbol to mislead consumers. If a company is free to use the mark of another company, then consumer confidence is impossible.

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¹ See Policy Development Facility Phase II Nigeria publication, 'Tackling Access to Finance: The Potential of Franchising in Nigeria', November 2016: <https://www.pdfnigeria.org/wp-content/uploads/2017/02/Franchising-Nigeria-Final-Version.pdf> (accessed on 26th February, 2019)

² [2013] 2 NWLR (Pt. 1336), 409.

The courts have held that a generic name (a name shared by any manufacturer) is incapable of achieving trade name protection. In **Smithkline Beecham Plc v. Farmex Limited**³ the Appellant sought to enforce the registration of 'Philips Milk of Magnesia' (otherwise called Magnesium Hydroxide) against the respondent's 'Dr. Meyer's Milk of Magnesium'. However the Court of Appeal (CA) held that 'Milk of Magnesium' was a generic name and as such free for use by its manufacturers.⁴

It has also been held that in a claim for infringement of Trade Mark, the rights of the claimant is limited to the name that is registered. This is because the rights under the **Trade Marks Act (TMA)**⁵ are limited to the mark that is registered.⁶ A Trade Mark when duly registered will entitle the proprietor to sue for any infringement of the Trade Mark. It does not enable third parties to sue: **C.N. Ekwuogor Investment Nig Ltd v. Asco Investment Ltd.**⁷

It should be noted that the use of a registered Trade Mark cannot constitute an infringement of another registered Trade Mark, irrespective of how similar or identical, the Trade Marks may be. This was the decision of the CA in **Gallagher Ltd & Anor v. British America Tobacco Nig. Ltd & 2 Ors.**⁸

A ministerial directive of 19th April 2007 attempted to fill the void of a service mark law. The Minister for Commerce purportedly acting under the powers conferred on him by **sections 42 and 45(1)(b) TMA**, issued a regulation (the Regulation) purporting to extend the classification of goods under the **Fourth Schedule of the Trade Marks Regulations**



1967 to include Service Marks, “according to the manner and structure” of the **9th Edition of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks** of 15th June 1957.

Section 45(1)(b) TMA empowers the Minister to make regulations “for classifying goods for the purposes of registration of trade marks” while **section 42** confers on him the power “to make regulations as may be necessary to empower the Registrar of Trade Marks to adapt the register of trade marks to any revised classification of goods.” A cursory look at the provisions of the relied-upon sections reveals that the Minister may have acted *ultra vires* in his declarations. **Section 45(1) (b)**, grants the Minister the right to make regulations for the classification of goods (not services).

Section 67 TMA defines a Trade Mark as a: “mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate a connection in the course of trade between the goods and some person having the right either as a proprietor or as a registered user to use the mark, whether with or without any indication of the identity of that person, and means in relation to a certification trade mark, a mark registered or deemed to have been registered under Section 43 of this Act.”

It is clear that a Trade Mark is limited to goods; the decision to extend it to services has no legal backing currently under Nigerian law.

³ [2010] 1 NWLR (Pt. 1175), 285.

⁴ *Smithkline Beecham's case (Supra)*

⁵ Cap. T13, Laws of the Federation of Nigeria (LFN) 2004

⁶ See Section 12 TA

⁷ [2011] 13 NWLR (Pt. 1265), 565.

⁸ [2015] 13 NWLR (Pt. 1476), 325.

Real Estate as a Possible Solution

RE and franchising should be co-joined twins needing each other for survival. A frequent conundrum franchisors face is how to deal with premises being occupied by a franchisee upon termination of the franchise relationship. Where the franchisor is not the owner of the RE, the franchisee may acquire its own interest in premises directly from a third party. This leaves the franchisor with a low level of control over the premises upon termination of the franchise arrangement. Franchisors need to put in place mechanisms to gain control in their franchising engagements.

Franchises investing in RE is not a recent phenomenon. Perhaps the most significant RE investor-franchisor is McDonald's. By purchasing lands and leasing them to its franchisees, it obtains dual revenue sources.⁹ In 2014, the McDonald's corporation made US\$27.4 billion in revenues, out of which US\$9.2 billion came from franchised locations (rent on real estate) and the rest (US\$18.2 billion) was from company-operated restaurants.¹⁰ We may be tempted to state that the majority of their revenue came from standard restaurant

business; however the profit margins differ. It costs more cash to run a restaurant than to collect rent. McDonald's reportedly keeps close to 82% of all their RE generated revenue vis-à-vis only 16% of its company-operated restaurant revenue. In essence, of that US\$18.2 billion generated by restaurants in 2014, McDonald's keeps just US\$2.9 billion, compared to US\$7.6 billion from the US\$9.2 billion coming from its real estate business.

However, investing in RE in Nigeria is a terrain requiring legal expertise to achieve efficiency during the change of title process. Key issues for any investor to note during purchase of RE in Nigeria are on due diligence on the proposed property at the relevant Land Registries as well as traditional investigation on the property where necessary; appropriate documentation (Deed of Assignment, Partition, Gift, Sublease, etc.); perfection optimization process.¹¹

Where the franchisor owns the property, the ability for the franchisor to go back into occupation at the end of the franchise relationship is often maintained to allow the franchisor to secure the renewal rights. This is especially necessary where the

property is in a prime commercial location. Franchisors are usually tasked with the choice between focusing on its core business and venturing into RE management. However considering current economic realities, franchisors are encouraged to explore alternative sources of revenue, chief among which is RE - as a marketing concept. It accelerates the expansion of a product or business to reach a wider market. Having control over its RE options could be a game changer in its business operations.

Where the franchisor does not own the property, it can enter into a long sublease with the owner which requires Governor's Consent (GC) at the Lands Registry. **Section 22 Land Use Act (LUA)**¹² provides: "It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained."

The GC would provide additional security for the franchisor in its title over the property. A

⁹ Chase Purdy, 'McDonald's isn't just a Fast-food Chain—it's a Brilliant \$30 Billion Real Estate Company' Quartz 25th April, 2017: <<https://qz.com/965779/mcdonalds-isnt-really-a-fast-food-chain-its-a-brilliant-30-billion-real-estate-company/>> (Assesses on 26th February 2019). The report stated that the "total sales for an average location clocked in at \$2.7 million per store each year, with \$1.7 million in gross profits after accounting for food and paper costs. But then there are also other expenses: rent, payroll, advertising, promotions, operating supplies, insurance, and more. Average operating income after accounting for all those expenses rounded out to a take-home of just \$154,000 per year for a single franchisee. The average rent per store amounts to about 22% of average gross profits each year for franchisees and the company has more than 36,000 locations across more than 100 countries. Better put, McDonald's has more than \$30 billion in real estate assets, and annual profits that float around \$4.5 billion, according to company financial disclosures."

¹⁰ 'McDonald's Real Estate: How They Really Make their Money', Wall Street Survivor, 8th October, 2015: <<https://blog.wallstreetsurvivor.com/2015/10/08/mcdonalds-beyond-the-burger/>>

¹¹ Frank Okeke 'Unlocking Real Estate Value In Nigeria', January 2019: <http://www.llelawlegal.com/blog-details.php?title=unlocking-real-estate-value-in-nigeria>

¹² Cap. L5, LFN 2004



subsequent lease to the franchisee allows a franchisor retain a large amount of control over both the occupation of the premises by the franchisee and the relationship with the landlord. A franchisor can control the discussions with the landlord (for example over rent reviews or consents) and can retain control of the premises if the franchise relationship ends. The franchisor can offer rent free occupation to its franchisees (especially during the franchisee's start-up phase) using this investment strategy as a leverage to drive expansion - franchisees will likely see same as a very attractive business proposition.

A franchisor can maintain its direct relationship with landlords and its control over the franchisee's occupation whilst

retaining security of tenure at the end of the term, even where the franchisee remains in occupation. A franchisor can be sure that its franchisee will not obtain rights in respect of the property independent of the franchisor.

Land Banking as a Real Estate Investment Option

The franchisor's efforts to leverage RE investment as part of its long term strategy could lead franchisor to undertaking several RE transactions. One could be *vide* land banking (LB). LB is the practice of aggregating parcels of land (with high potential value) for future development or sale - purchasing undeveloped or untapped areas. It involves buying a piece of land on the basis of its future potential selling price rather than on the basis of its

actual current value.

LB is often confused with land speculation (LS) mostly because both actions are similar in nature, the major difference being the approach of the 'investors'. LS involves 'obtaining' a piece of land with the hope for future purchase. According to some commentators, LS is often associated with 'omo-oniles' land grabbing, selling one piece of land to multiple parties, fraud, incomplete ownership of title, irregular documentation etc.¹³ LB is more of a measured and calculated approach to investing in real estate. LS, at its worst, is arguably the playground of scam artists and rife with high-level collusion leading to loss of capital investment, endless litigation and other economic repercussions if left unchecked.¹⁴

¹³ Uche Atuma, 'The Lagos Properties Protection Law' *The Sun*, 23rd August, 2016 (accessed 1st March, 2019).

¹⁴ The fraud can also lead to violence which could become a big problem. Hence responsive actions such as promulgation of the **Lagos State Properties Protection Law, 2016** popularly dubbed the Lagos State anti-land-grabbing law. LS is always discouraged by State Governments as it often causes prices to rise above the underlying value of the asset through the creation of artificial shortages amongst other negative effects. The bane of LS is that the State Government allocates land to members of the public and issues Certificate of Occupancy (C-of-O) with terms and conditions, noting that holding on to the land without developing it, deprives several other people who are willing and ready to develop it. This causes a stall in economic development. See '**Lagos Moves to Tackle Land Speculation**' *The Vanguard*, 3rd May, 2010: <https://www.vanguardngr.com/2010/05/lagos-moves-to-tackle-land-speculation/> (accessed 1st March, 2019). See also I.O Smith '**Practical Approach to the Law of Real Property in Nigeria**' (2013, *Ecowatch*), p. 507. Although part of the rationale for enactment of the **LUA** to curb LS, several decades after, such result cannot be said to have been effectively achieved.



Conclusion


Adequate structures should be put in place in order to reap the full rewards of franchising in Nigeria. Half-hearted attempts at franchising would only create half-baked solutions. Regarding the need for a Service Mark legislation, it has been argued that goods can also be intangible and since goods are not defined under the **TMA**, services can be included under the categorisation as goods for registration purposes.

However, rules of interpretation proffer that where words are not ambiguous or would not create ambiguity in its interpretation, a statute must be interpreted strictly in its own wordings without external input or additions. In *Saleh v. Abah*,¹⁵ the Supreme Court held that: “It is a cardinal principle of interpretation that where in their ordinary meaning the provisions are clear and unambiguous, effect must be given to them without resorting to any aid internal or external.”

¹⁵ [2017] 12NWLR (Pt. 1578), 100 at 159.

This may be of little impact in current practice as the *Trade Marks Registry* receive applications for Service Marks as well. Franchisors need to embrace real estate investment to draw out as much value as possible from franchising. Local franchisees, even though are still emerging, need to consider real estate investment to boost external revenue in addition to franchise fees and profits from their core business. Franchising may be in its infancy in Nigeria, but knowledge of the terrain and optimizing opportunities need to be in the front burner of any franchise which intends to scale, as optimally as possible.

RE investment in itself is a long term investment. Most franchisors may be best served by developing their product and building a market base in the short to medium term. However, it is key to recognise the impact which RE would have in its overall growth as well as prepare strategies to leverage same. RE investment may be capital intensive however the opportunity cost are enormous. A franchise having control over its RE operations is a great asset to

keep it afloat irrespective of economic downturns. Franchises like Huddle House Dinner and McDonald's have learnt to navigate real estate waters while staying true to their retail business in order to create high returns. It is time for Nigerian franchisees to start doing the same 

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