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THE TRUE SALE DOCTRINE IN ASSET SECURITISATION: THE NIGERIAN PERSPECTIVE

BY

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Abstract

The true sale doctrine is the foundation of every securitisation transaction. Assets transferred to a Special Purpose Vehicle in a securitisation transaction can only be bankruptcy remote if the transfer was a true sale transaction. Yet, the doctrine is surrounded by controversies and complexities. While some jurisdictions are using legislation to settle this controversy for the benefit of the investors and the broader economy, the Nigerian position is still unclear, confusing and without direction. This paper is an attempt to draw attention to the significance of true sale as it relates to the sale of receivables in asset securitisation. In doing this, this paper considered the Asset Backed Securitisation Act of the United States of American States of Delaware and Texas and English courts position on true sale to underscore the importance of the doctrine. This article further considered the position of the Nigerian Securities and Exchange Commission Rules on Securitisation and its limitations with regards to true sale doctrine. The paper concludes that the Nigerian position is not in tandem with international best practices and recommends the enactment of a

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securitisation law that will specifically address the question of true sale doctrine.

Keywords: Asset securitisation, True sale, Special purpose vehicle, Assets backed securities

1.0 Introduction

The true sale doctrine lies at the root of securitisation transaction because the assets can only be bankruptcy remote if they were transferred in a true sale. In asset securitisation, the owner of the assets (an originator) transfers its illiquid assets to a bankruptcy remote Special Purpose Vehicle (SPV). Rating agencies may give the SPV favourable ratings that will attract investors if they are certain that the transfer of assets to the SPV was done in a true sale manner. In the absence of true sale, the rating agencies will rate the bonds issued by the SPV based on the credit worthiness of the originator as the obligor.[3] In such situation the transaction will be considered as 'assets based' and not 'assets backed'.[4] The SPV depends on the funds it will raise from the capital market to pay for the assets it acquired from the originator. True sale therefore, is the holy grail of the securitisation industry.[5] Despite its overbearing influence, true sale like true love is much pursued but sadly elusive[6] such that determining whether the assets were transferred in a true sale has been shrouded in controversy particularly where the originator in under insolvency or bankruptcy proceedings. The controversy is deeply rooted in the ownership claims, i.e., whether the assets belong to the SPV or to the originator. In transferring the assets therefore, the originator wants to ensure that the SPV actually

[3] Simon Archer and Abdel Karim and Rifaat Ahmed, Islamic Capital Markets and products: Managing capital and liquidity Requirements under Basel III. (Wiley, 2018)

[4] Ibid

[5] Heather Hughes, Property and the True-Sale Doctrine. [2017] (19) (4) *University of Pennsylvania Journal of Business Law*, 870-926.

[6] Kenneth C. Kettering. True sale of receivables

owns the assets and that the SPV is not a creditor to the originator. If the transfer is truly a sale and characterised as such, the SPV will be unaffected by the originator's bankruptcy proceedings and would continue fulfilling its obligations to the investors.[7] Notwithstanding this importance, the position on what constitutes true sale in securitisation in Nigeria is unclear, confusing and without clear direction.

The aim of this paper is to draw attention to the importance of the true sale doctrine in asset securitisation and to show why this doctrine matters. This paper is divided into four parts. Following this introdcution is a general discusion of true sale, its significance and controversies arising from decisions of courts. The third part examined legislative interventions in other jurisdictions in a bid to resolve the controversies. The last part examined the position in Nigeria and makes recommendations.

2.0 True Sale, its Significance and Controversies surrounding it

Asset securitisation is a process that converts illiquid assets to marketable securities.[8] This conversion takes place through the use of a SPV. The owner of the assets (Originator) creates a SPV and transfers these assets to it. The SPV then issues Asset Backed Securities (ABS) to the investing public. The payment from the ABS is applied towards repaying the debts and other expenses. The procedures of repayment will depend on the initial agreement as stipulated in the transaction documents. Securitisation enhances corporate liquidity and helps the

[7] Stephen Schawrcz, The Impact of Bankruptcy Reform on True Sale Determination in Securitization Transaction. [2001] (7) *Fordham Journal of Corporate and Financial Law,* 353-360.

[8] Suresh M. Sundaresan, Fixed Income Markets and their Derivatives: Academic Press Advanced Finance Series (3rd edn, Elsevier. 1997)

company in raising funds.[9] Some of its other advantages include risk transfer[10] and diversification,[11] lower cost financing,[12] regulatory capital arbitrage[13] and deepening of the capital market.[14] This practice is well rooted in the international debt market.[15] The asset securitisation market is a market in which hundreds of billions of dollars flow - and the true sale doctrine is central to this market. The doctrine of true sale is important because issues affecting creditors such as employees, retirees, and tort claimants lies where the ownership belong.[16] In addition,

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[9] Paul Lund, Is Corporate Securitization Set to Take Off? Why the Structuring Technique May Prove Important in the Current Turbulent Market Conditions. [2008] (14) (2) *Journal of Structured* Finance, 46-51. See also Thomas Plank, The Security of Securitization and the Future of Security. [2004] (25) (5) *Cardozo Law Review*, 1655-1741.

[10] Steven L. Schwarcz, The alchemy of asset securitization. [1994] (1) *Stanford Journal of Law, Business & Finance*, 133- 152

[11] Amelia Pais, 2005. Why do Depository Institutions Use Securitisation? [2005] (10)(2) *Journal of Banking Regulation*, 1-31.

[11] Andres Jobst, What is securitization? [2008] Retrieved July 4, 2019, from http://www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf

[12] George G. Pennacchi, Loan Sales and the Cost of Bank Capital. [1988.] (43) *Journal of finance*, 375-396.

[13] Kathleene Donahoo and Sherrill Shaffer, Capital Requirements and Securitisation Decision. [1991] (31) *Quarterly Review of Economics and Business*, 12-23.

[14] Rafael Diaz-Granados, A Comparative Approach to Securitization in the United States, Japan, Germany, and France. [1996] (4) (1) *Willamette Bulletin of International Law and Policy*. 1-26.

[15] Charles D. Booth, Securitization in Emerging Markets, Including Government Promotion of Securitization: A comment on Hill & Arner, [2002] (12) *Duke Journal of Comparative International* Law, 533-536. See also, Miguel Segoviano and Bradley Jones and Peter Lindner and Johannes Blankenheim, Securitization: Lessons Learned and the Road Ahead. [2013] *IMF Working Paper*. No. WP/13/255. Retrieved December 4, 2019 from https://www.imf.org/external/pubs/ft/wp/2013/wp13255.pdf

[16] Mario Cerrato and Moorad Choudhry and John Crosby and John L. Olukuru. Why do UK Banks Securitise? [2012] Retrieved May 1, 2020 from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2051379.

benefits associated with asset securitisation can only materialise where investors are certain that their interests are protected.

True sale doctrine is simply a right of ownership claim in the asset transferred.[17] That is, whether the financial assets belong to the SPV or the originator.[18] Emphasing its signifcance in bankruptcy, Kothari[19] opines that if a transaction were to be regarded as a sale, the buyer would enjoy greater rights and privileges than if the transaction were seen as a loan. Peaslee and Nirenberg[20] opine that if the transaction was a sale, the assets would belong to the buyer. It would not form part of the originator's bankruptcy estate, and the SPV would not have to worry about the automatic stay, or any interference with its property rights. However, if it were to be regarded as a loan, the SPV will be seen as nothing but a secured creditor and if the originator were to go bankrupt, all the creditors must split up the originator's assets in an equitable fashion, and this process will likely lead to the SPV not being able to get the entire value of the receivables it acquired from the originator.[21] These risks are reduced substantially if the SPV can claim ownership of the asset in a true sale doctrine – that is, that the assignment to it actually constitutes a sale. True sale is the foundation of every

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[17] If the financial assets belong to the SPV, its investors will continue to receive payment; otherwise in the event of the originators bankruptcy, the SPV asset will be consolidated with the originators and the investor's right to receive payment will be deferred. The SPV can only claim ownership to the asset if the assignment of the asset from the originator to it constitute a sale – generally referred to as a true sale.

[18] Stephen Scharwcz, Securitization –Post Enron [2004] (25) (5) *Cardozo Law Review*, 1539-1575.

[19] Vinod Kothari, The Question of True Sale. Retrieved February 14, 2020 from http://vinodkothari.com/truesale/

[20] David Nirenberg and James M. Peaslee, Federal Income Taxation of Securitization Transactions. (3rd edn, Frank J. Fabozzi Associates, 2001)

[21] Aleksander Nikolic, Securitization of Patents and its Continued Viability in Light of the Current Economic Conditions. [2009] (19) (4) *Albany Law Journal of Science & Technology*, 393-403.

securitisation transaction as the investors will not invest in the SPV if they are convinced the transaction is not a sale.[22] Hughes[23] rightly posits that assets in a securitisation transaction can only be considered to be bankruptcy remote if they were transferred to the SPV in a true sale model. True sale therefore according to Hughes is the holy grail of the securitisation market.[24]

Despite the importance of true sale in a securitisation, the true sale doctrine is surrounded with a lot of controversies and complexities. This controversy according to Harris and Mooney[25] flows from the fact that both a sale and secured loan share many attributes.[26] In contrast, there is a lot of dissimilarities than shared attributes. According to Black's law dictionary,[27] a loan is "a delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest". In a sale of asset however, the purchaser receives irrevocable ownership, control, risk of loss, and potential benefit of appreciation with respect to the asset upon purchase.[28] The seller bears no liability in the sold

[22] Artem Shtatnov, The Elusive True Sale in Securitization. Retrieved July 4, 2019, from http://dx.doi.org/10.2139/ssrn.2115054

[23] Heather Hughes, Reforming the True-Sale Doctrine, [2019] *Yale Journal on Regulation. Bulletin.* Print Edition. Retrieved July 4, 2019 from https://yalejreg.com/reforming-the-true-sale-doctrine/

[24] Heather Hughes, Property and the True-Sale Doctrine Op. cit.

[25] Steven Harris and Charles Mooney, When is a Dog's Tail not a Leg? A Property-Based Methodology for Distinguishing Sales of Receivables from Security Interests that Secure an Obligation, [2014] (82) *University of Cincinnati Law Review.* 1029-1078.

[26] For instance, they argue that if the originator continues to service the transaction, (as it is usually the case) it is always difficult to differentiate which one is which. Some courts have considered continuous servicing by the originator to be a sign that the purported transaction was not a sale.

[27] Black's law Dictionary. 2004. United States of America: Thomson Reuters. 10th ed. Ed. B. A. Garner.

[28] Jason H. P. Kravitt, Securitization of Financial Assets. (3rd edn, Wolters Kluwer, 1996)

goods except where he gave a warranty.[29] He has no right to go after the obligor in hope of redeeming the collateral as the buyer has acquired the entire interest. The shared attribute that Harris and Mooney[30] referred to lies at the role the originator continues to perform after the asset has been sold. For example, most originators continue to act as servicer of the assets sold to the SPV. As a matter of fact, most originators now adopt unique measures to prevent a default of the transaction.[31] Some of these measures like 'buy back' clause may indicate that the "purported sale" was not actually a sale. So, if the originator is selling asset with a prior intention of a buy back or if he continues to be responsible for the assets as in the case of acting as a servicer, it may suggest that it is not a sale. As a result, the doctrine has continued to generate mixed reactions. Therefore, unless the bankruptcy court considers that the receivables were a true sale transfer, the asset securitisation transaction may not fulfil its purpose and the transaction will lose its essence.[32] In fact, Solomon[33] asserts that to structure the transaction as a true sale is also important to attract a high rating from the agencies.[34]

To limit the inconsistences and confusion arising from recharacterisation, Lupica[35] suggests that transfers should meet

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[29] Abiodun Osuntogun, A Critical Appraisal of Conditions and Warranties under the Sale of Goods Act 1893, [2006] (5) *University of Ibadan Journal of Private and Business Law*.1-26.

[30] Steven Harris and Charles Mooney Op. cit.

[31] Vinod Kothari, Truth of True Sale: An Analysis of Securitization. Being a paper delivered at the University of Hong Kong. Retrieved January 6, 2020 from http://vinodkothari.com/wp-content/uploads/truth-of-true-sale.pdf

[32] Steven Harris and Charles Mooney Op. Cit.

[33] Dov Solomon, The Rise of a Giant: Securitisation and the Global Financial Crisis. [2012] (49) (4) *American Business Law Journal*, 859-890.

[34] Ibid at 867.

[35] Lois Lupica, Revised Article 9: Securitization Transactions and the Bankruptcy Dynamic. [2001] (9) *American Bankruptcy Law Review*, 287-322.

certain objectives test notwithstanding the parties expressed intention. So that, if the parties are satisfied that the transfer meets the tests of sale and the asset is classified as a 'sale of accounts' for example, upon perfection and following the formalities required by case law, the transferee should be protected from the strong arm of the transferor's bankruptcy trustee.[36] Hughes[37] emphasises the significance of true sale and concludes that the only way to evade the inconsistencies is for lawmakers to formulate true sale laws that will emphasise the significance of price in the true sale analysis. According to him, determination of this price tag is important most specially to assuage the fears of the unsecured creditors.[38] Kettering[39] had earlier reiterated this opinion in stating that to determine a true sale, one must look at what sale means in common parlance. That is, until there is an exchange of money or a promise made to pay in future, there cannot be true sale.

The issue of enacting a law to take care of the issues as suggested by Hughes is desirable, however, the reason and the view expressed by Kettering may create further controversy. This is because a consideration other than price but which creates value may be sufficient. In support of this view, Harris and Mooney's[40] work partly concentrated on the value the transferred asset brings to the SPV. They opine that this value which is considered a capital contribution also serves as a price thereby qualifying the transaction as a sale. Plank[41] argues that what constitute true sale is straightforward, i.e., both the terms, forms and substance of

[36] Where the necessary fillings and perfection are not done, the transfer will be classified as a secured loan.

[37] Heather Hughes, Property and the True-Sale Doctrine Op. cit.

[38] Heather Hughes, Reforming the True-Sale Doctrine. Op. cit.

[39] Kenneth Kettering, True Sale of Receivables: A Purposive Analysis. [2008] (16) *American Bankruptcy Institute Law Review,* 511-562

[40] Steven Harris and Charles Mooney Op. cit.

[41] Thomas Plank, The Security of Securitization and the Future of Security. [2004] (25) (5) *Cardozo Law Review,* 1655-1741.

the transaction must form part of the sale. The seller must transfer all the benefits, risks and burden of the purchase to the buyer. Like Plank, Wood[42] laid down what he considered a valid characteristics of true sale to include that:

i. The vendor ought not to retain any form of liability with regards to the sold assets but for warranties for defects;
ii. The purchaser must in return obtain exclusive rights, control and ownership rights on the assets;
iii. The purchaser will have no obligation to render any form of accounts to the seller or his representatives; and
iv. There will be no reason to warrant setting aside the sold asset should the originator go into insolvency.

Aicher and Fellerhoff[43] observe that a transaction would qualify as a true sale if a purchaser pays a fair price for the assets. Pantaleo[44] et al insist that for a transaction to qualify as a sale, attention must be devoted to whether there is an obligation on the part of the buyer to the seller, i.e., whether the seller has a right of recourse to the buyer. Kettering[45] in offering what he called 'a purposive analysis' suggests that a sale should only be re-characterised if the seller is bound or mandated to repurchase the asset. Harris and Mooney,[46] offered 'property-based approach'

[42] Philip R. Wood, Project Finance, Securitizations, Subordinated Debt. (5th edn, Sweet and Maxwell. 2007)
[43] Robert D. Aicher and William J. Fellerhoff, Characterization of a Transfer of Receivables as a Sale or a Secured Loan upon Bankruptcy of the Transferor. [1991] (65) (98) *American Bankruptcy Law Journal*, 181-186.
[44] Peter V. Pantaleo and Herbert S. Edelman and Fredrick L. Feldkamp and Jason Kravitt and Walter McNeill and Thomas E. Plank and Kenneth P. Morrison and Steven L. Schwarcz and Paul Shupack and Barry Zaretsky. Rethinking the Role of Recourse in the Sale of Financial Assets. [1996] (52) *The Business Lawyer*, 159-198.
[45] Kenneth Kettering, True Sale of Receivables Op. cit.
[46] Steven Harris and Charles Mooney Op. cit.

which laid emphasis on interest and ownership. They posit that re-characterisation should only be encouraged if the sale does not represent an economic equivalent of ownership.[47] Unfortunately, this determination can only be reached by the court. In 1932, nearly 50 years before the practice of securitisation took the center stage, the English Court of Appeal in *Re George Inglefield, Ltd.*[48] laid the foundation for detemining when a transaction is a true sale. Romer, LJ stated that a transaction is a sale if the assignor is not entitled to get back by repaying the purchase price, the assignee does not have to account to the assignor for the profit and the fact that the assignee that sells at a loss has no claim to recover the deficit from the assignor.

Nigerian courts have not been presented with an opportunity to pronouce upon the vexatious issue of true sale of receivables in securitisation transaction. To further heighten the controversy in this area of law, some Nigerian writers[49] often refer to the case of *Mohammadu Jajira v Northern Brewery Company Limited*,[50] as the *locus* of true sale securitisation in Nigeria. These writers adopted the factors listed in *Jajira* as the factors the court will

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[47] If the seller has not transferred all of its interest in the sold receivables, then the transaction should be recharacterised.

[48] [1932] C.A.48 T.L.R. 536, 539

[49] Olubusola Oyeyosola-Diya and Onyinyechi Iwuoha, Recharacterisation of Repurchase and Reverse Repurchase Agreement: The Nigerian Perspective. [2018] *Back to Banking Law Committee Publication.* Retrieved February 29, 2020 from https://www.aelex.com/wp-content/uploads/2018/10/Recharacterisation-of-Repurchase-and-Reverse-Repurchase-Agreements-the-Nigerian-Perspective.pdf

Ajibola S. Basiru, Asset Securitisation in Nigeria: Legal Challenges and Prospects. [2015] Law Thesis. University of Lagos. Kofo Dosekun and Oludare Senbore in Global Legal Group, The International Comparative Legal Guide to Securitisation: A Practical Insight to Cross-Border Securitisation Law. [2006] Retrieved February 20, 2020 from https://alukooyebode.wpengine.com/wp-content/uploads/2018/10/chapter-33-nigeria.pdf

[50] [1972] NCLR 313

consider on whether it will recharacterise or not. The factors include;

i. the nature of the legal substance of the transaction as contained in the contract of sale;
ii. whether the legal substance of the transaction as contained in the contract of sale conforms with the definition of a sale or contract of sale under the provisions of the Sale of Goods Act;
iii. whether the contract of sale contains language that evidences a different type of legal transaction, such as further assurances, negative pledges, modification of property laws, restrictions against the free disposal of assets, or the right to reacquire the purchased goods on the return of the purchase money or other forms of mortgage language, that does not meet the requirements of a sale; and
iv. whether the purchaser is obligated to pay the seller any profit or income made on any future disposition of the receivables".

However, while we appreciates the spirit behind the ruling in this case, it is important to state that in stating the above conditions, the court was considering goods (tangible property) and not choses in action (intangible properties) like it is obtainable in securitisation. In fact, the court was faced with the interpretation of goods under the Sale of Goods Act. A contract of sale of goods under the Sale of Goods Act[51] is defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. Goods as defined under the Sale of Goods Act[52] apply strictly to only

[51] Section 1 Sale of Goods Act 1893.
[52] Section 62 of the Sale of Goods Act 1893.

personal chattels.[53] The Act specifically excludes things in action and money. In a securitisation transaction, the assets that are securitised are choses in action such as debt, loans and mortgage receivables. They therefore do not qualify as goods under the Sale of Goods Act. The Sale of Goods Act will therefore not apply to it. The case of *Jajira* therefore, does not serve as a good precedent for true sale in asset securitisation in Nigeria.

Court cases on true sales especially in the United States were not so favourable to securitisation transactions. In *Major's furniture v Castle Credit Corp.*,[54] the court held that the supposed sale transaction was a loan because the seller retained the risk accompanying the sale. Also, in *Octagon Gas System v Rimmer*[55] where the United States Court of Appeal held that the property which was sold prior to the seller's bankruptcy must form portion of the insolvency estate of the seller is reflective of Kettering[56] view when he opines that the pursuit of true sale is elusive. Plank[57] argues that the decision in Octagon Gas is clearly wrong. However, by the provision of the Revised Uniform Commercial Code,[58] once an account has been sold, the seller retains no interest whether legal or equitable in the sold collateral. According to Lupica,[59] what Revised UCC did was to overrule Octagon Gas in asserting that the moment an asset is sold and the interest of the transferee perfected, the debtor retains no residual interest in the asset either in or out of bankruptcy. Consequently, once it is determined that a perfected asset transfer meets the true-sale criteria, the securitised assets will not be vulnerable to

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[53] The term 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.

[54] (3d Cir. 1979) 602 F.2d 538

[55] (10th Cir. 1993) 995 F. 2d 948

[56] Kenneth Kettering, True Sale of Receivables Op. cit.

[57] Thomas E. Plank, When a Sale of Accounts is not a Sale: A Critique of Octagon Gas [1994] (48) *Consumer Finance Law Quaterly.* 45-53.

[58] Section 9-318

[59] Lois Lupica, Revised Article 9 Op. Cit.

the bankruptcy estate of the debtor. While it may be argued that the Revised UCC has settled this matter, the comment to Article 9-109 (4), which states that *"neither this article nor the definition of security interest... delineates how a particular transaction is to be classified" and '[t]hat issue is left to the courts"* show that the controversy is far from over.[60]

In *re LTV Steel Company Inc*,[61] the court held that *LTV Steel company Inc* retained an interest in the securitised asset until the final determination of the case. A brief fact of the case is provided for clarity. *LTV Steel Company Inc* was involved in two separate securitisation transactions with two separate banks. Its receivables and inventary backed each of the transaction. In addition, an opinion stating that the transaction met the true sale requirements was given by a major law firm. When subsequently LTV filed for bankruptcy, it attached the two securitisation transactions. In its defence, it argued that the transaction was a constituted financing and not a sale designed to deprive the unsecured creditors of their rights. The court agreed with LTV and held that it could continue to draw from the assets of the SPV pending the final determination of the case. This decision frigtened the financial community, and many commentators reasoned that there was no known legal background for the court to rule the way it did. However, Hughes[62] suggests that the rationale behind the decision was that the court felt pity for the numerous employees and retirees of the LTV who were dependent on the company for funds. The court in denying the emergency motion brought by the investors held that:

> *"the interim cash collateral order was necessary to enable LTV to keep its doors*

[60] See also Steven Harris and Charles Mooney Op. Cit, Heather Hughes, Property and the True-Sale Doctrine Op. Cit and Heather Hughes, Reforming the True-Sale Doctrine. Op. Cit.

[61] In Re LTV Steel Co 274 B.R. 278 (Bankr. N. D. Ohio 2001)

[62] Heather Hughes, Reforming the true-sale doctrine. Op. Cit.

open and continue to meet its obligations to its employees, retirees, customers and creditors, and that denial of the use of the assets would put an immediate end to the debtor's business, thereby forcing thousands of people out of work, depriving 100,000 retirees of needed medical benefits, and would have far reaching economic effects on the geographic areas where the LTV does business"[63]

While most US decisions have not favoured securitisation, the English courts seems to favour the true sale doctrine and uphold the agreements of parties. One example is the English Court of Appeal decision in *Welsh Development Agency (WDA) v Export Finance Co Ltd.* (Exfinco).[64] In this case, Parrot, before it entered into receivership sold computer disks to some overseas buyers which resulted in book debts, the subject of the litigation. WDA had a floating charge over all of Parrot's assets, it therefore claimed the book debts. Exfinco on the other hand had a "master agreement" with Parrot, by virtue of which it claimed that title to the Computer disks passed to it even before sale to the oversea

[63] The court also expressed disbelief to proposition that LTV lacks proprietary interest in the assets. In its words, "Furthermore, there seems to be an element of sophistry to suggest that LTV does not retain at least an equitable interest in the property that is subject to the interim order. LTV's business requires it to purchase, melt, mold and cast various metal products. To suggest that LTV does not own interest in products it crafts with its own labour, as well as the proceeds to be derived from that labour, is difficult to accept. Accordingly, the court concludes that LTV has at least some equitable interest in the inventory and receivables, and that this interest is property of the estate. This equitable interest is sufficient to support the making of the interim cash collateral order."

[64] (1992) BCLC 148. See also Eilis Ferran, Form and Substance in Financing Transactions. [1992] (51) (3) *The Cambridge Law Journal*, 434-436.

buyers and that since the Parrot sold them on its behalf, the book debts belonged to it and was not part of Parrot's assets. It was WDA's argument that though the "master agreement" was titled "Sale of Goods", it was actually a charge in favour of Exfinco to secure credit advanced by Exfinco to Parrot and was therefore void aginst WDA, a subsequent credit, for failure to register as required by the Companies Act. The English Court of Appeal rejected WDA's contention and allowed Exfinco's appeal. The Court described the "master agreement" as a "document of remarkable complexities" which was a valid contract of 'sale of goods'. It was immaterial that the purpose of the "master agreement" was not for Exfinco to become the owner of the computer disks. No doubt parties adopted the structure to avoid registration under the Companies Act. The Court held it is not part of its function to treat harshly the creative attempts by financiers and their solicitors to take advantage of deficiencies in the law. Dillion L. J. particularly declared that it is not illegal for a party to raise funds by a sale of goods rather than by mortgage or charge. The court concluded that the "master agreement" was *bona fide* and the terms consistent with the "sale of goods" as described by the parties.

Recently, in *Bank of Ireland v Eteams (International) Ltd (in voluntary liquidation)*[65], the Irish Court confirmed that Irish law reflects the English law principles with respect to the issue of true sales of receivables and when a sale will be re-characterised as secured loans. In this case, Eteams (International) Limited entered into a receivables financing agreement with the Bank of Ireland. The Company sold the receivables from its customers to the Bank at a discount, the Company agreed to collect those receivables on behalf of the Bank, and there were provisions whereby the receivables could, at the Bank's election, be transferred by the Bank back to the Company e.g. default by the

[65] [2017] IEHC 393

obligor. The Company became insolvent and the liquidator contended that the agreement was not a sale transaction but a charge created by the Company over its receivables which was void on the ground of failure to register the charge with the Companies Registration Office. The High Court ruled against the liquidator. On appeal, it was held that the provision requiring the Company to buy back any debt did not lead to the conclusion that the agreement was a charge. The court reasoned that, on the contrary, the Bank's right to transfer back debts to the Company in such instances showed that title had passed and there was no charge in existence. The court therefore held that the 'recourse option clause' was ineffective to constitute the transaction a secured credit. It was held further that the court will not look at the economic effects of an agreement but to the legal nature of the transaction applying the inconsistency test established in WDA. The Court concluded that the agreement was consistent with a sale as it did not appear to provide a loan or create a charge.[66]

3.0 Legislative Interventions

Pursuant to the decision in *In Re LTV Steel Company Inc.*, some US States now have Statutes that have overriden the position of the US courts.[67] In these jurisdictions, investors enjoy exclusive rights to the receivables backing the securities even if the transafer does not meet the common law rule on true sale. Plank[68]

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[66] Other factors which the court may use include expressions used in the documents and parties' behavioural pattern, issue of recourse, whether the right of service is inherent on the seller and whether the seller has the rights to intermingle the proceeds with his own assets, whether the seller has rights to repurchase the sold assets, whether the vendor has the right to keep proceeds collected in excess and whether the seller reserves the right to unilaterally change price of the goods and the transferred assets.

[67] States like Delaware, Texas, Louisiana, Alabama, Ohio.

[68] Thomas E. Plank, The Erie Doctrine and Bankruptcy. [2004] (79) (58) *Dotre Dame Law Review*, 633- 653. See also Michael Gaddis, When is a Dog

posits that these statutes were in response to concerns by the legislators that decisions in cases like in *Re LTV* will shake the legal foundation of the securitisation industry. The fear among the legislators was that the securitisation industry would colllapse if courts were to find that assets assigned to a SPV in a securitisation transaction are not the property of the SPV but that of the originator. For example, the Delaware Act,[69] provides that:

> "*any property, assets or rights purported to be transferred in whole or in part, in securitisation transactions shall be deemed to no longer be the property, assets or rights of the transferor*"[70]

The Act clarifies this position further by stating that:

> *"The transferor in securitization transactions, its creditors [and any] bankruptcy trustee shall have no rights, legal or equitable, whatsoever to reclaim or recharacterize as property of the transferor any property, assets or rights purported to be transferred.*[71] *Furthermore, —in the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor such of property, assets and rights shall not be deemed to be part of the transferor's property, assets, rights or estate*"[72]

Really a Duck? : The True-Sale Problem in Securities Law. [2008] (87) (2) *Texas Law* Journal, 487-502

[69] The Asset Backed Securities Facilitation Act of 2002, 73 Delaware laws chapter 214 Section 1.

[70] Chapter 2703A (a) (1).

[71] Chapter 2703A (a) (2).

[72] Chapter 2703A (a) (3).

Taking a slightly different approach, Texas non-uniform UCC provides that:

> "*The application of this chapter to the sale of accounts, chattel paper, payment intangibles, or promissory notes is not to recharacterize that sale as a transaction to secure indebtedness but to protect purchasers of those assets by providing a notice filing system. For all purposes, in the absence of fraud or intentional misrepresentation, the parties' characterization of a transaction as a sale of such assets shall be conclusive that the transaction is a sale and is not a secured transaction and that title, legal and equitable, has passed to the party characterized as the purchaser of those assets regardless of whether the secured party has any recourse against the debtor, whether the debtor is entitled to any surplus, or any other term of the parties' agreement*"[73]

4.0 The Nigerian Position

In Nigeria, the Securities and Exchange Commission Rules on Securitisation (SEC Rules) provides that the true sale transfer shall be effected by either a sale, assignment or exchange.[74] The originator must transfer the asset to the SPV in a way that qualifies that the SPV actually owns the assets. In transferring the assets, the originator should also transfer the underlying security as its interest in the entire assets now belongs to the SPV. This is because the investors will only invest in the SPV when they are convinced that the assets actually belong to the SPV and

[73] Texas Business & Commerce code ANN Section 9-109(e) (West 2015)
[74] Paragraph H (1) (d)

that the SPV will have priority over any other interest whatsoever, so that when the obligor fails in its payment obligation, the SPV will ensure that the debt is enforced.[75]

The SEC Rules also made provision for when the asset transfer will be considered a true sale. These conditions include;

a. The transferred assets are legally isolated and put beyond the reach of the Originator or Seller and its creditors;[76]
b. The SPV has the right to pledge, mortgage or exchange the transferred Assets;[77]
c. The Seller relinquishes absolute control over the assets transferred;[78]
d. The transfer shall be effected by either a sale, assignment or exchange, in any event on a without recourse basis to the Seller;[79]
e. The SPV shall have the right to profits and disposition with respect to the Assets;[80]
f. The Seller shall not have the right to recover the assets and the transferee shall not have the right to reimbursement of the price or other consideration paid for the Assets;[81] and
g. The SPV shall undertake the risks associated with the Assets.[82]

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[75] Louise Gullifer, Should Clauses Prohibiting Assignment be Overridden by Statute? [2015] (4) (1) *Penn State Journal of Law & International Affairs*, 47-68.
[76] Paragraph H (1) (a)
[77] Paragraph H (1) (b)
[78] Paragraph H (1) (c)
[79] Paragraph H (1) (d)
[80] Paragraph H (1) (e)
[81] Paragraph H (1) (f)
[82] Paragraph H (1) (g)

Where an assignment is made in accordance with the above requirements and conditions, the assignment is final, absolute and binding.[83] However, SEC Rules states that the sale shall be without recourse. This provision is not in tune with international best practices. The decisions in *WDA* and *Eteams*[84] made it clear that the existence of a recourse clause is not enough to determine the status of the transaction whether as a loan or sale.[85] Also in Luxembourg, obviously the busiest hub of securitisation in Europe, the law provides that the existence of recourse to the originator is not a ground for holding that it is not a sale.[86] The Luxembourg's position underscores the signifcance of the protection accorded to both investors and SPV in securitisation. In fact, the assignment of existing claims becomes effective amonsgt all parties from the time the assignment was agreed upon.[87] It follows that true sale of the assets is achieved immediately the assignor and the assignee agrees upon the sale, and it becomes effective against the obligor. Article 56 (1)[88] an anti-recharacterisation legislation provides that:

> "the assets assigned to a securitisation vehicle becomes part of its property as from the date on which the assignment becomes effective, notwithstanding any undertaking by the securitisation vehicle to reassign the claim at a later date"

[83] Paragraph H (2) (a)
[84] Supra
[85] See also James J. White, and Eric G. Brunstad, Secured Transactions Teaching Materials. (4th edn, Amazon. 2013) 365-70
[86] Article 62 (1) and (2) of Law 22
[87] Article 55(1) Law 22
[88] Securitisation Law 22 of Luxembourg

5.0 Conclusion

The true sale doctrine is central to the success of every securitisation transaction. If Nigeria is to benefit from the vast advantages attributed to securitisation, policy makers must make effort to address peculiar issues inherent in the transaction, one of which is true sale. The legislative intervention from other jurisdictions has shown how the market is to be structured for the benefit of the investors. It is hoped that Nigerian Court when called upon to determine the question of true sale in securitisation, would be courageous enough to adopt the progressive view in favour of protecting investors. It is hoped that lawmakers will follow this route and provide for what constitute true sale in a dedicated securitisation transaction.