A CRITICAL EXAMINATION OF PASSING OF PROPERTY AND RISK IN THE GOODS IN SALE OF GOODS CONTRACT.

By

Eberechi Jack Osimiri*

ABSTRACT

Passing of property in the goods has over the years been recognized as one of the most important aspect of sale of goods contracts: on the ground that passing of property in the goods from the seller to the buyer either in ascertained or unascertained goods, involves the delivery of the goods and the risk of loss. It also involves the various stages of parties' performance of their obligations. Though, the intention of the parties can be discerned from the terms of the contract, conduct of the parties and the circumstances of the case in specific/ascertained and unascertained goods, but there are problems of the buyer bearing the risk of loss, when the goods have been shipped but has not been delivered/received by the buyer. The challenges is observed more in a cost, insurance and freight (C.I.F.) contract/transportation term particularly when goods are bought afloat and the buyer is deemed to have assumed the risk of loss on shipment. There is also problem of transfer of property in unascertained goods forming part of the bulk and goods in undivided shares forming part of the bulk. It is in order to resolve these problems and to achieve the aim of this article, that a doctrinal method of research was used: whereof we used the primary research materials such as Sale of Goods Act, 1893, Sale of Goods Act, 1979 of England, and the Sale of Goods (Amendment) Act, 1995 of England and case laws; secondary research materials like opinion of law writers in textbooks, journals and tertiary sources like online materials. We found out that in interpreting the intention of the parties, due regard is not made to the nature of the goods which is the subject matter of the contract. Our findings also include that the application of rule 5 of section 18 of the Act, relating to passing of risk and property in unascertained goods forming part of the bulk and property in the goods in undivided share forming part of the bulk, there are harsh and inequitable effects on the transactions of parties particularly against the buyer. We further found that with the provisions of sections 20A and 20B of the English Sale of Goods (Amendment) Act 1995; such harsh and inequitable provisions of sections 16 and 18 rule 5 of the 1979 English Sale of Goods Act, has been cushioned. At the end, we recommended that the provisions of the amended Sale of Goods Act 1995 (English) should be

* Eberechi Jack Osimiri, Esq. LL.B (Hons) ABSU, B.L (Lagos) LL.M (Northumbria, UK) Ph.D Candidate, Lecturer in Law, Department of Public Law, Faculty of Law, Rivers State University, Nkpolu Oroworukwo, Port Harcourt.

adopted in Nigeria, in order to remedy the harsh effects and litigations in this respect.

INTRODUCTION

Passing of property and risk in the goods from the seller to the buyer, involves delivery of goods after sales; and it is at this stage that risk and property pass either simultaneously or at different times depending on the nature of the goods and the contract terms agreed by the parties. Generally, in commercial transactions, risk stays where the property resides, though this general principle of the law can be varied by parties stating that one party can bear the risk even though there is no property delivered to him. When a person is liable to a loss or damage to the goods, the goods is said to be at his risk[1]

Consequently, the fundamental aspect of sale of goods is the time when the property in the goods will pass to the other party in the contract. This is because, he that is in possession of the property/goods, bears the risk in the property.[2] And this is expressed in Latin maxim *res perit domino,* that is risk passes with the property. This seminar paper defined property and how property in the goods, passes from the seller to the buyer, considered the determining factors before property and risk in the goods can pass either when the goods are sold or delivered even though the goods are delivered on the happening of certain events. The paper also identified and considered various rules of passing of property in the goods in ascertained and unascertained goods. The paper further recommended on the way forward from the limiting factors in passing of ownership in the goods in sale of goods contracts.

What is Property?

By virtue of section 62 of the Act,[3] property means the general property in goods, and not merely a special property. A critical consideration of this definition indicates that the concept property is not clearly defined by the Act. However, in Black's Law Dictionary,[4] property means thing to posses, use and enjoy a determinate thing either a tract of land or a chattel; a right of ownership. Logically flowing from the definition, is that property in the goods, means

[1] R.A. Akande, *Fundamental Principles of Commercial Law*, (Abakaliki: Willy Rose & Appleseed Publishing Company, 2011), P. 50
[2] C..J. Okoro, *Business Law for Professional Examinations; ICAN, CITN, L.L.B. Note questions and solutions*, (Lagos: Malthouse press Ltd, 2003), P. 192
[3] Sale of Goods Act, 1893. This is the Principal legislation on sale of Goods contracts in Nigeria though many states of the federation has enacted sale goods law, which is in tandem with the this Act with little or no modifications.
[4] G. A. Garner, 8th ed. (USA: West publishing coy, 2004). P 3.1252

right of ownership of the goods. When the property in the goods passes to the buyer, the buyer becomes the owner of them. Risk is the chance of bearing the loss of goods involved in a sale.[5]

DEFINITION OF GOODS:

Section 62 of the Act,[6] provides:

> goods include all chattels personal other than things in action and money; and in Scotland all corporeal moveable except money. The term includes embelments, 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.

From the definition of goods under the Act, goods does not include sale of ship, animals, land/real property and sale of minerals except when mineral are detached from the land before it can be called goods. Similarly, money and things in action like shares and negotiable instruments are not regarded as goods. However, chattels are goods capable of being sold as goods, because it is detachable from the land and are moveable from place to place. Similarly, Okoro[7] argues that, goods means chattel personal other than money. However, he further opined that, for any money to serve as goods, it must have money value. The concept of goods includes all personal chattels with the exception of money. Therefore, all moveable objects come under the heading of goods but, immovable things such as land, houses, and other things which are permanently attached to land are excluded[8]

WHAT ARE THE DETERMINING FACTORS FOR PROPERTY AND RISK TO PASS FROM THE SELLER TO THE BUYER?

Generally, in a sale of goods contract, for property and risk in the goods to pass from the seller to the buyer, it is the intention of the parties to the contract that determines it, in case of specific/ ascertained goods. Where goods are unascertained, property cannot pass unless and until the goods are ascertained[9]. And this can be observed from the terms of the contract made by the

[5] O.V.C Okene, *Business Law in Nigeria; Fundamental Principles* 2nd edn. (Port Harcourt: Claxton and Derrick Ltd, 2012), P. 135

[6] Sale of Goods Act, *op. cit*. See Section 68(1) Sale of Goods Law, Cap. 115, Laws of Rivers State, 1999 which is in *parimateri*a with Section 62 of the Act

[7] C. J. Okoro, Business Law for Professional Examination, 16id,

[8] O. V. C. Okene, *Business Law in Nigeria: Fundamental Principles Op Cit*. P. 124

[9] < https://djetlawyer.com>blog, accessed on 16/2/2022 at 12:00pm; see also section 16 of sale of goods Act, *op. cit.*

parties, conduct of the parties and circumstances of the case.[10] Section 17 of the Act,[11] provides as follows:

> 17 (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred:
>
> 17 (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and of the case.

And passing of property in the goods is the transfer of ownership and not the physical possession of the goods[12]. Examples of when possession will be transferred while property/ ownership in the goods remain with another person is when a principal sends goods to his agent, and the goods are said to be ascertained, if such goods are identified in accordance with the agreement after the contract of sale is made.[13] Consequently, they are indicated by description or sample. Another determining factor in passing of property in the goods, is the class/ nature of the goods. Goods can be classified as specific/ascertained and unascertained at the time the contract is made. Therefore, in contract of sale of goods, the goods are either specific/ascertained or unascertained. By virtue of section 62 of the Act[14] goods is said to be specific when the goods are identified and agreed upon at the time a contract of sale is made.

This requires that, the actual goods the buyer is to receive after making the contract can be readily identified at the time the contract is made.[15] And there is nothing or condition to be done or fulfilled before the property in the goods can be transferred or passed to the buyer. Examples are when goods are taken to the cash point in a trade warehouse/market or a supermarket. Even electronics or a second- hand car chosen off at a car garage and sold by reference to its registration, are referred to as specific or ascertained goods. However, if there are things remaining to be done by the seller to the article before it can finally be delivered to

[10] R.A. Akande, *Op Cit*, PP.52-53
[11] Sale of goods Act, *op. cit;* see also https://www.casrilanka.com> accessed on 15/2/2022 at 10:30am
[12] https://aditi.du.ac.in. > econtent accessed on 16/1/2022 at 12:20pm
[13] G.L. Andrew Nicol, Passing of Property in part of a bulk, the modern law review, vol 42, No. March edn. 1979, pp. 129-142, accessed online at https://www.jstor.org/stable/1095116 on 15/2/2022 at 1.25pm. similarly, the distinction between specific and ascertained goods is that specific goods are goods identified at the time of contract of sale.
[14] Sale of goods Act, *op.cit;*
[15] R.A. Akande*, op. cit;* p.51

the purchaser; the contract will not be construed to be one to pass the property in the goods, until those things are done.[16]

In the case of *Underwood Ltd v. Burgh Castle Brick & Cement Syndicate*[17], where the plaintiff sold a condensing engine to the defendants. The engine was cemented to the floor and it had to be dismantled after being detached from the floor. The seller accidentally damaged the machine when loading onto a railway truck and delivered same to the buyer. The buyers refused to accept the machine. The Court held that the property in the engine did not pass at the time of making the contract because it was not in a deliverable state in as much as it had to be detached before the buyers could take delivery. In law of sale of goods, goods is said to be in a deliverable state when they are in such state that the buyer would under the contract be bound to take delivery of them[18].

On the contrary, where there are conditions to be done or fulfilled as indicated by the parties during the contract before the goods can be delivered, and the property to pass to the buyer, the goods is not specific or ascertained during the making of the contract. In *Boro of Yenegoa v. Kennedy & Anor*.[19]. The seller agreed with the buyer to fell timber trees, and he was required by the buyer to cut down the trees into lengths, prepare them into logs and haul, transport and deliver them at an agreed place. The Court held that the contract was conditional and property in the goods did not pass at the time the contract was made.

Similarly, Akande[20], argues that, Clauses for passage of property/title in the goods would be ineffective, if it is made after the contract has been concluded. This is exemplified in the case of *Dennant v. Skinner & Collan*[21], where the plaintiff sold a car to Mr. X, who is a swindler. The plaintiff further obtained his signature to a document which expressly stated that the property/title in the goods/car will pass to Mr. X, if the cheque he issued was finally cleared. Unfortunately Mr. X gave a false name and address and also sold the car to the Defendant when the cheque has not been cleared. The Court held that the intention of the parties as expressed in the document was to prevent the property from passing. Consequently, no title/property was passed to Mr. X and the sale by Mr. X to the Defendant was not valid.

[16] R. A. Akande, Ibid.; *Seath V. Moore* (1886) 11 App. Cas. p. 350, at P. 370
[17] (1922) 1 KB 343
[18] See Section 62 (3) sale of goods Act, *op cit*
[19] (1926) 31 comm. Cas p. 172
[20] R. A. Akande, *Op cit*, p. 53
[21] (1948) 2 KB P. 164

Further, the Terms of the Contract of Sale, also Determines When the Property in the Goods will be Transferred to the Buyer.

Under Sale by cost, insurance and freight (C.I.F) Contract the question is: How does property and risk in the goods pass to the buyer in specific goods? Before delving into this, it is necessary to define the nature and features of cost, insurance and freight (C.I.F) term in contract of sale of goods. In defining the rights and obligations of the parties under a C.I.F Sale contract, McCardie J. in *Manbre Saccharine Company Ltd, v. Corn Products Company Ltd.*[22] made a succinct statement on the nature and characteristics of a C.I.F. contract in these words:

> All that the buyer can call for is the delivery of the customary documents. This represents the measure of the buyers' rights and the extent of the duty. The buyer cannot refuse the document and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent.

Logically, the statement of the law in Manbre's case reveals that a C.I.F. contract term is better described than been defined. Similarly, delivery is satisfied by delivery of documents and not by actual delivery of the goods to the buyer. Performance starts with the seller's delivery of the goods to the carrier at the port of shipment across the ship rail and completed on tender of shipping documents to the buyer and the seller receives the price. Consequently, document is very important to the seller and the buyer. To the seller, document is a weapon to claim his contract price and to the buyer, it is an effective instrument to take possession of the goods when it arrives or if the goods did not arrive after the documents[23] has been tendered to the buyer: it enables the buyer to sue the insurer and/or the carrier for damages and purchase price, if it has been paid in advance.

Under C.I.F. contract term, when goods are shipped or cross the ship rail, only risk pass to the buyer[24] while property/title in the goods remains with the seller till the shipping/contract documents are tendered to the buyer at a later date. This is subject to the seller's right to reserve title/property in the goods or withhold documents if the goods were already delivered but the

[22] (1919) 1 KB P. 198
[23] The shipping/contract documents are the bill of lading, Insurance Policy and income.
[24] See *Law and Bonar Ltd V. British American Tobacco Company Ltd* (1916) 2 KB 605 where the court held rejecting the buyers contention that section 32 (3) sale of Goods Act is applicable since the sellers failed to give him notice to procure war risk insurance, court held that section 32 (3) of the Act is inapplicable in a CIF contract. Therefore the risk passed to the buyer under CIF contract on shipment and the buyer was held entitled to pay contract price and accept the documents.

buyer could not pay. Practically, if the seller retains the bill of lading and other contract documents, but appropriated the contract goods, property will not pass to the buyer, because the seller has retained or reserved the right of disposal: until and unless the conditions for the right of disposal to be lifted are fulfilled by the buyer, that is payment of price is made,[25] property in the goods will not be transferred.

This presupposes that under C.I.F. contract, risk is not linked with the passing of property. That is, risk does not stay where property reside. However, Bradgate[26], has opined that, where goods are bought float, and the seller did not ship the goods directly, risk passes retrospectively from the time the goods were shipped and the buyer is deemed to have assumed the risk of loss from the time of shipment. According to McDonald,[27] the buyer under C.I.F. term is deemed to have assumed to take the risk of loss before he is aware of the fact that the goods are his: when the goods are bought afloat. In *Marsh & Murrel Ltd v. Joseph Emmanuel Ltd*,[28] a C & F contract of sale of potatoes subject bought afloat, but the potatoes where damaged. One of the issues for determination was when did risk in the goods bought afloat pass to the buyer? The Court of Appeal held that, risk of loss passed to the buyer retrospectively; therefore, the buyer cannot contend that any warranty given by the seller is broken.

However, in practice, since the buyer takes the benefit of the contract of carriage and insurance policy, he has a right to claim damages from the insurer or carrier in the event of loss or damage in transit; except where the documents tendered or goods delivered by the seller is defective or does not conform to contract and it is apparent on the face of it: and if this happens the buyer is likely to sue the seller for damages for the sellers' failure to perform its duty according to the contract. The importance and use of contract documents in Sale under C.I.F term, gives the buyer peace of mind, in circumstances where the goods did not arrive or if it arrives, it is defective, damage or not contract goods. Even in situation, where the goods purport to have been shipped by the Seller but in fact, it was not Shipped within the Shipment period or at all; the problem can be remedied, if the documents are tendered and received by the buyer, and it entitles the buyer can sue and claim all his entitlements

[25] Section 19(2) Sale of Goods Act, *op. cit*; see also the equivalent in section 18 Sale of Goods Law, Rivers State
[26] R. Bradgate, International Sale Contracts (London: Butterworths Ltd, 2000), P. 789, para. 33.2.10
[27] T. McDonald, The Insurable Interests of International Buyers on CIF terms," *in Journal of International Maritime Law*, Vol. 10. Issue 5, Oct-Nov, 2004, P. 44
[28] 1961) 2 Lloyd's Report P. 326 at 333

Under free on Board (F.O.B) contract term, where the seller undertakes to ship goods across the ship rail and give the buyer sufficient information of the shipment to enable the buyer to insure the goods, while the buyer's duty is also to arrange for carriage of goods contract; risk and property usually pass to the buyer when the goods cross the ship rail, in ascertained or specific goods,[29].

In *Pyrene Company Ltd v. Scindia Navigation Company Ltd*,[30] the contract involved the delivery of a fire tender by the seller which was sold under F.O.B with a ship nominated by the buyer. While lifting the tender, and before it crossed the ship rail, it dropped and damaged when the goods has not been shipped. The seller sued the ship owner for the cost of repairs. It was held that, the property in the goods has not passed to the buyer and it remained the property of the seller when the tender damaged. In practice, the postponement of passing of property/title in the goods to a later date outside the shipment period or due to reservation of the right of disposal in an F.O.B contract does not affect the time risk pass to the buyer on shipment.

In spite of the argument above, the passing of risk and property in F.O.B contract term, is in accordance with general rule relating to transfer of risk and property in the goods as contained in section 20 of the Act, subject to the intention of the parties.

Section 20 of the Act[31] provide thus:

> unless otherwise agreed, the goods remains at the sellers risk until the property in the goods is transferred to the buyer but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not.

Passing of Risk and Property in Specific/Ascertained Goods in other Contracts.

Passing of property and risk in the goods is one of the distinguishing elements of outright sale, credit sale, conditional sale and hire purchase agreements in sale of goods contracts.[32] In an Outright Sale Agreement, Property and risk in the goods passes to the buyer when the contract is made in specific/ascertained goods. In the case of *Ajagbe v.Idowu*[33], where the plaintiff bought a Toyota Litece bus from the defendant on a credit sale basis for ₦250, 000.00 and made initial payment of N20, 000.00. The agreement was to make monthly payments until the

[29] D. G. Cracknell, Obligations: Contract Law, 5th ed. (London: Old Bailey Press, 2005), P. 414
[30] (1954) 2 QB P. 402
[31] Sale of Goods Act, *op. cit*;
[32] F. N. Monye, Hire Purchase and Credit Sales: A review of Alhaji F, Jimoh Ajabe V. Layiwola Idowu, *in the Nigerian Law Journal* vol. 15, No. 1, 2013, P. 199 at P. 206
[33] *(2011) All FWLR (pt. 590) P. 1235; Yakassai V. Incar motors LTD (1975) NSCC P. 284 at pp.287-288*

installments is liquidated. However, after making a total payment of N39, 000.00, he could not meet up with the payment of other installments. The defendant seized the vehicle and sold it to a third party. When the plaintiff sent a further installment of N12, 000.00 to the defendant, he was told that the bus has already been sold. Consequently, the plaintiff sued for the return of the bus and loss of daily earrings and general damages for unlawful seizure of the bus. The plaintiff (the buyer) contended that, the transaction was an outright sale and that ownership/property has been transferred to him. The defendant (the seller) contended that it was a hire purchase agreement, ownership remain with him, among other issue for determination. The Supreme Court held that, the transaction was an outright sale and the defendant has no right to seize the bus and resell it to a third party. The Court also held that, the property in the vehicle had passed to the plaintiff (buyer) at the date of the contract before the defendant seized the bus. The Supreme Court per Mukhtar JSC further clarified the difference in passing of property between outright sale and hire purchase agreement in these words:

> The difference between an outright sale and a hire purchase agreement is that in the former, the property in the vehicle passes to the purchaser as soon as the contract is entered into, whereas in hire purchase agreement, the property in the vehicle still remain vested in the owner until payment is fully made. In other words, under a hire purchase agreement, it is always open to the owner of a vehicle to take possession of it on failure of the hirer to pay the installments. In an outright sale, the seller's remedy lies in an action to recover the balance of payment owed by the purchaser.[34]

However, the position is different under the hire Purchase Act,[35] in respect to the right of the owner to take possession of the goods if the hirer defaults in payment of any installment. By virtue of Section 9 (1) (2) (3) (4) of the Act,[36] where goods are let under hire Purchase agreement and the relevant proportion of the hire purchase price,[37] has been paid or tendered by the hirer or on his behalf by the guarantor, the owners' right to take possession of the goods in case of default, shall cease. The owners' right only lies in action to recover the balance, not

[34] Ibid. at P. 1247, paras. B-E and P. 1249. Paras. C-D ratio 3; see also section 9 & 10 on Hire Purchase Act Cap. H4 Laws of the Federation of Nigeria 2004.

[35] Cap. H4. Laws of the Federation of Nigeria, 2004.

[36] Hire Purchase Act, Ibid.

[37] What constitutes relevant Proportion of the hire purchase agreement as contained in paragraphs (a) & (b) of sub-section 4 of section 9, is as it relates to goods if one-half has been paid. And as it relates to motor-vehicles, if the three-fifth has been paid by the hirer, the owner shall not enforce his right to cease the goods or motor vehicle. See also section 10 of the Act, *op. cit*; on the powers of the court for actions to recover goods.

ceasing the goods. Where the owner contravenes these provisions and ceases the goods by force, the hire purchase agreement is automatically terminated; and the hirer is released from all liability and the guarantor may recover from the owner any money had and received by the owner.[38]

Conditional Sale Contract

This is an agreement/transaction for the sale of goods which the purchase price or part of it, is payable by installments and the property in the goods or land is to remain in the seller (even though the buyer is in possession of the goods) until such conditions as to the payment of installments or otherwise as specified in the agreement are fulfilled.[39] Therefore, what passed to the buyer, who has taken possession of the goods, is risk.

Credit Sale Agreement

A credit sale agreement is an agreement for the sale of goods, under which the purchase price or part of it, is payable by installments but which is not a conditional sale agreement. The property in the goods passes immediately to the buyer when the contract is made.[40]

WHEN THE INTENTION OF THE PARTIES ARE NOT EXPRESSLY DECLARED OR NOT CLEAR IN THE CONTRACT, HOW WILL THE INTENTION OF THE PARTIES BE KNOWN IN SPECIFIC/ASCERTAINED AND UNASCERTAINED GOODS?

In order to ascertain the intention of the parties on when property in the goods will pass to the buyer in specific/ascertained and unascertained goods, when the parties to the contract did not expressly state it or not contained in the parties agreement and it is not clear on when the property in the goods will pass; the court will call in aid the provisions of section 18 rules 1 to 5 of the Act.[41]

---

[38] See section 10 of the Act, *op. cit;* on the powers of the court for actions to recover goods.
D. G. Cracknell, *Obligations. Contract Law*, *op.cit,* P.415; see also *Yakassai v. Incar Motors Nig. Ltd*. *op.cit,* at P. 287 paras.15-20; *Ajagbe v. Idowu Op. cit*. at P. 1250 paras. B- C.
[40] D.G. Cracknel, *op. cit*; P. 415; see also *Yakasai V. Incar motors Nig. Ltd, op. cit*; at P. 287 paras. 15-20; Ajagbe V. Idowu *op. cit*; at P.1250 paras. B-C.
[41] Sale of Goods Act, *op. cit*; see also *https://www.globalnegotiator.com*>accessed on 15/4/2022 at 11:15am.

Section 18 provides:

> Unless a different intention appear, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

This section sets out five rules to ascertain the intention of the parties. Rules 1 to 4 deals with contract for specific/ ascertained goods while Rule 5 deals with contract relating to unascertained goods. Rule 1 provides that:

> Where there is 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.

It can be discerned that for rule 1 to apply, that: (a) the goods must be specific

(b) The contract must not be subject to any conditions and (c) The goods must be in a deliverable state.

Therefore, it is argued that for property to pass to the buyer under rule 1 of section 18, the three conditions must be present in the contract. In *Tarling v. Baxter*[42] where the buyer bought a hay stick but before he took it away it was destroyed by fire. The Court held that property had pass to the buyer and the loss fell on the buyer, in spite of the fact that delivery was postponed. Therefore, in the case of *Underwood*[43] the Court held that rule 1 is not applicable because the goods were not in a deliverable state as something is remaining to be done to them. Consequently, the purport and effect of rule 1, can be illustrated in situation where Mr. John enters into Nwoye's shop and bought a washing machine for N85, 000.00, with the terms that Nwoye will deliver the washing machine at John's house the following day and receive payment. However, the night of the date contract was made, Nwoye's shop was burgled and the machine was stolen. Mr. Nwoye can sue John for the price of the machine because property in the machine has passed to Mr. John when the contract was made and risk has also passed to Mr. John under section 20 of the Sale of Goods Act.

[42] (1827) 6 B & C 360; it is also clear from the decision that the phrase "unconditional contract" as contained in rule 1 is a contract which is not subject to condition precedent or subsequent.

[43] *Op. cit*; see also the case of *Boro of yenagoa V. Kennedy & Anor*, *Op. cit*, where because at the time of the contract was conditional, was held property cannot pass to the buyer and rule 1 is not applicable.

Rule 2: This relates to contract for specific goods, to be put by the seller in a deliverable state and the buyer given notice of it before the property can pass. Where the seller fail to put the goods in a deliverable state and give the buyer actual notice of doing the act, property in it will not pass to the buyer.

Rule 2 provides:

> Where there is a contract for the sales of specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until the thing is done, and the buyer has notice thereof.

Rule 3 provides:

> 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 be done, and the buyer has notice thereof.

Critically, rule 3 applies if the seller has the responsibility for measuring, weighing or testing to ascertain the price before sales. But, where the responsibility to weigh, test or measure to ascertain the price, is on a third party, other than the seller, rule 3 is inapplicable.[44] In *Nanka-Bruce v. Common Wealth Trust Ltd,*[45] where the responsibility to weigh and the measure the goods in order to ascertain the price was on a sub-buyer, who is a third party, the court held it that, rule 3 does not apply and property in the goods has not passed to the buyer when the contract was made before the price was agreed. The court further held that, the condition to weigh the cocoa was not a condition precedent to the conclusion of the contract. Therefore, the seller could pass a good title to the respondents.

Rule 4 provides:

[44] . A. Akande, *op. cit,* p. 55

[45] (1926) AC P. 77, (privy council).

Where goods are delivered to the buyer on approval or "on sale or Return", or other similar terms, the property in the goods will pass to the buyer: if the buyer:

(a) Signifies his approval or acceptance to the seller or does any other act adopting transaction.

(b) If he does not signify his approval or acceptance to the seller but retain the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

The importance of this rule is that a buyer who intends to examine the goods and may use the goods in order to establish if they are suitable for purpose, may have goods on approval and/or sale or return[46]. Similarly, the buyer who buys goods with intention of re-selling them but may not show commitment to the original purchase, until the sub-sale is agreed. The operation of this rule, has startling effects as exemplified in the case of *Port v. Smith Car Sales Ltd*[47] where a car was delivered to the defendants on "sale or return basis". The car was not returned for over three months despite, repeated telephone calls and a letter written by the Seller that if the car was not returned, it would be deemed to have been sold to the defendants, but the car was not returned.

The court held that, property in the car has passed to the defendants on the ground that a reasonable time had expired without the car being returned. However, a contrary decision was held in the case of *Weiner v. Smith,*[48] where W. delivered goods to H on "sale or return" but there was a provision in the contract that sale or return "would remain except the price was paid". It was held by the Court that the term on which goods were delivered showed a different intention and accordingly property in the goods did not pass when they were pledged to "L" to whom H delivered them to find customers.

From the provisions of rule 4, what constitutes acts adopting or accepting the transactions are:

(i) Any action by the buyer which is inconsistent with his free power to return the goods and where a buyer retains goods on sale or return

[46] R. A. Akande, *op. cit*, p. 56;it is also clear from rules 2, 3 and 4 of section 18 of the Act deals with contracts subject to condition precedent
[47] (1962) 2 All ER 482
[48] (1906) 2 KB 574; see also *Atari Corp (UK) Ltd V. Electronics Boutique store (UK) Ltd* (1998) 1 ALL ER P. 1010 where the court of appeal addressed the issue of a valid notice of rejection

> or similar term and pledges or resells it to a third party, the third party is protected against the seller.[49]

Rule 5 which deals with unascertained goods provides that:

> where there is a contract for the sale of unascertained or future goods by description, and goods of that description are in a deliverable state and 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 and the assent maybe express or implied, may be given either before or after the appropriation is made.

The key elements of rule 5 are:

a. The goods are unascertained or future goods. And before it can be unconditionally appropriated to the contract, it must be ascertained

b. The contract goods must be by description

c. The goods be in a deliverable state

d. Goods should be unconditionally appropriated to the contract

e. There must be an assent by either party with the consent of the other party of the appropriation.

First, rule 5 requires that, the goods must be unconditionally appropriated to the contract for the property in the goods to pass to the buyer. What constitutes an unconditional appropriation of the goods to the contract is when in pursuant to the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodial (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal.[50]

In *Pinatoro v.Gilroy* [51] a buyer ordered for some bags of rice, which he was to collect when they were ready. The buyer however did nothing to collect the rice for three weeks it was ready and he was informed that the bags of rice were ready. However, the bags of rice were stolen

[49] R.A Akande, *op. cit*; P. 57
[50] Paragraph 2 of rule 5 (Rule 5 (2); see also https:djetlawyer.com>blog accessed on 15/2/2022 at 11:30am, *op. cit*;
[51] (1919) 1 KB 459

during the three weeks. The Court held that the buyer had by his action assented to the appropriation and thus the property in the goods and the risk of loss had passed to him.

Also, goods are said to be "unconditionally appropriated" to the contract, when contract goods have been on board the ship or have crossed the ship rail. In the case of *Carlos Feder Shipiel & Co. S.A. v.Twingg*[52] the seller contracted to manufacture and transport F.O.B (free on board) some bicycles to the buyer in Costa Rica. The bicycles were manufactured, created bearing the buyers name, but was not dispatched or shipped before the seller went into liquidation. Though, the buyer had paid for the bicycles. Hence, he sued and sought for possession. The Court held that, the goods has not been unconditionally appropriated to the contract. Consequently, property has not been transferred to the buyer though the goods has been created in the buyer's name. The court further held that, unconditional appropriation would have occurred if the bicycles were loaded into the ship.

Another circumstances where unconditional appropriation is deemed to have taken place is, if the seller after labeling the goods, sets them aside and send to the buyer a delivery note given the details of the serial numbers of the relevant goods, as was done in the case of *Hardy (Industrial Engines) v. Puttick*[53] Secondly, the rule requires that, consent of the parties should be done expressly or impliedly. And the assent of the buyer to the appropriation may be given either before or after the appropriation, which may be implied.[54]

WHAT ARE THE DETERMINING FACTORS BEFORE PROPERTY CAN PASS IN UNASCERTAINED GOODS FORMING PART OF AN IDENTIFIED BULK AND SALES OF UNDIVIDED SHARE IN GOODS.

Curiously, there is much litigation in determination of when property in the goods pass in unascertained goods forming part of an identified bulk, unconditional appropriation of such good and passing of property in the goods and sale of undivided shares in goods. Importantly, part of the problem in passing of property in the goods to the buyer in unascertained goods forming part of an identified bulk not appropriated to the contract, was observed in *Re Wait*[55] where the trustees in bankruptcy was successful in their claim that the 500 tones of wheat which

[52] (1957) 1 Lloyd's Report P. 240
[53] (1984) 2 All ER P. 152.
[54] Pignatoro V. Gilroy, op. cit;
[55] (1927) 1 CH. 606

was part of the larger bulk but was not identified and not unconditionally appropriated to the contract; hence, the property in the goods did not pass to the sub buyer. The Court held that the goods are unascertained and the property in it had not passed to sub-purchaser. The trustees were successful in the claim for the delivery of 500 tons of bulk wheat to them not to the sub-purchaser.

In England, this harsh and mandatory effects of sections 16 and 18 rule 5 of the Act[56] on the passing of property in unascertained goods forming part of the identified bulk which is not appropriated to the contract, was remedied by section (1) and section 2 Sale of Goods (Amendment) Act[57] It is interesting to note that, the new English Act, deals with two specific aspects and affects the sale of unascertained goods in:

(a) the sale of unascertained goods forming part of an identified bulk only (not to other forms of unascertained goods); and

(b) sale of undivided shares in goods

Section 1 of the Sale of Goods (Amendment) Act provides for unascertained goods forming part of an identified bulk. According to the 1995 (amended) Act provides that in section 18 of the 1979 Act (England) at the end of Rule 5, there shall be added the following: 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 (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; he is deemed to be the owner of the remaining goods on the grounds that:

(a) The remaining goods are to be taken as appropriated to that contract at the time when the bulk is reduced, and

(b) The property in those goods then passes to that buyer.

For purpose of clarity, section 16 of the 1979 Act provides:

[56] Sale of Goods Act, Op. cit.
[57] (1995) chapter 28. The law became operational on 19 September, 1995 in England

> Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

The problems and challenges posed by the provisions of section 16 of the Act are:

a) Even though the buyer had paid for the goods and had obtained the property, but in reality the property in the goods may not be passed to him. This makes the buyer vulnerable, if the seller becomes insolvent before the goods were ascertained.

b) Similarly, if part of the goods sold was done while they were at the sea.

c) When the transaction between the buyer and the seller, has been completed and the contract price is paid; however, the seller is still in possession of the goods, property can only pass to the buyer: if the seller separates the buyers' goods from the bulk. But, if the buyers' goods are not separated from the bulk, rule 16 applies and property in the goods will not pass to the buyer[58].

However, the new Sale of Goods (Amendment) Act 1995, makes the general rule in section 16 of the 1979 Act, subject to the provisions of section 20A and 20B of the 1995 Act. This means that, the general rule in section 16 may not apply if the conditions contained in section 20A and 20B exist and are fulfilled. The Court of Appeal in England held that, goods remaining has been ascertained by exhaustion and appropriated to the contract, in the case of *Karlshamns Oljefabriker v. East Port Navigation Corporation (The Elafi)*[59] where the ship carried 22,000 tones of unascertained copra in bulk. The buyer first acquired 6,000 tones of copra with a bill of lading and later made a separate contract of 500 tones. The ship after discharge at Rotterdam and later at Hamburg, the cargo remaining on board consisted of copra purchased by the buyer and when the ship arrived at Halshamn, water damaged the goods of about 825 tones of copra. The buyers sued the ship owners contending that the remaining goods are his and he has title to them under the bill of lading. The Court per Muskill L J. held that, the goods (copra) remaining in the ship after discharge at Hamburg had become ascertained by the process of exhaustion and the buyer had acquired title/property in them. Therefore, before the exhaustion,

[58] Seehttps://www.lawteacher.net accessed on 15/2/2022 at 1:10pm

[59] (1982) 1 ALL ER 208

property could not have passed on shipment or on the transfer of bill of lading because, the seller shipped 22,000 tones of copra to different buyers including the plaintiff.

A close observation of the reasoning and principle of law in the cases of *Re Wait* and the *Elafi*, reveals that, though, the facts are likely the same as both involves the transfer of property in unascertained goods forming part of the bulk; but the court decided differently by qualifying unascertained goods under, the *Elafi* as being ascertained by exhaustion during the voyage.[60] The transfer of property to the buyer by the process of exhaustion is not automatic. The buyer must indicate by saying that the remaining goods belongs to him and should be transferred to him. Secondly, the second part provided by section 20B of Sale of Goods (Amendment) Act is when property in the goods will pass in an undivided share in goods forming part of a bulk. Therefore, in a contract for the sale of specified quantity of unascertained goods in an undivided share, forming part of the bulk, the property in the undivided share in the bulk, will be transferred to the buyer and also the buyer will become an owner in common of the bulk; if the buyer fulfills certain conditions thus:

(i) Where the goods or some of them forms part of a bulk, and it is identified in the contract or subsequent agreement by the parties or

(ii) The buyer has paid the price for some or all the goods subject of the contract and which forms part of the bulk.

Thirdly, when goods are sold from the bulk by the seller and the seller represents to the buyer that his goods has been set aside, the seller will be *estopped* from denying the representation which the buyer relied on. Consequently, the buyer who had prepaid some or all the purchase price but the goods are not appropriated to him before the sellers' insolvency, property in those goods which are specified quantity of an identified bulk, could be transferred to the buyer as tenant in common.

Above all, unascertained goods under the rule can be ascertained when the goods are separated from the remainder of the bulk either prior to delivery, or at the time of delivery or when the only goods left from the bulk is capable of fulfilling the contracts, by the concept of ascertainment by exhaustion from the rest of the goods been sold[61]. Also, where the goods or

[60] See D' Acry *et al* (ed.) Schmittohffs, *The Law and p Practice of International Trade* (London: Sweet and Maxwell, 1993) P. 70, paras. 4-005, where the authors criticized the decision in *Re Wait* as being unsatisfactory and unjust to the buyer and suggested that it will be more satisfactory and equitable to both parties, if the law provides for a common ownership of the undivided shares in bulk goods.
[61] R. A. Akande, op cit, P.57

some of them form part of a bulk which is identified either in the contract or subsequent agreement of parties and the buyer has prepaid the price of some or all the goods subject of the contract and forms part of the bulk, the property in the undivided share in the bulk will be transferred to the buyer in common.

CONCLUSION AND RECOMMENDATIONS

This work demonstrates with sufficient clarity, the passage of property and risk in ascertained and unascertained goods in sale of goods contracts. The importance of risk and property, as it affects the various stages of parties' performance of their obligations are highlighted.

Generally, to discover the intention of the parties on when risk and property will pass in the sale of specific/ascertained and unascertained goods, reference is made to the agreement of parties, conduct of the parties and terms of the contract. As a general rule, risk resides with the property, but under a cost, insurance and freight (C.I.F.) contract/transportation term, risk does not reside with the property; on the ground that risk passes to the buyer on shipment or when the goods cross the ship rail but property resides with the seller until the shipping/ contract documents are tendered by the seller to the buyer on a later date. In outright and credit sales agreement, risk and property in the goods passes when the contract is made, in hire purchase and conditional sale agreement, only risk pass to the buyer when the contract is made but property pass to the buyer when the payments have been transfer by the buyer to the seller respectively.

There is much debate and litigation regarding when property will pass in unascertained goods forming part of an identified bulk and sales of undivided shares in goods. Such controversy has certain harsh and inequitable effects on the parties to the contract particularly the buyer. But with the amendment of Sale of Goods Act, 1979 by Sale of Goods (Amendment) Act 1995 in England, the harsh and inequitable effects of sections 16 and 18 rule 5 on the parties, has been remedied which we recommend in Nigeria to adopt the provisions of English Amended Act, though it has been replaced by the Consumer Rights Act, 2015 in England.[62] First, we recommend that, if this amendment is done in Nigeria, transfer of property to the buyer in an unascertained goods forming part of an identified bulk, will pass to the buyer by the processes of exhaustion. This will be done if the buyer will say that those goods remaining are his goods.

[62] The replacement does not preclude parties who bought goods before the coming into effect of the Act on 1st October, 2015 from claiming under the sale of goods (Amendment) Act 1979 for any faulty or defective products. https://www.which.co.uk>regulations, accessed on 15/2/2022 by 10:15am.

We also recommend that, if the sale of goods Act of Nigeria is amended in accordance with English sale of goods (Amendment) Act, transfer of property in an undivided share in goods forming part of a bulk, would be transferred to the buyer by separation and the buyer will be a tenant in common. Third, when goods is sold from the bulk and are set aside by the seller and the buyer relies on the representation, then the seller will be *estopped* from denying the representation.