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**THE LEGAL IMPLICATION AND COMMERCIAL RISK WHEN  
TITLE DOES NOT PASS UNDER THE SALE OF GOODS ACT**

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## **ABSTRACT**

In the commercial world goods are defined to mean all chattels personal other than things in action and money, and includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. In Nigeria, sale of goods is regulated under the Sale of Goods Act of 1893 and the Sale of Goods laws of the various States of the Federation. Contracts involving sale of goods also formed part of the law of contract. Thus, there had been a notable recurrent challenges in commercial transactions between seller and buyer as to passing of title and risk. Generally, title will not pass to the prospective buyer if there is absence of authority to do so. This had placed so many parties in sale of good contracts in a mess. In this regard, this paper adopted the doctrinal legal research methodology in evaluating the legal implication and commercial risk when title does not pass under the Sale of Goods Act. This in effect is geared towards mitigating the risk of losing title to goods when goods have been fully paid for in a sale transaction.

**KEY WORDS:** Title, Legal Implication, Goods, Contract of sale,

## INTRODUCTION

The law regulating commercial transactions in Nigeria is the Sale of Goods Act,<sup>1</sup> the Rules of Common Law and the law merchant which are not inconsistent with the provisions created under the Sale of Goods Act herein after referred to as the Act.<sup>2</sup> We also have Sale of Goods law of the various States of the Federation such as the Sale of Goods Law of the former Bendel State,<sup>3</sup> Sale of Goods law of the former western Nigeria.<sup>4</sup>

It is expedient to state that although the Former Western Region of Nigeria abrogated the Act and replaced it with the Sale of Goods Law of 1959. The 1959 law is a replica of the 1893 Act.<sup>5</sup> The point must be made that the study of the sale of goods is only a specialized one in the sense that contract involving sale of goods is essentially a part of the law of contract. The Act has therefore not done away with the general rules relating to contract. Hence, offer and acceptance, consideration and other elements of a valid contract must, inter alia be present in a contract for the sale of goods.<sup>6</sup> This means that the vital elements that determine the legality of a contract still have essential roles in sale of goods transactions.

## DEFINITION OF TERMS

### TITLE

The union of all elements, as ownership, possession and custody constituting the legal right to control and dispose of property.<sup>7</sup>

### GOODS

Goods means all chattels personal other than things in action and money and includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.<sup>8</sup>

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<sup>1</sup>1893, Statute of General Application in Force in Nigeria.

<sup>2</sup> Section 61 (2)

<sup>3</sup> 1976, Applicable to Delta State and Edo State

<sup>4</sup> 1959

<sup>5</sup> Okay Achike, Commercial Law in Nigeria (1985) p. 173

<sup>6</sup> Adesanya M.O. and Oloyede E.O, Business Law in Nigeria (1983). P. 87

<sup>7</sup> Bryan A. Garner et al, Black's Law Dictionary 9<sup>th</sup>Edn. (West Publishing Co. Thomson Reuters U.S.A.) 2009. P. 1622

<sup>8</sup> Section 2 CAP S1, Sale of Goods Law 1958. Applicable in Delta State.

## **MERCANTILE AGENT**

Mercantile agent means an agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods.<sup>9</sup>

## **PROPERTY**

Property means the general property in goods and not merely a special property.

## **A CONTRACT OF SALE OF GOODS**

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.<sup>10</sup>

## **THE PERCEPTION OF PROPERTY**

The term property in sale of goods contract embraces generally varying objects such as clothes, shoes, machinery, furniture, aircraft, motor cars and growing crops. Thus, goods which is the subject matter of the contract does not include choses in action like bills of exchange and cheques or money. Furthermore, it does not include real property such as land or any interest therein. This distinguishes chattels personal from chattels real which are chattel attached to or forming part of the land. Chattels personal are sub-divided into thing in possession and things in action.

The word emblements which was borrowed from ancient real property law comprises crops and vegetables such as corn and potatoes produced by the labour of man and ordinarily yielding a present annual profit.<sup>11</sup> Similarly, it suffices to say that emblements covers crops which are planted and harvested annually. This includes crops like yam, cassava, maize, potatoes which are popularly known as emblements are not part of land and are regarded as chattels even before they are severed from the land. The term industrial growing crops has not yet been judicially defined but presumably it is wider than emblements and may include crops not maturing within a

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<sup>9</sup> Section 2 CAP S1, Sale of Goods Law 1958. Applicable in Delta State.

<sup>10</sup> Section 1 (1) Sale of Goods Act, 1893

<sup>11</sup> Robert Lowe, Commercial Law (1970) 3<sup>rd</sup> Ed. p.125

year such as clover. This covers emblements and other cultivated crops which may be harvested outside the annual period.<sup>12</sup>

Things attached to or forming part of the land which are agreed to be severed as provided under the Act<sup>13</sup> embraces the distinction between fructusindustriales and fructusnaturales. Fructusindustriales refers to annual cultivated crops which though growing on land are not regarded as land because of the transient nature of the cultivation. In other words, it consists largely of emblements such as crops and vegetable as are the annual result of agricultural labour. These include cassava, yam, corn, rice, wheat, potatoes and industrial growing crops, an expression which is wider than emblements and includes crops which are not annual. These can be sold as goods whether they are severed before or after the contract.

Fructusnaturales on the other hand, are regarded as land. The term is used to refer to the natural products of the soil such as Iroko trees, Grass etcetera and also the products of those plants and trees which although needing retention when first planted do not require it each year to produce a crop such as fruits from fruit trees. These do not qualify as goods unless under the contract they are to be severed from land.<sup>14</sup>

## **TYPES OF GOODS**

The Act makes provisions for different types of goods which are highlighted below.<sup>15</sup>

### **SPECIFIC OR ASCERTAINED GOODS**

Specific goods are goods which are identified and agreed upon at the time of entering into contract of sale. Example of this is Rav-4 Toyota Jeep, 2002 model with chassis and engine number described in the contract of sale.

### **EXISTING GOODS**

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<sup>12</sup>Achike Op. Cit. p.181, Adesanya and Oloyede, Op. Cit. p.89

<sup>13</sup> Section 62 (1) of the Act

<sup>14</sup>Ezejiofor G., Okonkwo C.O. and Ilegbune, Nigerian Business Law (1982). P.155, Okany M.C., Nigerian Law of Property (1986) p.76

<sup>15</sup> Section 5 of the Act

Existing goods as provided for under the Act means goods that are owned and possessed by the seller at the time of the contract. They are goods that are actually in existence when the contract is made. Thus existing goods may be either specific or unascertained goods.

## **FUTURE GOODS**

A future goods includes goods not yet in existence and goods in existence but not yet acquired by the seller. They are goods yet to be acquired or manufactured by the seller after the contract has been made. For the purposes of passing of property, it is a trite matter that future goods cannot be specific goods except they can be sufficiently identified in which case, if destroyed may frustrate the contract.<sup>16</sup>

## **UNASCERTAIN GOODS**

Under the Act, unascertained goods are goods sold by description but which are not identified or agreed upon at the time of the contract but are included in a particular class of goods. For example, 12 tons of grade one cocoa.<sup>17</sup>

## **THE RULES GUIDING TRANSFER OF PROPERTY BETWEEN SELLER AND BUYER**

There are certain rules under the sale of goods transaction that determine when property in the goods can validly pass from seller to a buyer. These rules are provided for by the Sale of Goods Law<sup>18</sup> and are considered herein as follows:

**Rule One:** This rule relates to an unconditional contract of sale of specific goods in deliverable state, here the property passes at the time of contract irrespective of whether the time of payment or time of delivery or both be postponed.

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<sup>16</sup> Section 7 of the Act

<sup>17</sup>Atiya P.S., The Sale of Goods (1986) 5<sup>th</sup>& 6<sup>th</sup>Edns. Pp.36-7

<sup>18</sup> Section 19 Sale of Goods Law Cap 150 Laws of the former Bendel State 1976 as applicable in Edo and Delta States

**Rule Two:** This rule states that where the goods are specific but the seller has to put them in a deliverable state by doing certain things, property will not pass until such things are done and the buyer is notified.

**Rule Three:** This rule states that where the seller has to weigh or measure the goods and put them into sizes or consignment until this is done and the buyer has notice of it, no property passes.

**Rule Four:** According to this Rule, where the goods are delivered to the buyer on approval or on sale or return and the buyer signifies his acceptance expressly or by conduct, the property passes to him.

**Rule Five:** This rule states that where there is a contract for unascertained goods by description and the 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 then passes to the buyer.

## **PASSING OF TITLE AND RISK**

In all commercial transactions involving contract of sale of goods, the legal effect or connotation of such contract is what determines whether or not such transaction is recognized in the eye of the law as valid contract capable of passing property in goods as well as risk. Thus, part 2 of the Act made provisions relating to transfer of property as between buyer and seller<sup>19</sup> while other provisions in the same part 2 are collectively headed; 'Transfer of Title'.

The term 'property' as earlier stated means the general property in goods as opposed to mere special property.<sup>20</sup> From the legal purview relating to sale of goods, the term 'general property conveys' the meaning of dominion, title or ownership.

It is important to note that there was a deliberate effort in the provisions of the Act under part 2 to differentiate between circumstances where there is a transfer of property between the seller

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<sup>19</sup> Section 16-20 of the Act

<sup>20</sup> Section 61(1) of the Act

and the buyer from the transfer of property between a third party who may profess himself as a seller (even though he is not a true seller) and a buyer. The type of transfer that take place between the questionable seller and a buyer is called transfer of title.

It follows therefore that under the second heading; 'Transfer of Title' deals with the 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.<sup>21</sup> This means that the seller, in the course of transaction may pass a title as against the position of the true seller who can pass the property in the goods. For instance, where a thief who may or may not be in possession of goods sells such goods belonging to another person, under this situation, the thief is not the true owner but still he passes the title to the innocent buyer who does not know his true position. This informed the rationale for the use of the term 'Title' in the heading of that provision of the Act.

Sequel to the above, an appraisal is done hereunder on transfer of title between the bona fide purchaser and the questionable seller. On the other hand, an evaluation is also done on the legal implication when title does not pass from the seller to the buyer.

### **LEGAL IMPLICATION WHEN TITLE DOES NOT PASS**

Generally, the legal implication when title does not pass in a sale of goods transactions probably due to some flaws, property in the goods will under the Act, remain at the seller's risk until the title is transferred to the buyer. When title is transferred to the buyer, he takes the risk whether there is actual delivery of the goods or not. However, where there is a valid arrangement as to delivery and one of the parties causes undue delay in delivery, the legal implication is that the risk lies with the one who caused the delay.

It is a trite matter under the commercial law<sup>22</sup> that no one can give a better title than what himself possesses. This is stated in legal maxim as "Nemo Dat Quod Non Habet". More often than not, difficulties usually occur in finding out who is really vested with the title where there is more than one claimant deriving title from different persons. The ensuing effect is usually an innocent

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<sup>21</sup>Okany M.C., Nigerian Commercial Law, (Africana-Fep Publishers Ltd, 1992, Reprinted by Rex Charles &Patrick Ltd, Nimo, Anambra State, Nigeria) 2001, p.242

<sup>22</sup> Section 22 Sale of Goods Law Cap 150 Laws of the Former Bendel State, 1976 as applicable in Edo and Delta States



party suffering loss from the act of someone who does not have the legal right in passing valid title.

However, a modification has been brought into the commercial circle to mitigate the suffering of the innocent third parties to transactions who may buy goods in good faith for value without noticing any encumbrance. It is now possible in some cases for persons who do not have title to goods to transfer valid title. The exceptions are:

**(i). Sale Under Voidable Title:** Where an innocent third party who buys goods in good faith from someone with voidable title may acquire valid title until such title is voided. In the old case of *Lewis v. Avery*<sup>23</sup>, a rogue impersonated a famous actor, issued a cheque and caused a car dealer to deliver a car to him. The cheque turned out a dud cheque and the rogue subsequently sold the said car to a bona fide purchaser for value without notice of the fraud. The court held that the purchaser acquired good title.

**(ii). Sale in Market Overt:** Goods sold in a market overt according to the custom of trade and practice of the market, a buyer who buys in good faith for value without notice, acquires good title to the goods.

**(iii). Sale by Seller in Possession:** A seller in possession with all the indices of title other than the real owner may also transfer valid title to innocent bona fide purchaser.

Order circumstances through which a valid title may be passed are; Sale by buyer in possession, sale by a mercantile agent, Estoppel and sale by Order of Courts.

## CONCLUSION

From the foregoing, it is crystal clear that the legal implication and commercial risk on innocent buyer when title does not pass between him and a questionable seller is total loss and hardship usually suffered by innocent buyer. However, the property in the goods may only pass if sale transaction falls within any of the aforementioned exceptions.

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<sup>23</sup> (1972) 1 Q.B. 198, (1971) 3 All E.R 907

## **RECOMMENDATIONS**

Pursuant to the preceding, this paper recommends the followings:

Investigation of title before going into contract of sale transactions is sine qua non. Since passing of property in goods is not dependant on transfer of possession of the goods. This is predicated on the fact that situations may arise under which a non owner may be in physical control or custody of goods and yet he is not the true owner.

It is expedient to know at what point in time does property in goods and risk pass in a contract of sale transaction in order to avoid transaction of sale that will end up being exercise of futility which may result into litigation.

Sequel to the provision of Section 20 of the Act, Risk generally passes with property. Consequently, if in the course of the transaction of sale, the goods are destroyed or stolen, the owner will bear the loss as title will not pass. In this regard, this paper recommends that protection and security of goods should take priority in transaction of sale or agreement to sell.

Furthermore, this paper recommends amendments to the replica provisions of the Sale of Goods Laws of the respective States of the Federation with regard to section 62 (1) of the Act so as to accommodate fructus naturales such as iroko trees, grass, minerals etcetera as goods whether they have been severed or not before sale. For instance, a contract for the sale of iroko trees will now be treated as goods whether or not they have been severed before sale. On this premise, the confusing identity of what constitute goods between contracting parties in determining when the subject matter of transaction of sale will be seen as goods for the purpose of passing property will be mitigated in the commercial circle.

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