

Transfer of Property' and its Significance in Commercial Transactions in Nigeria

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Abstract

This article is an examination of the transfer of property and its significance in commercial transactions in Nigeria. However, for a better understanding of this topic, its related concepts such as meaning of contract for sale of goods, classification of goods, concept of property, distinction between property and possession are examined. Thereafter, a thorough examination of transfer of property and its significance are considered. Particularly, attention will be focused on transfer of goods forming part of a bulk in Nigeria and England as well as in the United States of America. The classification of goods is paramount as it is pivotal in determining when property passes and the significance of such passage in contract of sale of goods. This topic is important as we engage daily in either the buying or selling of goods.

Keywords: Property, commercial transaction, contract, possession

Introduction

The law governing contracts for *the sale of goods was codified by the Sale of Goods Act, 1893*¹, a statute of general application in force in Nigeria². The Sale of Goods Act, 1893, though a codification of Common Law of England, as was observed by merchants many centuries ago in contracts for sale of goods. It was ".at. however, exhaustive. The Sale of Goods Act, 1893 applies to the Eastern and Northern States in its raw form; States in the former Western Region, former Bendel State (that is, Edo and Delta) and Lagos State have Sale of Goods Laws which merely re-enact Sale of Goods Act, 1893 with slight changes in numbering, of sections. In England, Sale of Goods Act, 1979, as amended, has replaced the Sale of Goods Act of 1893, which originated from England but applicable in Nigeria

as one of the statutes of General Application. The United States of America has a Uniform Commercial Code, which replaced her Uniform Sale Act of 1906 to meet with present commercial practice. Other relevant laws are the Factors Act of 1889, Infant Relief Act, 1874, Merchant Shipping Act, 1962, Law Reforms (Contract) Law of Lagos State, 1961.

Also because commercial transactions are contractual, doctrine of equality and rules of Common Law as regards fraud, misrepresentation, mistake and other vitiating causes apply wholesale to contracts of sale of goods except inconsistent with statute in this regard.

Contract for Sale of Goods: A contract for sale of goods according to Burton's Legal Thesaurus is a contract for the transfer of property. Under the Sale of Goods Act, a contract for sale of goods is defined as "a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called price."

According to M. C. Okany (1999), the definition above envisages two situations namely:

- a. contract of sale in which the property in the goods is transferred from the seller to the buyer
- b. agreement to sell in which the transfer of property takes place in future (at a future date) or on fulfillment of certain conditions. A good example of an agreement to sell is a contract for sale of goods yet to be manufactured.

The assertion that the definition of contract for sale of goods is recognised in terms of two transactions is affirmed by section 1(3) of Sale of Goods Act, 1893. which provides that: "Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time (futuro) or subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell." However, agreement to sell becomes sale when the time elapses or upon fulfillment of the conditions subject to which the property in the goods is to pass. Also, the transfer or agreement to transfer the goods must be for a monetary consideration called price. Thus, in *Tenarewa Nigeria Ltd and Anor v. Musa Bai_ Arzai and Anor*, where there was no agreement on the price of the goods, the court held that there was no contract of sale of good and no property passed.

Goods

The subject matter of contract for sale of goods is "goods". What then is the meaning of goods? Section 62 of Sale of Goods Acts defines "goods" to include a. chattels personal, other than things in action and money, and includes emblements industrial growing crops, and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale.

The implication is that real property or chattel real e.g. leasehold; chooses in action - negotiable instrument such as cheque and draft are not goods. Money is also excluded from the definition of goods, but would be regarded as goods if dealt with as curiosity e.g. Biafran coin which has lost the attributes of money, an old and unusual object such as 1897 jubilee 5 pound gold coin. Also, a contract for the sale of minerals (oil and gas inclusive) is a contract of sale of goods if severance is to be made by seller. But where the buyer is to sever them from the land, the contract is considered the sale of real estate which is regulated by Real Property Law, not sales of Goods Act or Law. It is also necessary to distinguish between the products of the soil and "things attached to or forming part of the land" on the one hand from the actual land itself or interest therein, on the other hand (Atiyah, 1997). In *Morgan v. Russell*, it was held that the sale of cinders and slay which were not definite and or detached heaps resting on the ground, was not a sale of goods but a sale of interest in the land itself. Also the sale of sand from a quarry is a sale of interest in land not sale of things attached or forming part of the land."

Emblements comprise crops and vegetables e.g. corn, cassava, yam and vegetable produced by labour of men which yields annually. Emblements are not part of land and are regarded as chattels even before severance from the land.

Also regarded as goods are industrial growing crops, known also as frutus industrialise. These include things that are grown by the industry of man and wider than emblements as they include crops, which do not mature annually (Fogam, 2005).

Chattels personal are tangible personal things such as car, clothes, shoes, even animals. They are goods.

Classification of Goods

As noted earlier, classification of goods is crucial in the context of transfer of property. Goods, the subject matter of contract of sale may be classified as follows:

1. **Specific Goods:** These are goods identified and agreed upon at the time a contract of sale is made. If "A" agrees to buy a book from "B" and selects the book there and then the book selected and purchased by "B" is therefore specific goods. In *Mary Ajayi v. Alice Eburu*, the Plaintiff sold £98 worth of gold to the Defendant. The Defendant paid £20; she was unable to pay the balance because her own customer returned the article alleging adulteration. The Defendant rejected the goods and demanded for money already paid. The plaintiff sued for the balance. At the trial court, the Magistrate dismissed the claim on the ground that the goods are unascertained and therefore the Defendant properly rejected the goods. But on appeal to the high court, it was held that the Learned Magistrate erred

in Law in classifying the goods as unascertained. In this case, the goods which is the gold was identified, agreed on and exchanged for agreed price of £98 (although the Defendant made part payment of £20) at the time of the contract which qualified the gold as a specific goods.

2. **Ascertained Goods:** This category of goods is not defined under the Act. It is generally referred to as those goods identified in accordance with the agreement after the contract is made. According to Professor P. K. Fogam, the distinction between specific and ascertained goods is the time of identification. Specific goods takes place at the time of making the contract while in the other, it takes place after making the contract. In *Mary Ajayi v. Alice Eburu*, on appeal to the high court the gold was held to be a specific goods because it was identified at the time the contract was made.
3. **Unascertained Goods:** This type of goods is not defined in the Act but mention is made of them. They are goods sold by description and which have not been specifically identified and agreed upon. This category arises in the following three situations:
 - a. The sale of purely generic goods. Generic goods are goods of a kind. E. g. a sale of 20 bottles of Malt whether the stock out of which the Malt is to be taken is specified or not.
 - b. The sale of part of a whole or larger quantity of goods e. g. 10 bags of rice in a warehouse, here, no specification; any 5 bags will do. In *Rewart*, a sale of 500 tons of wheat out of quantity of 1,000 tons of wheat on board a ship was held to be a sale of unascertained goods. However, once selected or appropriated it ceases to be unascertained and becomes ascertained goods.
 - c. The sale of goods to be manufactured or acquired or grown by the seller.
4. **Existing Goods:** These are goods owned and possessed by the seller at the time of the contract. They need not be specific, as they can be unascertained. Mr. A working in NOUN, Lagos sold his old Toyota car packed in his carriage at Benin to Mr. B in Lagos and the car is to be delivered to B in the next 4 days. The car is existing goods.
5. **Future Goods:** These are goods to be manufactured or acquired by the seller after the contract.

Concept of Property

The contract for sale of goods envisages the transfer or agreement to transfer the property in the goods. The property in the goods connotes transfer of dominion,

that is, the highest possible rights enjoyed by the owner of goods. It also means ownership. Under the Act²⁴ “Property” means the general property in the goods not specific property. So what is transferred to the buyer is ownership, dominion or title to the goods not mere possession.

Property and Possession

As noted above, property in the goods means ownership, dominion or title to goods. Possession, on the other hand, is as a general rule, a physical control or custody of goods. The transfer of property in goods is not dependent on transfer of possession of the goods. It is possible for possession of goods to vest in one person while title and ownership or property in goods is vested in another. Example: a repairer of car/shoe to whom the car/shoe is sent for repair has possession while the person/owner that sent the car/shoe retains title or ownership. Also a third person may be in possession of goods. Example: carrier even though title of the goods may have passed from the seller to the buyer . In *M.I.N Ltd v. M.F.K.W.A* , the court held that .. In this case, when the appellant paid for the goods and took delivery of part of them, ownership and possession of the goods in respect of those the appellant took delivery of passed to the appellant. In respect of the 50KVA generator ownership similarly passed to the appellant, but what remained with the respondent thereafter was base possession. Therefore, there was a constructive bailment contract between the parties.”

Transfer of Property

Part II of the Act talks about transfer of property as between seller and buyer and transfer of title. The term, property, is defined in Section 62 of the Act as the general property in the goods.

Two schools have emerged as regards the title of part II of the Act. According to the first school, the reason for the differentiation in the wording of the two headings of part II is not clear (Okany, 1999). But according to Greig, there is deliberate effort to differentiate between circumstances where there is a transfer of property between the seller and the buyer from a transfer between a third party, who may style himself a seller (not true seller) and a buyer (Greig, 1974). Greig called the kind of transfer that takes place between the questionable seller and buyer a “Transfer of Title”.

So, the sections dealing with transfer of title deal with circumstances in which a buyer takes a good title even though the seller was not the owner and was not entitled to sell the goods in question. In *Lewis v. Averay*, the plaintiff placed a newspaper advertisement offering his car for sale at £450. A person telephoned and arranged to see it, and took it for a test drive after dropping cheque and other documents identifying him with the plaintiff. It turned out the cheque and documents had been

stolen. The car was subsequently sold to the defendant who purchased it for £200. Plaintiff sued defendant for conversion. The issue was whether a valid contract of sale exists under which the property passed from Lewis (the plaintiff)? If there was no contract because any purported contract was void ab initio, then defendant could not claim good title as the rogue would have had none to pass on. Clearly, plaintiff was mistaken about the rogue's identity. Lord Denning in considering the case, considered two similar but conflicting cases. They are Phillip v. Brooks and Ingram v. Little. These cases involved someone being cheated by a rogue and the identity was confirmed before the cheque was accepted. In Phillip, the ultimate buyer was held to be entitled. In Ingram the original seller was held entitled. In Ingram, Phillip's case was distinguished by saying that there the contract was concluded before the rogue made the fraudulent misrepresentation. In Ingram, the fraudulent misrepresentation was made before the contract was concluded. Lord Denning observed that "where people deal with each other, then there is a contract subject to being avoided by fraud. Lewis made a contract with the rogue - we do not look to the parties intentions, we look to outward appearances. "I regret that either should suffer, but on balance, it should be Lewis." Similar decision was reached in the Nigerian case of Muhamed SMD v. Kpelai, where the 1st defendant brought to the plaintiff a Toyota Carina car to buy at the rate of N330,000.00, the plaintiff paid and was issued a receipt and invoice. The car was later seized by the police on the allegation by the 2nd defendant that the entire purchase price had not been given to the 3rd defendant. It was held even on appeal that property had passed to the plaintiff. Suffice it to say that the use of title and property mean one and the same thing under this part II.

Passing of Property

The main object of contract for sale of goods is the transfer of property from seller to the buyer. One striking feature of our law as it relates to passing of property is that contrary to natural expectation, property is not necessarily linked to either delivery or possession. A buyer can become owner of goods before they are delivered to him, and also a seller can retain property even after delivery to the buyer. The rules about passing of property are set out in Sections 16 to 19 of the Act. The exact moment of passing of property is dependent on whether the goods are specific or unascertained.

Specific Goods

The rules regulating the transfer of specific goods are found in Section 17 of the Act which provides that property in the goods is transferred when the parties intend it to be transferred. This provision makes transfer of specific goods subject to the intention of the parties. The intention of the parties must be gathered from the terms of the contract, the conduct of parties, and the circumstances of the case. According to Agbebaku, the Act has laid down rules to help determine when

intention on the matter of property passing has either been expressed or failed to be expressed by the parties (Agbeba, 1997). Lord Wright observed that “as the seldom express any such intention or perhaps, even think of it, the intention will generally be a matter of inference from the terms of the contract.” Section 18 of the Act provides guide in ascertaining the intention of the parties as to the time which the property in the goods is to pass to the buyer, subject, however, intention of the parties. Three rules applicable to specific goods are set out as follows; Rule 1. This rule provides that “where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed”.

This rule only applies to specific goods and it is immaterial whether the time of payment or delivery or both be postponed. In *Fayose v. Alalade*, F requested A to help him purchase a car in England and ship it to Nigeria. F paid A no money. A bought car and shipped to Nigeria in the name of her (A's) brother. F paid for all the custom duties but nothing towards the cost of the car. “F” the Plaintiff brought action for damages for detinue. It was held that property in the goods had passed - “F”. Similar decision was reached in *Folabi v. Mandilas Ltd*. This position was captured by Diplock, in *L. J. V. Ward. Ltd v. Bignall*, when he stated that “in modern times very little is needed to give rise to the inference that property in specific goods is to pass only on delivery or payment.”

One question which arises under the Rule 1 is the meaning of “specific goods”. According to P. S. Atiyah, it has already been observed that this term does not necessarily mean the same wherever it appears in the Act, despite the single definition by Section 62 of the Act as goods “identified and agreed upon at the time of the contract of sale is made”. He further states that it seems settled that future goods can never be specific, although may be sufficiently specific to come within the doctrine of frustration. In *Kursell v. Timber Operators and Contractors Ltd*, the contract was for sale of all merchantable timbers, which conform to specific measure in a Latvian forest to be felled within 15 years. Almost immediately, afterwards, the Latvian Parliament passed an Act confiscating the forest. The issue was whether property had passed? The English Court of Appeal held that property in the tree had not passed since the goods had not been sufficiently identified and since not all trees were to pass but only those that conform to the stipulated measurement. But an Australian decision provides an interesting contrast to the above decision. In *Joseph Reid property Ltd v. Schultz*, a sale of all millable and marketable timber to run for 10 years on a certain site was held to be a sale.

Another feature under this rule was what Prof. P. K. Fogam identified as a limitation in the application of this rule is the requirement for the goods to be in “deliverable state”. According to Professor C. A. Agbebaku there is nothing to prevent parties from providing for property passing in an article which is not even in a condition to be delivered at the time of the agreement. This means that deliverable state cannot be construed by reliance on the definition of delivery in section 62 (1) of the Act as “voluntary transfer of possession from one person to another”.

Where the contracts call for certain work to be done before the buyer can be asked to take delivery, the goods cannot be regarded as being in deliverable state until the work is done. The distinction here is between the state of the goods at the date of contract and the state they are to be delivered under the contract. This, was clearly shown in *Underwood Ltd v. Burgh Castle Brick and Cement Syndicate*, where a machine attached to the floor and was sold FOB. The court held that it was not in deliverable state until detached and dismantled for delivery. Goods are in deliverable state within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Another requirement under this rule is that the contract be “unconditional”. Unconditional here means contract not subject to condition precedent or subsequent but does not mean contract not containing any condition in the sense of essential stipulations, the breach of which gives the buyer the right to repudiation of the contract. According to Atiyah “if the term unconditional in Rule 1 is given its natural meaning the result appears to be that in the vast majority of sales of specific goods there was no real right to reject for breach of condition at all”. Thus, in *Varley v. Whipp*, it was held that the sale of reaping machine was not an unconditional sale despite the fact that it was clearly not subject to any condition precedent. In *Yakassai v. Incar Motors (Nig.) Ltd*, and *Kofi v. Mensah*⁵¹, it was held that the sale being an outright and absolute sale, the purchaser was not bound by the agreement which allowed the seller to seize the lorry on failure to pay installment. The plaintiff’s only remedy would be to enforce payment of installments by action in court. However, in *Afrotec v. M.I.A.*⁵² the contract provided that payment of 40% cash deposit and balance to be made by installments. It was agreed by the parties that the seller shall take immediate possession of the goods without hindrance on the buyer’s failure to comply fully with the conditions of the transaction. It was held that the sale was a conditional sale.

Factor Indicating Contrary Intention to the Application of Rule 1 of Section 18

The application of the Rule 1 of Section 18 is subject to the existence of evidence of contrary intention. Rule 1 provides that the fact that time of delivery or payment is postponed does not prevent the passing of property at the time the contract is made. Commercial practice is different in the case of sales in a cash and carry

shop or a supermarket. In an ordinary sale in a shop, property does not generally pass; at least until the parties agreed on the mode of payment and on a sale in a supermarket property does not pass until the price is paid. According to Atiyah the postponement of time of payment or time of delivery is not to be ignored completely as this may be an indication of contrary intention which excludes the operation of Rule 1 altogether.

Another pointer to a contrary intention is where there is a specific agreement on transfer of risk. Generally, risk in the goods passes with the property. Where the risk has passed, this may be an indication that the property has also passed. Conversely, where the risk remains on the seller this may be an indication that the property has not passed. Interestingly, in *Re Anchor Line Ltd*, the court held that property in the goods had not passed because there was a specific clause placing risk upon the buyer and had the property passed such clause would not be necessary. Also an obligation to insure placed upon one party by the contract is also an indication that he bears the risk and an indication that he has the property. Presumption contained in Rule 1 would normally be rebutted in a contract for sale of goods and land together. Example: a contract to sell a house, together with some furniture, the presumption of passage of property at the making of contract would be rebutted in such a contract, property passes on conveyance. Where the contract of sale is for supply and installation, property passes at the completion of installation. However, if the contract is for sale of goods to be afterwards installed, by the seller, Rule 1 will apply.

Rule 2

This rule provides that "where there is a contract for sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof. This rule applies where the seller is bound to do something for the purpose of putting the goods in deliverable state. In *Underwood's* case, the court held that Rule 1 was not applicable; Rule 2 would have been applicable if the machine had been completely put in the truck and the buyer notified. Atiyah queried the limitation of this Rule thus:

It is little difficult to see why Rule 2 should be confined to cases where the seller is bound to do something to put the goods into a deliverable state. Thus, it seems that the rule would not apply where the seller has agreed to repair the goods, for example to overhaul a second hand car. On the other hand, such a sale may well be a conditional sale in which case none of the Rules in Section 18 would apply to it at all. In such a case, the court may simply fall back on Section 17 and hold that property is not passed...this is the presumed intention of the parties (Atiyah, 1975).

On the issue of notice, the Act does not specify that the seller must give notice; therefore, the knowledge of the buyer may suffice (Okany, 1992).

Rule 3

It provides that “where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done, and the buyer has notice thereof.” The presumption embodied in this rule is probably somewhat weaker than those under Rules 1 and 2 because it is easy to imagine the circumstance in which the parties intend property to pass at once especially if price has been paid (Atiyah, 1975). This rule requires that the act or thing to be done must be done by the seller not the buyer. Also the purpose must be to ascertain price not quality of the goods. If the buyer does any of the acts, this rule does not apply and the property may not pass to him. However, ownership of the goods may pass in accordance with Rule 1. In *Namka Bruce v. Commonwealth Trust Ltd.* A sold cocoa to B at an agreed price per 60lb; it was arranged that B would resell the goods, and that the cocoa would then be weighed in order to ascertain the total amount due from A to B. It was held *inferred alia* that the weighing did not make the contract conditional, and that the property passed to B before the price was ascertained (that was their intention).

Rule 4

This rule provides that “where goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer:

- a. When he signifies his approval or acceptance to the seller or does any other act adopting the transaction
- b. If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if time has been fixed for the return of the goods, on the expiration of that time and if no time has been fixed on the expiration of a reasonable time. The issue of “reasonable time” is a question of fact.

Under rule 4 (a), property will pass in either by (i) signifying approval or acceptance or (ii) any other act adopting the transaction by the buyer. In *Kirkham v. Attenborough*. Lopes J. defined the phrase “does any other act adopting the transaction” to mean an act inconsistent with his being other than a purchaser”. The pledge by W of jewelry delivered to him by K was held to amount to an act by W adopting the transaction.

Rule 4 (b) refers to a situation where the buyer retains the goods without giving notice of rejection beyond the time fixed for the return of the goods, or if no time is fixed, beyond reasonable time. In *Poole v. Smith’s Car sales (Balham) Ltd.* The

Plaintiff sent a car to the Defendant for storage. It was agreed that the Defendant could sell it provided the Plaintiff receives N325 for it. After 3 months, the Plaintiff demanded for the car, when tendered, it was damaged. The Plaintiff sued for the price. It was held that since both parties had treated the contract as one of sale or return, the property has passed to the Defendant for they had retained the car beyond reasonable time and therefore liable. In this instance, it is suggested that the defendant also had, by conduct, adopted the transaction by using the car without the plaintiff's permission. However, the buyer will not be deemed to have adopted the transaction by retaining the goods, if he is prevented from returning them by forces outside his or her control as was held in *Ferrier's Case*.

It is important to distinguish sale or return transaction from other similar transactions. It must be emphasised that where goods are delivered "on approval, or sale or return", they are delivered in response to request from the "buyer" (intending buyer). When goods are delivered without such a prior request, they are unsolicited and the recipient may, in some circumstances, be entitled to treat them as gift. As a result, the practice of delivering unsolicited goods, which was once a popular "inertia selling", is no longer common.

Also, superficially, approval or sale or return arrangement may be similar to conditional sale arrangement. However, under conditional sale, the buyer is committed to buy the goods, though the seller may repossess for non payment but the buyer has no right to return them, and property will not pass until the condition, normally payment of price, is fulfilled. If, however, the sale is on approval or sale or return them, in the absence of express reservation of ownership, property will pass to the buyer automatically regardless of payment of price. Failure of election to return the goods is acceptance, if the goods conformed to the contract. Acceptance of any part is acceptance of the entire whole.

The goods are delivered on approval arrangement to afford the buyer opportunity to check them for quantity, suitability for purpose, before buying, while goods are delivered on sale or return arrangement where the buyer is not sure about his ability to resell them and wants freedom to return some or all of the goods (e.g. a newspaper vendor). The seller makes offer to sell. The arrangement is also beneficial to the seller as he is protected against buyer's insolvency because until the transaction is adopted or accepted by buyer the goods are the seller's property. Under this arrangement, property may pass to the buyer where the he indicates approval or acceptance of the goods, or does an act adopting the transaction or retains the goods without rejecting them beyond any time limit fixed for the return and where no time is fixed, the buyer retains the goods beyond reasonable time provided that the buyer is not prevented from returning the goods by force outside his control. This rule is also subject to the intention of the parties.

Rule 5 - Unascertained Goods

Rule 5 (1) of Section 18 of the Act provides that “where there is a contract for the sale of unascertained or future goods by description, and goods of that description in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. This rule applies to unascertained and future goods sold by description. Before property passes to the buyer, the following must be fulfilled:

- a. the goods must be ascertained
- b. the goods must be in deliverable state and
- c. unconditionally appropriated with the assent expressed or implied of either parties.

According to Agbebaku (1997), this rule is the most complex of the rules in Section 18. It is also the most important in commercial transactions. The reasons for this being that nearly all commercial transactions involve purchase of bulk cargoes. (Agbebaku, 1997). Rule 5, just like other rules in Section 18, can be excluded by contrary intention of the parties to the contract, so that it can be agreed that passing of property shall be deferred until payment. However, contract for sale of unascertained goods is subject to the overriding requirement of Section 16 of the Act that “where there is a contract for sale of unascertained goods, no property is goods transferred to the buyer unless and until the goods are ascertained.”

The question is: When are unascertained goods said to be ascertained? Goods are said to be ascertained if they are identified in accordance with the agreement after the contract of sale is made. Under the contract for sale of unascertained goods, no property passes to the buyer until the goods to be used to fulfill the contract have been so identified, even if the source from which they are to come is identified, for how can one speak of someone having bought goods, if he cannot acquire title until it is known to what goods the title relates.

One basic requirement for application of Rule 5(1) is that the goods must be “unconditionally appropriated” to the contract. According to P. K. Fogam (2005), goods are appropriated when they are separated from the bulk and earmarked for a particular buyer. What is required is some further action by the seller which irreversibly attaches the goods to the contract. Also, according to Agbebaku, (1997), “goods are appropriated when one party irreversibly indicates his intention to use those goods in performance of the contract, so that there is no doubt as to the goods in question”. In *Healey v. Howlett and Sons*, a seller delivered 190 boxes to go to various customers. He did not label the boxes to go to particular destination or customers, but left this to the railway company. It was held to be unascertained goods, property, therefore, could not pass until the railway company

made the allotments. Pearson J. in determining the meaning of appropriation stated that appropriation alone is not sufficient, to pass property in goods to the buyers, the goods will pass if appropriation is unconditional. Where there has been a sale of an unascertained part, the part sold must be separated and attached irrevocably to the contract in order to be appropriated.

Another issue worthy of consideration, under Rule 5 (1), is assent. Appropriation by either parties will only be effective if the other party subsequently assents. Where there is no provision in the contract for sale of unascertained goods as to the mode or place of delivery, it may not be possible to infer advance assent. If a party has notice of the other's appropriation, he may be held to have assented, if he fails to object (Agbebaku, 1997). There is principle of exhaustion. Under this principle, unascertained goods can be ascertained by exhaustion. In *Karisliamms Oljetabriker v. East Port Navigation Corp*, goods were in four identical contracts. It was held that there was ascertainment after two previous discharges and there were two parts left.

As noted before now, contract for sale of unascertained goods is subject to Section 16 of the Act, that no property can pass until the goods for the contract is ascertained. In both *Re Wait* and *Re Gold Corp*, the court rejected the argument that the contract gave them equitable proprietary interest in the goods because the contract was for sale of unascertained goods. Therefore, where goods form part of a bulk, property will not pass until such goods are separated, identified and unconditionally appropriated to the buyer in line with the contract of sale.

Rule 5 (2)

Provides that "where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right to disposal, he is deemed to have unconditionally appropriated the goods to the contract." This rule provides instances or examples where the seller will be held to have unconditionally appropriated goods if he transmits the goods, to the buyer without reserving the right of disposal.

Section 19 (1): Reservation of the Right of Disposal

Where in pursuance of the contract for sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the

buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled (Agbebaku, 1997). The essence of reservation of right of disposal by the seller is to obtain security of goods, which is considered more effective than the right of stoppage in transit. In *Re Slipton Anderson and Co Ltd*, the contract included the term “payment of cash within 7 days against transfer order.” It was held that the inference to be drawn is that the seller had reserved to himself the right to disposal and that no property passes to the buyer.

Reservation of right of disposal is very important in relation to international sale (Agbebaku C. A., 1997). The importance of retention of property is not only to secure payment from the buyer but also for the purpose of obtaining finance. It was observed by the court in the above case thus: “The general course of international commerce involves the practice of raising money on the documents so as to bridge the period between shipment and the time of obtaining payment against documents.”

Deemed Right of Reservation

Section 19 (2) and (3) provide two principal ways in which the seller is deemed to reserve the right of disposal. They are:

- * 19(2) where goods are shipped, and by the bill of lading the goods are delivered to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal, and
- * 19(3) where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him. According to C. A. Agbebaku, the two subsections are based on common law principles, which seem to show that appropriation would not be such as to pass property on - goods, if it can be inferred that there was no intention that property should pass.

Romalpa Clause

The above provision has led to the popular clause known as Romalpa Clause, which enables the seller to trace the goods and claim the proceeds of sale. This clause became prominent after the landmark case of *Aluminium Industries Vaasser. V. Romalpa Aluminium Ltd*. A key term of the contract specified ownership of material delivered on full pay. The court held that the seller is entitled to recover both unsold unmixed foil and proceeds of such sale of the foil and that ownership of the foil would not pass until it was paid for.

Significance of Transfer of Property in Commercial Transaction

The transfer of property is important and significant in contract for sale of goods for the following:

- (1) Unless otherwise agreed, the “risk” passes with property. Where there is accidental damage to the goods, the owner of the goods bears the loss. P. K. Fogam gave illustration thus: If S agrees to sell goods to B, but before delivery they are accidentally damaged; the transfer or passing of property will generally determine the passing of risk of loss or damage to the goods, so that if property has passed, B will have to pay for the goods (Fogam, 2005).
- (2) It determines the right of the seller where the seller agrees to sell goods to the buyer but before delivery they are accidentally damaged. If the property has passed, seller can sue for the purchase price (Gordon , 1980).
- (3) It will also determine the right of the buyer, where the buyer pays for goods before they are delivered, but, before delivery, seller becomes insolvent. The buyer has the right to claim goods if property has passed to him, if not, he is unsecured creditor.
- (4) It also helps to determine the right of the seller, where the buyer refuses to accept delivery. If property has passed, the seller may be able to sue for the price. If not, the seller may only be entitled to sue for damages for non acceptance, in which case he must seek to mitigate his loss.
- (5) It is also important in a situation where the seller agrees to sell goods to buyer, and deliver them, but before paying for them the buyer sells them to another buyer. If property has passed to the first buyer, the seller will be unable to recover the goods from the second buyer, but if property was still on the seller at the time of the sale to the second buyer, the seller may be able to recover them, if he shows that the second buyer purchases malafide.

Reform in England under Section 18 Rule 5

In England, under Section 18 Rule 5, there are additional sub-rules 3 and 4 which deal with goods forming part of a bulk. They provide as follows;

“(3) Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk-

- (a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and
- (b) the property in those goods then passes to that buyer.

(4) Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single

buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.”

These sub rules 3 and 4 of SGA, 1979 as amended provide another instance where appropriation will be said to have taken place when the contract is for a sale of specified quality of unascertained goods forming part of a bulk. Thus, it is submitted that this is a codification of the principle of exhaustion enunciated in *Elifa*'s case, where *Mustill J.* held that as soon as the buyers goods were ascertained by exhaustion, property passes to the buyer because that was what the parties intended: there was no need for separate appropriation.

Goods Forming Part of Bulk

The rules as to the passing of property on unascertained goods are complex, especially where the goods under the contract form part of a bulk. The modern trend to bulk carriage and storage of goods means that the rules create even greater problems in large scale commercial transaction.

Section 16 of SGA 1893 is clear and provides that no property in the goods passes where the contract is for sale of unascertained goods. So, if the seller becomes insolvent before the goods are separated from the bulk, the buyer will rank as an unsecured creditor in the insolvency and will probably recover little or nothing of his payment. Even, where the buyer does not pay in advance, the contract may impose on him the risk of loss or damage to goods in transit; however without property he will be unable to sue the third party who damages the goods.

In England and other leading jurisdictions, bold steps were taken to deal with goods forming part of a bulk. The step taken in England is, reflected in SGA, 1979 as amended where Section 16 is made subject to Section 20 (A). Section 16 provides: “subject to section 20 (A) below where there is a contract of sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.”

Section 20 (A) of 1979 at amended titled: Undivided shares in goods forming part of a bulk, deals with a specified quantity of unascertained goods forming part of an identified bulk. It provides that a buyer who has paid some or the entire contract price will obtain an undivided share in the bulk as a tenant in common with the seller and or other buyer(s). This section applies to sale of an identified bulk within the contract or by subsequent agreement of the parties. This will apply to *Re Wait's* case and cases where contract was initially for sale of wholly unascertained goods but after the contract the seller appropriated to the contract part of the particular bulk. However, this provision will not apply to sale wholly unascertained goods where no particular bulk is appropriated or identified.

In order to deal with the possibility that the bulk might contain more or less than the parties believed, it provides that the buyer will become owner of same proportion of the bulk as to the amount for which he has paid bears to the actual amount of the bulk at that time. For instance, if the buyer agrees to buy 1000 tons of grain from a bulk source containing 100,000 tons, if contrary to the belief, it becomes 80,000 tons, the buyer will own one eighth which is 8,000 tons.

All co-owners would be deemed to consent to dealings with goods by each of the other co-owners in so far as the goods fall within the other co-owners' individual share.

In order to avoid imposing obligations on co-owners to make contribution or restitution, delivery to the buyer out of the bulk shall be for the purpose ascribed to the buyer in the first place to the goods in respect of which payment has been made. Section 18 Rule 5 (3) and (4) provide also another instance where unascertained goods forming part of identified bulk can be ascertained, in which case property will pass.

Nigeria's Position

The position in Nigeria as regards transfer of goods forming part of a bulk is same as the decision reached in *Rewart's* case. A sale of 500 tons of wheat out of a quantity of 1000 tons of wheat on board a ship was held to be sale of unascertained goods. The buyer paid in advance of delivery of the goods and the seller went bankrupt. It was held that property in unascertained goods cannot pass until the goods are ascertained and that the buyer had no right to claim the goods and could only prove as unsecured creditor in the seller's bankruptcy. In both *Re Wait* and *Re Gold Corp*, the court rejected the argument that the contract gave the buyers equitable proprietary interest in the goods because the contract was for sale of unascertained goods. This is the clear interpretation of section 16 of the Act, which provides that no property passes in unascertained goods. In *Mary Ajayi v. Alice Eburu*, at the trial court, the Magistrate dismissed the claim on the ground that the goods are unascertained, and, therefore, the Defendant properly rejected the goods. But on appeal to the high court, it was held that the Learned Magistrate erred in Law in classifying the goods as unascertained. Both the trial court and high court agreed that no property passes once the goods is unascertained. Also, in *Sabru Motors Ltd. v. Rayab Ent. Ltd*, the Respondent at the trial court claimed the sum of N1,692,519.40 being the money he originally paid to the appellant for the purchase and delivery of two vehicles and an additional sum of N4,307,000.00 which the Respondent was to add to the original sum paid or alternatively compelling the delivery of the vehicle to him. The appellant purchased the vehicles at the original rate but sold them to *Leventis* at a higher rate. Both the trial court and the Supreme Court found for the Respondent in the original sum and damages but refused specific performance. The court refused to make order for specific performance

because the goods were unascertained and no property had passed. What if the seller is bankrupt and the buyer had paid as was in the above case? Also, the fact that 500 tons formed part of identifiable bulk of 1000 tons of wheat on board a ship was immaterial in *Re wait*.

A Call for Amendment of the Nigerian Sales of Goods Laws

As seen above, in other jurisdictions like United States of America and England there had been amendments of their Sale of Goods laws to bring it in line with the modern commercial practices and reality. The Nigerian Sale of Goods Act, which is the England Sale of Good Act, 1893 and in some States of Nigeria a codification of same Act, into law save for slight changes in numbering of sections still remains in its obsolete state. The issue of passing of property forming part of bulk is no longer an issue in these jurisdictions. It, however, remains a big issue in Nigeria, where goods form part of a bulk, property will not pass until such goods are separated and ascertained. The Nigerian legislatures should follow the steps in the Unites States and England where this issue has been put to rest. In solving this problem in the United States of America, their Uniform Commercial Code provide that an undivided share in an identified bulk of fungible goods can be identified to be sold although the quantity of the bulk is not determined. The proportion of the bulk or any quantity to be sold can be agreed upon by number, weight, or other measure and such extent of the seller's interest in the bulk can be sold to the buyer that then becomes an owner in common. In England, similar provision in Section 20A of the Sale of Goods Act, 1979 as amended deals with a specified quantity of unascertained goods forming part of an identified bulk. It provides that a buyer who has paid some or the entire contract price will obtain an undivided share in the bulk as a tenant in common with the seller and or other buyer(s). By this the buyer can exercise right of ownership and would rank as secure creditor in the event of the seller's insolvency especially where buyer has made full or part payment. Also, even where no payment is made, where the contract imposes on the buyer the risk of loss or damage to goods in transit; with ownership vested in him, he will be able to sue the third party who causes damage to the goods. This will drastically reduce the hardship the buyer is faced with in transfer of proper, in Nigeria. It is submitted that, the time for the review of our Sale of Goods La- i in Nigeria is long overdue, especially as it relates to the transfer of goods forming part of a bulk.

Conclusion

It is clear that transfer of property is very significant in commercial transactions because issues of ownership, rights, risk, locus standi, liabilities are all dependent on it. However, the transfer of goods forming part of a bulk has been of great challenge to contract for sale of goods, especially in Nigeria. Effective steps have been taken in other jurisdictions. Nigeria is part of the global village and

must inculcate the best commercial practices. The time for the amend Nigerian sale of goods laws is now.

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END NOTE

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¹ Owing to the effort of Sir Mackenzie Chalmer's draftmanship in 1888.

² See the various reception law the earliest was Ordinance 3 of 1863, Section 32(1) of Interpretation Act. CAP 134, LFN, 2004.

³ Section 61(2) Sale of Goods Act 1893.

⁴ Sale of Goods Law Cap 150 Vol. 6 Laws of Bendel State of Nigeria 1976, Sale of Goods Law Cap 125 Laws of Lagos State, 1961, Laws of Former Western Region 1959-comprising of Ogun, Ondo, Osun, Oyo and Ekiti States.

⁵ Section 61(2) Sale of Goods Act, 1893.

⁶ Third Ed., Page 916.

⁷ Section 1(1) Sale of Goods Act. 1893.

⁸ Okany M. C., "Nigerian Commercial Law", Onitsha: African-Feb Publisher Limited. (1992) Page 230.

⁹ (2005) 5 NWLR Pt 919, 593

⁸ Moss v. Hancock (1899). 203; R. V. Thompson (1988) Q. B 229.

⁹ Article 2 of United States Uniform Commercial Code 1977.

¹⁰ Atiyah P. S., *the Sale of Goods, Canada: Pitman Publishing*, 5th Ed.. (1975). p. 31.

¹¹ (1909) 1 K.B. 357.

¹² See *Mills v. Stokeman* (1966-67) 116 CL R 61.

¹³ Fogam P. K., "Sale of Goods" in Prof. Akanki E. O. Ed.. "Commercial Law in Nigeria" Lagos: University of Lagos press, (2005) p.269.

¹⁰ *Ibid*

¹¹ See generally Section 5 Sale of Goods Act, 1893.

¹² Section 62 of the Act

¹³ (1964) MNLR, 41.

¹⁴ Fogam P. K., *op cit.* p.270.

¹⁵ Section 16 Sale of Good Act 1893.

¹⁶ (1927) 1 Ch 606, (1926) All E. R. 433

¹⁷ Section 1 (1) Sale of Goods Act 1893.

¹⁸ Section 62 (1) Sale of Goods Act 1893

²⁴ Okany M. C. (Supra), note 8, p.243

²⁵ (2005) NWLR 10 Pt 934, p. 645. See also *Afrotec v. MIA* (2000) 15 NWLR Pt 692. p.730

²⁶ Section 16-20 headed "Transfer of Property as between buyer and seller" while the remaining provisions of Part II are collectively headed "Transfer of Title."

²⁷ Okany M. C., *op cit.* p.242.

²⁸ Greig D. W., "Sale of Goods" (1974) p. 17.

²⁹ (1972) 1 Q.B 198. <http://netk.net.aU//contract.lewis.asp>

³⁰ *Ibid*

³¹ (1919) 2 KB 243

³² (1961) 1 QB 31

³³ (2001) NWLR, Pt 710, p. 700

³⁴ Section 1 (1) SGA, Prof. Fogam P. K. *op cit.*, p. 295

³⁵ Section 28 of the Act

³⁶ Fogam P. K., *op cit.* p. 297

³⁷ Section 17(2) SGA 1893

³⁸ Agbebaku C. A. "Sales of Goods Law in Nigeria" Akure: Sylvia Publishers Ltd.. (1997) p. 61

³⁹ Rose T. Smyth & Co. Ltd v. Bailey and Co (1940), 3 ACLER at 66. H. J.

⁴⁰ Section 18 Rule 1 of the Act. Applied in *Tanarewa (Nig.) Ltd. V. Arzai (supra)*, p. 632

⁴¹ (1976) 2 O. Y. S.H. C. 92

⁴² (1976) 3 O.Y.S.H. C. 79

⁴³ (1967). 2 All E.R. 449,453