COMMON LAW PURCHASE MONEY SECURITY INTEREST AND NIGERIA'S SECURED TRANSACTIONS IN MOVABLE ASSETS ACT 2017*

ABSTRACT

Retention of title clause, conditional sale and Quistclose trust are all common law (and equity) devices for preserving sellers' or creditors' title in property they finance or advance which is no longer in their possession. As functional secured credit, most common law jurisdictions have codified these common law mechanisms and principles and termed them purchase money security interest (PMSI) save for Quistclose trust that remains equitable and an involuntary or non-consensual security interest. This article examines the common law origins of these principles, their application in Nigeria, and analyses the application and consequences of codification of these principles in Nigeria's Secured Transactions in Movable Assets Act 2017.

Keywords: Quistclose trust, Romalpa clause, conditional sale, PMSI, tracing of proceeds, codification of common law.

INTRODUCTION

PMSI is a quasi-security interest and as such is not one of the original or traditional security interest known to the English common law. In *Re Cosslet (Contractors) Ltd*,[1] the position of the English common law was clear on the recognition of only the traditional security interest in pledge, lien, equitable charge and mortgage. The traditional school of thought on secured credits maintains that these are the only recognised security interests, while the liberal or functional school of thought believes that any device that makes money more assured in its repayment example guarantee and other quasi security interest devices, do qualify as security interest.[2]

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[1] [1998] Ch 495 (CA).

[2] Allan David, 'Security-Some Mysteries, Myths and Monstrosities' (1989) 15(3-4) *Monash University Law Review*; Roy Goode, 'Security: A Pragmatic Conceptualist's Response' (1989) 15(3-4) *Monash University Law Review*; Fidelis Oditah, *Legal Aspects of Receivables*

They did not, at least originally, emanate from statutes but by agreements of the parties activated by judicial interpretation and activism. They are modern common law security interest devices, and notable are Quistclose trust (or resulting trust), the Romalpa clause (retention of title) and conditional sale.

The application of these common law and equitable principles over time became convoluted with courts continually extending the bounds, resulting in some conflicting decisions and unpredictability. Codification was resorted to with the United States taking the lead in their Uniform Commercial Code Article 9 (UCC9) before the Personal Property Security Acts (PPSAs) of the provinces of Canada, Australia and New Zealand all of which are classical English common law jurisdictions. The essence of codifying these equitable security interest devices was to achieve certainty in the law and also provide for registration and priority in the relevant collateral registry. They are called PMSI because by their very nature they secure purchase money or to protect its intended destination.

Nigeria enacted the Secured Transactions in Movable Assets Act 2017 (STMA)[3] to enhance access to credit.[4] So much excitement greeted the assent into law of the STMA as welcome relief to the hitherto disheveled state of secured transactions law in Nigeria.[5] The STMA contains provisions on PMSI which have not been subjected to judicial interpretations just yet. However, the STMA has towed the line of the developed common law jurisdictions in codifying PMSI in Nigeria. Guided by equivalent PMSIs of other common law jurisdictions that have tested their legislation over time, an attempt will be made to foretell the implications and ramifications of PMSI in Nigeria's STMA with a view to anticipating eventual judicial interpretation and stimulating further conversation.

Financing (London: Sweet&Maxwell,1991) 4-11; Fidelis Oditah, 'Issues and Problems in Corporate Debt Financing in Nigeria' in Cyprian Okonkwo (ed), *Contemporary Issues in Nigeria Law* (Lagos: Toma Micro, 1992) 125-128.

[3] *Federal Republic of Nigeria Official Gazette* No 50 (Lagos, 31 May 2017) 58(104), A37-60.

[4] Levinus Nwabughiogu, 'Osinbajo signs laws to ease access to credit facilities for MSMEs' (30 May 2017) *The Vanguard* <https://www.vanguardngr.com/2017/05/osinbajo-signs-laws-ease-access-credit-facilities-msmes/> accessed 30 June 2022.

[5] Chima Iheme, *Towards Reforming the Legal Framework for Secured Transactions in Nigeria: Perspectives from the United States and Canada* (AG Switzerland: Springer 2016) 29-30; Iyare Otabor-Olubor, 'A Critical Appraisal of Secured Transactions over Personal Property in Nigeria: Legal Problems and a Proposal for Reform' (PhD thesis, Nottingham Trent University, March 2017).

1. COMMON LAW PMSI IN NIGERIA

1.1 The Quistclose Trust

An innovative way equity sought to protect a creditor outside specific grant of security for credit advances in the event of debtor's insolvency is the application of doctrine of resulting trust. This situation arises where a loan given for a particular purpose failed, so that the custodian or trustee is faced with the option of either releasing the fund to the general body of creditors or returning same to the lender in the event of the debtor's insolvency or even in simple cases of giving meaning to the intention of the creditor or person advancing the funds. Resulting trust will usually arise in equity when there has been a failure of an express trust, ambiguous transfer or when a gratuitous transfer has been made.[6]

The Quistclose trust concept is traced to Lord Wilberforce in the House of Lords' decision in *Barclays Bank Ltd v Quistclose Investments Ltd.*[7] Here there was an arrangement for Quistclose to advance some money to Rolls Razor Ltd for the purpose of paying dividend on the company's shares only. The money was paid into a special account with the plaintiff company's bank who agreed that the money was to be used for dividend, but before the dividend was paid, the company went into liquidation and the dividend was not paid. It was held that the defendant was entitled to the repayment of the money, the purpose for which it was advanced having failed, on the basis of a resulting trust of which the bank had become a constructive trustee with notice of the resulting trust and as such cannot set it off against the company's overdraft. After *Quistclose*, a couple of English cases have also been decided on the same trust principle.[8] As security for the lender or creditor, Lord Millett explained further in *Twinsectra Ltd v Yardley*[9] that the essence of Quistclose trust is to prevent the money in question from passing to the borrower's trustee-in-bankruptcy in the event of his or its insolvency.[10] From normative perspective, the justifications for Quistclose trust have been summarised to be based on respecting party intention, unconscionability, fairness, and the incentivisation of desirable transactions.[11] With

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[6] Robert Chambers, 'The Presumption of Resulting Trust: *Nishi v Rascal Trucking Ltd*' (2014) 51(3) *Alberta Law Review* 667-676; Jason M Chin *et al*, 'The Presumption of Resulting Trust and Beneficiary Designations: What's Intention got to do with it?' (2016) 54(1) *Alberta Law Review* 41.

[7] *Quistclose Investments Ltd* v *Rolls Razor Ltd* [1970] AC 567 (*Quistclose*).

[8] See *Re Holiday Promotions (Europe) Ltd* [1996] BCC 671, 674; *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

[9] Ibid.

[10] *Twinsectra v Yardley* at 82.

[11] Emily Hudson, 'A Normative Approach to the Quistclose Trust' (2017) 80(5) *Modern Law Review* 775-811.

this summation, some methodology and characterisation appear to have been synthesized from the jurisprudence of Quistclose trust over the years.[12]

This trust doctrine has been applied in other common law jurisdictions. In Malaysia, in the case of *PECD Berhad (In Liquidation) v AmTrustee Berhad*,[13] the court held that the proceeds received from a rights issue exercise was specifically advanced for the purpose of paying the noteholders, and accordingly held, on a Quistclose trust, that such noteholders must be paid outside of the general creditors from the sum that was clearly agreed should be set aside for that purpose.[14] In Canada, in *Ontario (Training, Colleges and Universities) v Two Feathers Forest Products LP*,[15] there was a grant to a First Nations limited liability partnership in Ontario by the respondent, Ontario's Minister of Training Colleges and Universities. The grant was not spent before the partnership sought to dissolve and appoint the interim receiver. The Ontario Court of Appeal held that the funds were to be subject to a Quistclose trust for the benefit of the Ministry.[16]

The Nigerian courts have on numerous occasions dealt with Quistclose trust situations which emanated from resulting or implied trust doctrine. The courts usually referred to the expression of resulting trust in circumstance where there is failure of purpose of purchase money. In *Adekeye v Akin-Olugbade*[17] the Nigerian Supreme Court stated that an instance of implied trust is '…where on a purchase, property is conveyed into the name of someone other than the purchaser. The consensus of legal and judicial opinion is that the trust of a legal estate….results to the man who advances the purchase money.[18] In a long line of cases, the Nigerian courts have continued to espouse the principle of implied or resulting trust to give effect to the unexpressed but presumed intention of the purchaser.[19] However, Quistclose trust was specifically mentioned and applied in *FATB v Ezegbu*[20] where it was held that once the money raised for the share capital by the consultant was applied for the payment of the shares of the promoters in whose names the money was raised, the lenders

[12] Ibid
[13] [2014] 1 MLJ 91.
[14] See Ying Khai Liew and Weng Low, 'The Quistclose Doctrine: Resurrection of the Primary Trust?' (2014) 25 *King's Law Journal* 8-18.
[15] [2013] ONCA 598. See *Cliffs Over Maple Bay Investments Ltd (Re)* [2011] BCCA 180.
[16] Kosta Kalogiros, 'When is a Quistclose Trust not a Quistclose Trust? When you call it a "debt"' (13 December 2013) available at <https://www.lexology.com/library/detail.aspx?g=c2892a14-1194-4d49-a720-6ecd92343291> accessed 20 September 2022.
[17] [1987] 3 NWLR (Pt 60) 214.
[18] Ibid, 228.
[19] *Idirisu v Obafemi* [2004] 11 NWLR (Pt 884) 396; *Dada v Williams* [2013] 2 NWLR (Pt 1338) 260, 282.
[20] [1994] 9 NWLR (Pt 367) 149.

ceased to be beneficial owners of the money, but became creditors to the promoters and had a right to be reimbursed. In *Registered Trustees of BC&S v Edet*,[21] the court specifically used the expression 'purchase-money resulting trust' when it explained that it is a resulting trust that arises when one person buys property but directs the seller to transfer the property and its title to another so that the trust of a legal estate results to the man who advanced the purchase money.[22] It is one that is based on the unexpressed but presumed intention of the true owner so that in *Atta v Ezeanah*,[23] where a person applies for leasehold of a right of occupancy in the name of another person, a resulting trust arose in favour of the person who provided the purchase money.[24] In *Ughutevbe v Shonowo*,[25] the Nigerian Supreme Court applied it to the relationship between the true and nominal purchaser, and other courts in a claim for money had and received against unjust enrichment,[26] and in criminal breach of trust.[27]

As conceptualised and applied, this device is intended to give effect to the intention of the parties and protect the creditor in the event of insolvency.[28] While the principle in its basic element is straightforward, the entire ramifications of the principle and its evolutionary character remain the subject of continuous academic debate and attention.[29] Since this device operates to arrest the money of the creditor from going into the pool of unsecured creditors' asset in insolvency, it creates a security interest and has also come to be recognised as an involuntary secured transaction.[30] However, at common law, there is no registration of this security interest.

1.2 The Romalpa Clause

This is also known as the retention of title clause. Advances, trade credits and outright loans to buyers of goods pose some significant credit risk to the seller-

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[21] [2016] 5 NWLR (Pt 1505) 387.
[22] Ibid 399.
[23] [2000] 11 NWLR (Pt 678) 363; *Madu v Madu* [2008] 6 NWLR (Pt 1083) 296.
[24] Ibid 383.
[25] [2004] 16 NWLR (Pt 899) 300.
[26] *FBN Plc v Ozokwere* [2014] 3 NWLR (Pt 1395) 439, 472.
[27] *Uzoagba v COP* [2014] 5 NWLR (Pt 1401) 441.
[28] Imram Smith, *Nigerian Law of Secured Credit* (Lagos: Ecowatch Publications Ltd, 2001) 46.
[29] Emily Hudson, 'A Normative Approach to the *Quistclose* Trust' Ibid; Sue Tappenden, 'Commercial Equity: The Quistclose Trust and Asset Recovery' (2009) 2(3) *Journal of Politics and Law* 11-19; Brandon Dominic Chan, 'The Enigma of the Quistclose Trust' 2(1) *UCL Journal of Law and Jurisprudence* 1-39.
[30] Michael Bridge, 'The *Quistclose* Trust in a World of Secured Transactions (1992) 12(3) *Oxford Journal of Legal Studies* 333–361; Gerard McCormack, 'Conditional Payments and Insolvency: The Quistclose Trust' 9 *Denning Law Journal* 93-115.

creditor since the delivery of possession creates an ostensible authority in law in favour of the original buyer in relation to subsequent buyers, and estops the seller-creditor from recovering same.[31] In such a situation, the seller-creditor will be classed as an unsecured creditor in the event of the buyer's insolvency hence will join the queue of other unsecured creditors. To avoid such occurrence, a retention of title clause was devised and inserted in sales agreements. This clause enables the seller-creditor to retain title in the goods which are in the physical possession of the buyer, pending full payment of the unpaid purchase price.[32] A retention of title clause is 'merely an agreement between the parties as to the time when ownership is to pass.'[33] This is also known as the Romalpa clause having received judicial imprimatur in *Aluminum Industrie Vassen NV v Romalpa Aluminium Ltd*[34] where the court had to interpret the effect of a retention of title clauses in a sale agreement for aluminum and held that the buyers were in a fiduciary relationship with the seller as their agents and bailees, and as such had an obligation in equity to account for the proceeds of the sale while the seller was entitled to trace the claim.

In *Re Bond Worth*[35] Slade, J held that a retention of title clause is a contract by way of security for payment of debt which confers an interest in the property, defeasible on the payment of the debt and thereby constituting a mortgage or charge over the assets in the event of buyer's insolvency. This arrangement may not avail where the goods are used as components in the product made by the buyer[36] or where the goods lose their identity entirely in a manufacturing or industrial process.[37] It is not ideal for securing payment obligations for agricultural goods, raw materials or industrial goods, but for finished goods.[38]

Even in England where this legal concept originated, it is yet to be understood as completely devoid of legal controversies.[39] It keeps evolving. In *Caterpillar* (*NI*) *Ltd*

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[31] *Sale of Goods Act* 1893, s 25.
[32] Imram Smith, 43-44.
[33] Roy Goode, 'The Modernisation of Personal Property Security Law' (1984) 100 *Law Quarterly Review* 234, 238; Gerard McMeel and Stefan Ramel, 'Retention of Title – A Thorn in the Side?' (May 2009) available at <https://www.guildhallchambers.co.uk/files /RetentionofTitle_StefanRamel&GerardMcMeel.pdf> accessed 10 October 2022.
[34] [1976] WLR 676.
[35] [1980] Ch 228, 261.
[36] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 676.
[37] *Boren (UK) Ltd v Scottish Products Ltd* [1981] Ch 25; Dennis Ong, 'Romalpa Clauses' (1992) 4(2) *Bond Law Review* 194-197.
[38] It was successfully applied to foodstuff in *Re Highway Foods International Ltd* [1995] 1 BCLC 209.
[39] William Davies, 'Romalpa Thirty Years on – Still an Enigma?' 4(2) *Hertfordshire Law Journal* 2-23.

v John Holt and Company (Liverpool) Ltd,[40] the court applied fiduciary agency to give effect to the retention of title clause in the agreement so that when property passes to a sub-buyer, the creditor holds the proceeds in trust for the retention seller in view of the fiduciary agency relationship.[41] This *Caterpillar* construct is not devoid of complications as it gives the seller probable priority over receivables financiers, which has undesirable commercial consequences and creates unanticipated commercial risks for factoring businesses, for instance.[42] Prior to *Caterpillar*, the New Zealand case of *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd*[43] appears to have established the fiduciary relationship theory where the court held that there was a fiduciary relationship and a consequent obligation to account. In *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*,[44] the supplier agreed to deliver bunker fuel through another upstream supplier who retained title to the bunkers to a shipowner until payment, but the shipowner was entitled to consume all or some of the bunkers before payment. The UK Supreme Court held that such contractual arrangement was not a contract of "sale of goods" within the meaning of s 2(1) of the Sale of Goods Act 1979. Lord Mance described this transaction not as a sale contract but as a contract to permit consumption prior to payment and passage of property after payment if unconsumed.[45] The inexorable consequence of this decision is that it effectively exiled large swathes of commercial agreements containing such or similar clauses from the English law of sale of goods.[46]

From transactional and experiential perspectives, the clause should be drafted in clear language, unequivocal in terms and devoid of all nebulousness. The drafting of a Romalpa clause is critical to its value and effectiveness as a security interest device as experienced in *Sandhu (T/A Isher Fashions UK) v Jet Star Retail Limited & Ors*,[47] where the retention of title clause was worded like an exercisable right which was not activated prior to the sale to a third party by the administrators. The court found and held that as Isher Fashions had not requested retention of the goods before the company was sold, nor withdrew the implied authority, the defendants had the

[40] [2013] EWCA Civ 1232 (hereinafter called '*Caterpillar*').
[41] Duncan Sheehan, 'Registration and Re-Characterisation of Retention of Title Clauses' (March 2018) *Briefing Paper* Vol 2.
[42] Ibid. See also Daniel Webb, 'The Potential Danger of Retention of Title Clauses' (2014) 39 *Oxford University Undergraduate Law Journal* 39.
[43] [1986] 1 NZLR 349.
[44] [2016] UKSC 23 ('*The Res Cogitans'*).
[45] Duncan Sheehan, 'Registration and Re-Characterisation of Retention of Title Clauses' (n 41).
[46] Kelvin Low and Kelry Loi, 'Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales' (2018) *Journal of Business Law* 229 (online) available at <https://ssrn.com/abstract=3231728> accessed 30 September 2022.
[47] [2011] EWCA Civ 459 (CA).

implied authority to effectively sell them. The lesson from this case is the need for the decisiveness and specificity of the retention of title clause. It is also the seller's responsibility to be clear and specific about the goods to which it is claiming title and diligently pursue same with specific demand for return; and if he fails in this duty, the goods may be lost during the administration process, the existence of a retention of title clause notwithstanding.[48] The onus of identifying the goods subject to retention of title and making a clear and explicit demand for their return remains that of the supplier claiming title and not on the administrator.[49]

In English law, a simple Romalpa clause is not a registrable charge.[50] However, the court will take into account the underlying commercial substance and reality of the transaction in deciding whether a retention of title clause has thereby created a registrable charge which could become void for non-registration.[51] Even though some commentators believe certainty has been achieved in the law relating to retention of title,[52] the progressive evolution of this security interest device and peculiarity of each jurisdiction tend to prove that the nature and reach of Romalpa clause remains an evolving principle that lends itself to the circumstances of each case, the nature of the jurisdiction and their legal system; the interpretation of the particular retention of title clause and possibly the court's sense of fairness.[53] Some opinion is that codification that provides certainty and a registration system, like in the PPSAs, UCC9 and Nigerian STMA will introduce certainty and put paid to the measure of subjectivity that bedevil the interpretation and application of this security interest.[54]

European Union in a 2011 Directive mandated Member States to provide, in conformity with the applicable national provisions designated by private international law, that the seller shall retain title to goods until they are fully paid for if same was expressly agreed between the buyer and the seller before the delivery of the goods.[55] The rationale for the Directive is the desirability *'...*to ensure that creditors are in a position to exercise a retention of title clause on a non-discriminatory basis throughout the Union, if the retention of title clause is valid under the applicable

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[48] Daniel Tate, 'A Brief Overview of Retention of Title' available at <http://www.greenhalghkerr.com/articles/a-brief-overview-of-retention-of-title/> accessed 30 December 2022.
[49] *Blue Monkey Gaming Ltd v Hudson & Others* [2014] All ER (D) 222.
[50] *Clough Mill Ltd v Martin* [1984] 3 All ER 982.
[51] *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602.
[52] James Mitchel, 'Retention of Title Clauses: A Key to the Romalpa Maze' (2016) 4 *Legal Issues Journal* 77.
[53] Giorgio Monti *et al*, 'The Future of Reservation of Title Clauses in the European Community' (1997) 46(4) *The International and Comparative Law Quarterly* 866-907.
[54] Duncan Sheehan, 'Registration and Re-Characterisation of Retention of Title Clauses'(n 41).
[55] Directive 2011/7/EU of 16 February 2011.

national provisions designated by private international law.'[56] This codification brought harmony and predictability to the European market, resolving the conceptual differences in common law and civil law jurisdictions in the European Union.[57]

In Nigeria, prior to the STMA in 2017, in sale of goods transaction and as a general rule, the unpaid seller of goods loses his right of lien or right of retention when, inter alia, the buyer or his agent lawfully obtains possession of the goods.[58] In *Afrotec Technical Services (Nig) Ltd v MIA & Sons Ltd*,[59] the Supreme Court clearly stated: '...But although possession of the goods may have passed to the buyer…so as to terminate the unpaid seller's statutory right to a lien, the contract…between the parties, as is the position in the present case, may make express provision for or create a special right in the seller which is analogous to a lien. Where such express provision is agreed to… it cannot be doubted that it will be binding on the parties.'[60] This is a clear judicial recognition of the Romalpa clause in sale of goods in Nigeria. There has become an awareness and a deliberate use of Romalpa clauses to secure the lender's interest in consumer financing and equipment leasing, especially in the event of a fraudulent sale by the lessee-debtor as happens from time.[61] Without necessarily calling it by its name, the Supreme Court in *Afrotec* has clearly given an indication that Romalpa clause is an integral part of Nigerian commercial law.

1.3 Conditional Sale

Conditional sale is a security interest device commonly used in consumer credits to protect the interest and title of the owner in the goods prior to the fulfilment of the sale condition especially payment. Sale of goods law has always recognised the distinction between the passing of title in the goods and delivery of the goods so that unless and until that condition is satisfied, the buyer obtains no general property in the goods to transfer to any other person, whether for value or upon execution, bankruptcy or distress.[62] In the event of default, the seller will be entitled to repossess and sell or keep the asset and the conditional buyer has an obligation to preserve the

[56] Directive 2011/7/EU, Recital 31.
[57] Robert Pennington, 'Retention of Title to the Sale of Goods under European Law' (1978) 27(2) *The International and Comparative Law Quarterly* 277-318.
[58] Sale of Goods Act 1893, s 43(1), as applicable to the various states in Nigeria.
[59] [2000] 15 NWLR (Pt 692) 730 (hereinafter called *Afrotec*).
[60] Ibid,788.
[61] A. O. Salami, 'Equipment Leasing: Its Development and Future in Nigeria' in Lanre Fagbohun and Bambo Adewopo (eds) *Developments and Reforms: Nigeria's Commercial Laws* (LASU, 1998) 228.
[62] John K. Macleod, *Consumer Sales Law* (2nd ed, Oxford: Routledge-Cavendish, 2007) 18 para 1.14.

market value of the assets.[63] Most conditional sale agreements are worded in a way that title passes only when all the payments have been made by the borrower, by which time there is no agreement left to terminate.[64] In a 1918 article, a writer noted that 'The validity of contracts for the sale of goods upon the condition that the property therein shall not pass until the price has been paid, although possession is given to the buyer, is well established at common law.'[65] Unfortunately this has an unforeseen consequence for an unsuspecting third party.[66] The English common law on conditional sales has been significantly modified by statutes. The Consumer Credit Act 1974 (CCA) defines it as 'an agreement for the sale of goods or land under which the purchase price or part of it is payable by instalments, and the property in the goods or land is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods or land) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled'.[67] In the United States, the Uniform Conditional Sales Act was passed to protect innocent third parties and streamline the law on conditional sales.[68] Most jurisdiction have their various enactments that have significantly amended the concept but the original common law idea behind it remains intact.[69]

The Sale of Goods Act, 1893 still applies in parts of Nigeria.[70] For states that have enacted sale of goods laws, the provisions mirror that of the SGA 1893.[71] By section 1(3), for a contract of sale to be conditional, parties must have agreed that: (a) the transfer of property in the goods is to take place at a future time; or (b) that the transfer of property in the goods is subject to some conditions thereafter to be fulfilled. Conditional sale agreement is premised on the same principle as a conditional contract. The Supreme Court in *Olowu v Building Stock Ltd*,[72] held that the inability of appellant to meet a repurchase condition within a specific period meant that he did not meet the condition in that contract. Where however the transfer of ownership in the goods is agreed to take place at a future time or date or where the

[63] Ibid, 19-20.
[64] Alexander Hill-Smith, *Consumer Credit: Law and Practice* (2nd ed, Oxford:Routledge, 2015) 193 para 49.
[65] Francis Burdick, 'Codifying the Law of Conditional Sales' (1918) 18(2) *Columbia Law Review* 103-122.
[66] Ibid, 105.
[67] CCA, 189(1).
[68] Garrard Glenn, 'The Conditional Sale at Common Law and as a Statutory Security' (1939) 25(5) *Virginia Law Review* 559-586.
[69] For England, see CCA, Consumer Protection Act 1986.
[70] Hereinafter called SGA.
[71] See for instance Sale of Goods Law of Lagos State. See further, Felicia Monye, *Commercial Law in Nigeria* (Enugu: Chenglo, 2006) 2.
[72] [2018] 1 NWLR (Pt 1601) 343.

transfer is subject to the fulfilment of certain conditions in the contract, that will be an agreement to sell.[73]

The legal foundation for conditional sale is the parties' freedom of contract. In *Tsokwa Oil Marketing Co Nig Ltd v BON Ltd*[74] one of the issues before the court was the effect of a contract made subject to a condition precedent. The Supreme Court held that such contract is not formed and not binding unless and until those terms and conditions are fulfilled.[75] The Court of Appeal also followed the well-reasoned decision in *Tsokwa* in *Sidiku v Atiba Iyalamu Savings Loans Ltd.*[76] In *Afrotec*, the Supreme Court was faced with the difference and effects of an absolute and conditional contracts of sale. The court considered the relevant sections of the law,[77] and held that where the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled the contract is an agreement to sell. From the point of view of equity, conditional sale is distinguishable from mortgage in the sense that there is no equity of redemption (as applicable to mortgage transactions) in conditional sale contracts in the event of default.[78]

2. TRACING PROCEEDS OF PURCHASE MONEY

At common law, PMSI entitles the secured party to follow the proceeds of the purchase money, even in fraud cases through tracing. Tracing at common is different in application from equitable tracing. The challenge with common law tracing is that as in *Taylor v Plumer*,[79] the property must be identifiable, and if it has mixed with other property, it may not be successfully claimed and recovered.[80] The reach of common law tracing is short and unsophisticated. Some have questioned the very essence and existence of tracing at common law on following the value and claiming

[73] Matthew Nwocha, 'Law of Sale of Goods in Nigeria: Interrogating Key Elements of the Sale of Goods Act Relating to the Rights of Parties to a Sale of Goods Contract' (2018) 9(2) Beijing *Law Review* 201-210.
[74] [2002] 11 NWLR (Pt 777) 163 (hereinafter called *Tsokwa*).
[75] Ibid, 193
[76] [2007] 10 NWLR (Pt 1043) 590.
[77] SGA, ss 1(2), (3) and (4).
[78] *C A Savage & Others v Uwechia* [1961] 1 All ER 830; *Olowu v Milner Brothers* [1911] 3 NLR 110; Niki Tobi, *Cases and Materials on Nigerian Land Law* (Lagos: Mabrochi Books, 1997) 131-134.
[79] [1815] EWHC KB J84.
[80] Richard Edwards and Nigel Stockwell, *Trust and Equity* (8th ed, New York: Longman Publishers, 2007) 477-478; FOB Babafemi, 'Tracing Assets: A Case for the Fusion of Common Law and Equity in English Law' (1971) 34(1) *The Modern Law Review* 12-28.

a substitute asset.[81] However, equitable tracing avails even if the original property or proceeds have mixed with others. According to Lord Justice Millet, '...equity's power to charge a mixed fund with the repayment of trust moneys enables the claimant to follow the money, not because it is derived from a fund which is treated as if it were subject to a charge in his favour'[82] In *FHR European Ventures LLP v Cedar Capital Partners LLC*[83] the UK Supreme Court held that Cedar held the €10 million secret commission and bribes traced to some bank accounts on constructive trust for FHR notwithstanding that the amount was held in different accounts and currencies in the same bank. Even though these cases are not on PMSI but they demonstrate how equity follows the proceeds of money.

Fiduciary requirement is another problematic issue in tracing in equity and is considered a long standing one traceable to *Re Hallett's Estate*[84] where the Court of Appeal ruled that any fiduciary relationship was enough to allow a tracing claim in equity and was not exclusively available to the beneficiaries of a trust.[85] This requirement is one that has attracted criticisms creating a dichotomy between those owed fiduciary duties and those who are not, and calling for reforms.[86] Tracing value brings neutrality to the concept of tracing to the disparate heads of fiduciary and non-fiduciary liability.[87] The rule that a fiduciary relationship is needed to trace in equity in a mixed fund situation, has not been considered a popular one with the most disapproval coming from Lord Millett when he described it as "capricious", "productive of the most extraordinary anomalies", and as having "no logical justification."[88] Modern courts appear not to constrain themselves with the fiduciary requirement, though not without conflicting decisions.[89] Also, tracing need not be based on unjust enrichment either.[90]

Another constraint in tracing is the applicability of tracing to loan accounts or accounts in debit balance or the concept of backward tracing. *Serious Fraud Office v*

[81] Jonathan Silver, 'Tracing and Common Law Claims to Substitute Assets: Separating Myth from Reality' (PhD Thesis, *De Montfort University,* March 2018).
[82] *Boscawen & Others v Bajwa & Anor* [1995] 4 All ER 769.
[83] [2014] UKSC 45.
[84] [1880] 13 Ch D 696.
[85] Andreas Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims (2017) 133 *Law Quarterly Review* 492-515, 492.
[86] TRS Cutts, 'The Role of Tracing in Claiming' (PhD Thesis, Oxford University, 2015).
[87] Andreas Televantos (n 85).
[88] Ibid, 3 quoting Lord Millet in *Foskett v McKeown* [2001] 1 AC 102, 12.
[89] *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (hereinafter called *Chase Manhattan)*; *WLG v Islington LBC* [1996] UKHL 12; *Foskett v McKeown*.
[90] David Salmons, 'Claims against Third-Party Recipients of Trust Property' (2017) 76(2) *The Cambridge Law Journal* 399-429.

Lexi Holdings Plc[91] and *Re BA Peters Plc*[92] held that tracing would not apply, at common law, to overdrawn accounts. The court relied on an earlier *Bishopsgate Investment Limited v Homan*[93] and stated that '....the claim to beneficial ownership of money in a bank account requires the continued existence of the money either as a separate fund, or as part of a mixed fund, or as latent in property acquired by means of such fund. Where money is paid into a bank account, which then becomes overdrawn, the fund ceases to exist....' *Bishopsgate* in turn found solace in earlier *James Roscoe (Bolton) Limited v Winder*[94] to buttress that tracing would only be possible if balance standing to the credit of the trustee in the account does not exceed the lowest balance of the account at the time, and also that payments into a general account cannot be used to replace trust money which has been improperly mixed with that account and drawn out, except there is an proof of express intention.[95]

On backward tracing, the *Bishopsgate*'s court[96] was divided on its possible application. Scot LJ in *Foskett v McKeown*[97] believes it is possible to apply backward tracing especially when a clear intention is evinced,[98] like in *The Federal Republic of Brazil v Durant International Corporation (Jersey)*[99] where the court held that backward tracing applied in a Brazilian bribery case where the money paid into a bank mixed with other funds before receipt of, and in apparent anticipation of bribes from public contracts amounting to $10 million. In a recent Australian case of *Silversea Cruises Australia Pty Ltd v Abellanoza*,[100] Ms Abellanoza, in breach of employment contract and fiduciary duty to her employer-appellant, fraudulently transferred over $3.5 million from the employer's bank accounts to various other bank accounts from which gambling was done and winnings made. Claims were made for those monies being proceeds of gambling payouts and the court ordered refund from winnings. This Australian decision is equitable and accords with current realities. It was cited and followed in yet another Australian case, *Moriah War Memorial College Association v Augustine Robert Nosti*[101] and it appears the

[91] [2009] QB 376.
[92] [2010] 1 BCLC 142.
[93] [1995] Ch 211 (hereinafter called *Bishopsgate*) per Dillon LJ, 216.
[94] [1915] 1 Ch 62.
[95] Ibid, 69. See Insolvency Lawyers Association, 'Re BA Peters Plc (in administration) Case No 5862 of 2007' (2007) *ILA Trust Accounts and Administration Technical Bulletin No 152,* 1-2.
[96] [1995] Ch 211.
[97] Ibid.
[98] [1998] Ch 265, 284.
[99] [2016] AC 297.
[100] [2020] NSWSC 942.
[101] [2020] NSWSC 942. See also *Russell Gould Pty Ltd v Ramangkura*, [2014] NSWCA 310.

Commonwealth is progressively blazing this trail amongst the common law jurisdictions.

Even though these cases are not directly on PMSI, they are certainly helpful in deciphering modern tracing. The consequences of the decisions on overdrawn accounts and disavowal of backward tracing are disagreeable both in conscience and logic. In contemporary sophisticated world where financial transactions have become advanced, complex and methodical, it is expected that the law should adapt accordingly to those challenges of modern times. The fact that an account is in debit does not mean that an undue advantage or benefit was not obtained. It has been obtained from the defrayment of the loan liability. Even so there will be unjust enrichment or at least fraudulent or undeserved increase in someone's purchasing power.[102] It has been suggested, and rightly so, that using the principle of causality, there is no equitably rational reason why backward tracing should not be applied by the courts in deserving circumstances, ditto to overdrawn and loan accounts.[103] It is submitted that once unjust or unwarranted value has been received or enjoyed- whether forward or backward, and whether in credit or defrayment, such should be a veritable candidate for restitution, at least in the minimum, for money had and received. The issue should be of value, intention and causality connection. Such restitution rights and claims should be overarching and should override that of creditors and administrators in insolvency. Banks and financial institutions also have statutory, moral and public policy obligation for due diligence on their customers. Disavowing backward tracing may be a disincentive for proper due diligence by banks, financial institutions and similar deposit takers. As a product of equity, tracing continues to morph with contemporary development and sophistication of modern transactions and remains unprincipled.[104] Tracing is not an end, it is a means to an end- being the remedies available to the claimant. Remedies would depend on jurisdiction,[105] facts and circumstances of the case as well as the discretion of the court. The traditional common law remedies would range from right of accretion and

[102] Hon Edelman, 'Understanding Tracing Rules' (n138 below) 13-14; Tatiana Cutts, 'Tracing, Value and Transactions (2016) 79(3) *Modern Law Review* 381-405; Mark Pawlowski, 'Tracing into Improvements, Debts and, Overdrawn Accounts' *Trusts & Trustees* (2011) 17(5) 411-414; John Breslin, 'Tracing into an Overdrawn Bank Account - When does Money Cease to Exist?' (1995) 3(2) *Journal of Financial Crime* 197-203.
[103] Hon Edelman, 'Understanding Tracing Rules' (n138 below) 14.
[104] Dale Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-30' (1983) 68(2) *Cornell Law Review* 172.
[105] Robert Hunter (ed), *The Asset Tracing and Recovery Review Edition 8* (London: Law Business, 2020).

substitution;[106] subrogation;[107] civil forfeiture;[108] order of restitution;[109] equitable charge or lien; constructive trust; order to account;[110] election to take the property; freeze order;[111] Anton Piller order;[112] Mareva injunction[113] and other injunctive reliefs, damages, and so on.[114]

3. CODIFICATION OF PMSI IN NIGERIA: IMPLICATIONS FOR SECURED FINANCING

The STMA is a tectonic jurisprudential shift from common law formalism to functionalism in the treatment of secured transactions in Nigeria[115] and with reference to PMSI. As noted earlier noted, challenges of uncertainty and rigidity of a formalist approach to secured credit compelled many developed jurisdictions to adopt their various laws on secured credits. Nigeria's own functional variant, the STMA is egregiously commercially progressive and borrows extensively from UCC9 and the PPSAs- liberated from the common law formalist approach to secured credit transactions.[116] On the value of the United States' UCC9, the court in *Kinetics Technology International Corp v Fourth National Bank of Tulsa*[117] complimented the UCC9's '...purpose of promoting certainty in commercial loan transaction...'

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[106] See *Buhr v Barclays Bank Plc* [2001] EWCA Civ 1223 relying on William Fisher et al, *Fisher & Lightwood's Law of Mortgage* (10th ed, London: Butterworths, 1988) 55-57; Magda Raczynska, *The Law of Tracing in Commercial Transactions* (OUP, 2018) ch4.

[107] *Boscawen v Bajwa* [1996] WLR 328; NH Andrews, 'Tracing and Subrogation' (1996) 55(2) *The Cambridge Law Journal* 199-201; *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66,128 on subrogation security.

[108] *Joy Oti v EFCC* [2020]14 NWLR (Pt 1743)48, 90-91; *Patience Jonathan v FRN* [2019] 10 NWLR (Pt 1688) 533.

[109] Yeo Min, 'Tracing and Three-party Restitution' (1993) *Singapore Journal of Legal Studies* 452-490.

[110] *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australian Friendly Society Ltd* [2018] 92 ALJR 918.

[111] *JSC BTA Bank v Khrapunov* [2018] UKSC 19.

[112] *Celanese Canada Inc v Murray Demolition Corporation* [2006] 2 SCR 189.

[113] *Aetna Financial Services v Feigelman* [1985] 1 SCR 2; *Sibley & Associates LP v. Ross* 2011 ONSC 2951.

[114] John Pirie, 'CANADA', *The Asset Tracing and Recovery Review - Edition 8* (London: Law Business, 2020).

[115] Michael Bridge, 'Formalism, Functionalism and Understanding the Law of Secured Transactions' (1999) 44 *McGill Law Journal* 567.

[116] *Re Cosslet (Contractors) Ltd* (n 1). Grant Gilmore, *Security Interests in Personal Property, Vol 1* (New Jersey: The Lawbook, 1991) 24-25.

[117] 705 F 2d 396 (CA10 (Okl), 1983.

3.1 Nature and Scope of PMSI in Nigeria

By virtue of section 63(1) of the STMA, PMSI in Nigeria covers the following:

(a) a right in collateral taken or retained by the seller to secure all or part of its purchase price;

(b) a right taken by a person who provides credit to enable the grantor to acquire the collateral if such credit is in fact so used;

(c) a right of a financial lessor.

Just like in other jurisdictions with statutory PMSI, the definition entails three things. First is a lender situation where it is represented to the lender that the purpose of the loan is for acquisition of certain property and the money is used to acquire that property and security interest in that property is granted to the lender.[118] Secondly, the vendor situation where vendor of the property gives the debtor time to pay for the property purchased, and is granted a security interest in the property to ensure payment.[119] And a third which is peculiar to the STMA is the finance lessee.

From a careful reading of the definition of PMSI, it is clear that PMSI covers the rights of a seller in a Romalpa clause or retention of title transaction as well as that of a conditional seller for payment of purchase price. It also covers the rights of a credit seller in a pure credit sale arrangement. It also appears to apply to a situation of a resulting or Quistclose trust where money is advanced for a particular purpose but used for another or where the acquisition is made other than as intended by the creditor making the advance. Provided that the credit is used to acquire the collateral, the person making the advance is entitled to a PMSI in the said collateral, it is submitted, so that even before the declaration of a resulting trust or Quistclose trust, the STMA empowers such creditor to protect his security interest in the collateral, the purchase money for which he advanced. Needless to add that the scope of PMSI also covers a financial lessor, but not an operating lessor. The reason for the latter is not far-fetched. A finance lease is meant to pass title at the end of the lease term but an operating lease is structured in such a way that the intention of the parties is that title to the subject matter of the lease will never leave the operator nor pass to the lessee.[120] The lessee in the latter is only entitled to possession and use.

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[118] Darcy MacPherson, 'Dueling Purchase-Money Security Interests Under the PPSA: Explaining the Law and Policy Behind Section 34(7)' (2012) 36(1) *Manitoba Law Journal* 383-393.
[119] Ibid.
[120] STMA, s 63(1).

The STMA also provides thus:

> *'27. A purchase money security interest in a collateral or its proceeds shall have priority over a non-purchase money security interest in the same collateral created by the same Grantor if the purchase money security interest in the collateral or its proceeds is perfected when the Grantor obtained possession of the collateral.*
>
> *28 (1) A perfected security interest in goods that subsequently become part of a product or mass shall continue as a perfected security interest in the product or mass if the goods are so manufactured, processed, assembled or co-mingled that their identity is lost in the product or mass.*
>
> *(2) If more than one Security Interest is perfected in the goods before they become part of a product or mass, the Security Interests rank equally in proportion to the value of the goods at the time they became part of the product or mass.'*

PMSI has become registrable security interest in Nigeria. The primacy of PMSI is known as 'super priority' in other jurisdictions because PMSI has priority over conflicting security interests in the same collateral, provided the creditor followed the requirements of the law for registration and perfection of the PMSI.[121] The super priority status granted PMSI in the PPSA and UCC9 are clearly adopted in the STMA as it provides that PMSI will override non PMSI security interest created over the same collateral even if created by the same grantor. The reason may not be unconnected to the fact that the holder of the security interest should rightly be entitled to enforce, as of priority, his superior title to goods payment for which has not been received in full against any other claimant to inferior title in the collateral. It is just fair and equitable. The PMSI is not only on the collateral but also attached to the proceeds of the sale or investment of the collateral with statutory backing. Both the PMSI and the proceeds take priority over any non PMSI in the same collateral. And where the subject matter of the PMSI are goods (including raw materials) which become comingled or become part of a product or mass in manufacturing, processing

[121] Editorial, 'Super-Priority of Securities Intermediaries under the New Section 9-115(5)(c) of the Uniform Commercial Code' (1995) 108(8) *Harvard Law Review* 1937-1954; Nathaniel Hansford, 'The Purchase Money Security Interest in Inventory Versus the After-Acquired Property Interest-A "No Win" Situation' (1986) 20(2) *University Richmond Law Review* 235-265; Michael Reyen, 'Benefitting From PMSI in Inventory…Understanding the Complexities is Key' (15 April 2014) *ABF Journal* (online) available at https://www.abfjournal.com /articles/benefitting-from-pmsi-in-inventory-understanding-the-complexities-is-key/ accessed 26 February 2022.

or assemblage the security interest shall continue in the finished or comingled product or goods.

However, notwithstanding the super priority status of PMSI, there are other security interest that trump the creditor's PMSI.[122]A financial institution's right of set-off has priority over a perfected security interest that extends to money in a deposit account. And except for bailment, a transferee of funds from a deposit account or cash other than from a deposit account takes the funds or cash free of a security interest unless the transferee acts in collusion with the grantor of the security interest or the borrower in violating the rights of the creditor.[123] A lien arising out of materials or services provided in the ordinary course of business in respect of goods that are subject to a security interest shall have priority over that security.[124] And a holder of a negotiable instrument or title document shall have priority over a perfected security interest in the negotiable instrument or the title document where such holder gave value, has taken possession of the negotiable instrument or the title document without knowledge that the transaction is in breach of the security agreement to which the security interest relates.[125]

Perfection of security interest is achieved when a financing statement in respect of that security interest has been registered in the National Collateral Registry established under the STMA.[126] And if proceeds of a collateral are describe in a financing statement, or are in the form of money, receivables, negotiable instruments or bank account, a security interest in any proceeds of the collateral is perfected automatically without any further action by the grantor or the creditor when the proceeds arise or are acquired.[127]

Clearly, the provisions of the STMA retention of title or Romalpa arrangement in mind and also a conditional or credit sale arrangement. And because a Quistclose trust is not consensual, rather involuntary security, it may be outside the scope of the STMA, but exists in equity (common law) nonetheless. It is therefore a misnomer, in the light of the STMA, to consider retention of title arrangement described as quasi security interest as they are now statutory security interest. At common law, one of the limitations of Romalpa clauses was the reach. As statutory PMSI, it is registrable as security but the perfection attaches also to the proceeds of the sale of the good subject to the security interest. This entitles the creditor to recover the collateral, trace the proceeds and recover same. The registration requirement puts paid to the earlier

[122] STMA, s29(1).
[123] STMA, s29(2) and (3).
[124] STMA, s30.
[125] STMA, s31(a)-(c).
[126] STMA, s8(1).
[127] STMA, s9(1) (a) and (b).

danger of the interest of a bona fide third party in the common law Romalpa security or in the event of insolvency. Consequently, the reasonable apprehension raised about the requirement for registration of the Romalpa clause as a charge in English law as seen in *Re Bond Worth* and in the possible recharacterization consequences of *Caterpillar*, is completely obviated.[128] The court will also be spared the rigours of deciphering whether the clause is a registrable charge that would become void for nonregistration as noted in *Compaq Computer Ltd v Abercorn Group Ltd.*[129]With respect to the mixing of good that constrained the Romalpa clause at common law, STMA is clear that the security interest attaches to the processed or manufactured products.

With respect to the nature of assets PMSI applies, it appears it applies to all property (and their proceeds) covered by STMA including 'collateral' and 'goods'.[130] Collateral is defined as movable property, whether tangible or intangible and subject to a security interest, while goods are tangible movable property and include farm products, inventory, equipment, consumer goods, trees that have been severed and oil, gas or minerals that have been extracted.[131] PMSI tangible and intangible property.

3.2 Proceeds of PMSI

Apart from section 27 of STMA which provides that PMSI in a collateral or its proceeds shall have priority over a non-PMSI in the same collateral, there are other provisions which provide that security interest (not only in PMSI) shall attach to the proceeds of the collateral. Section 6(2) of STMA states that a security interest shall extend to the identifiable or traceable proceeds of a collateral, whether or not the security agreement contains a description of the proceeds. Also, specifically, a security interest created in tangible property before they were commingled in a mass or product continues in the mass or product.[132] This is what the common law had struggled with over time. In *Clough Mill Ltd v Martin*,[133] the House of Lords allowed the "all monies" security interest in a retention of title scenario likewise in *Armour v Thyssen Edelstahlwerke AG*.[134] However, at common law, the courts have struggled

[128] Duncan Sheehan, 'Registration and Re-Characterisation of Retention of Title Clauses' (n 41).
[129] Ibid.
[130] STMA, ss27, 28(1) and (2).
[131] STMA, s63.
[132] STMA, s7(1) and (2).
[133] [1984] 3 All ER 982.
[134] [1990] 3 All ER 481.

with various taxonomies of "all money" clauses in retention of title scenarios.[135] With the STMA, there is no argument as to the reach of PMSI to the proceeds of the collateral.

The STMA has successfully codified the common law doctrine of tracing established in *Re Diplock*.[136] Though it has been claimed that the modern law of tracing is rooted in the decision in *Taylor v Plumer*[137] where the proceeds of a fraudulently acquired assets were decided to be held in trust for the original owner by the assignee's in bankruptcy of the acquirer who defrauded the original owner.[138] The principle of following precedes tracing so that tracing starts where following ends. Following involves understanding how the asset moves from hand to hand while tracing involves a deeper inquiry of identifying the final destination or identifying the asset that has substituted the original one.[139] This equitable and common law remedy of tracing as espoused by Lord Greene, MR entitles the owner or beneficiary of a trust to identify the property, like money, that has been taken from him involuntarily and the court will make the necessary restitution orders.

The STMA has codified the common law principle of tracing[140] as reinforced in the House of Lords' decision in *Foskett v Mckeown*.[141] Consequently, with the codification of tracing the proceeds of collateral, the distinction between equitable and common law tracing has become of mere historical interest. Also. the question of backward tracing, accounts with negative balances and the general scope of tracing are no longer of debate because the STMA makes no distinction as to the kind of benefit derived from the proceeds of the collateral; it is traceable and collectible nonetheless. Once the proceeds are identifiable, they can be proceeded against.[142] The definition of proceeds under the STMA is wide enough to catch all conceivable shapes and sizes of proceeds of collateral as it means '...identifiable or traceable movable asset received as a result of sale, other disposition, collection, lease or

[135] Robert Bradgate, 'Retention of Title in the House of Lords: Unanswered Questions' (1991) 54(5) *Modern Law Review* 726-735; James Mitchell, 'Retention of Title Clauses: A Key to the Romalpa Maze' (2016) 4 *Legal Issues Journal* 77; Andrew Hicks, 'Reservation of Title: A Pious Hope' (1985) 27(1) *Malaya Law Review* 63-112.
[136] *In re Diplock. Diplock v Wintle* (and associated cases) [1948] Ch 465 (CA).
[137] [1815] 3 M&S 562.
[138] Hon Edelman, 'Understanding Tracing Rules' (2015) 16(2) *QUT Law Review* 1-18.
[139] Phillip Pettit, *Equity and the Law of Trusts* (12th ed, OUP, 2012) 535; Adam Greaves, 'Tracing and Following Assets — the Location and Identification of Stolen Assets in English Law' (4 April 2018) *Ukrainian Journal of Business Law* <http://www.ujbl.info/article .php?id=1085> accessed 12 December 2020.
[140] Magda Raczynska, *The Law of Tracing in Commercial Transactions* (OUP, 2018); Lionel Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997).
[141] [2001] 1 AC 102, 126-245.
[142] *Oti v EFCC* (n108); *Jonathan v FGN* (n108).

licence of the collateral, including natural fruits, distributions, insurance payments and claims arising from defects in, damage to or loss of collateral'.[143] And in today's world with sophisticated forensic audit and investigation, there is really no hiding place for proceeds of PMSI. However, the STMA is limits proceeds to movable assets. Real estate, unfortunately, is not within the scope of proceeds, but other rules, say forfeiture, will apply.

3.3 Refinancing, Consolidation, Renewal and Transfer of PMSI under the STMA

It is possible that after the recoupment of the purchase money or in the course of recoupment of the purchase money, the creditor advances further (purchase) money for the collateral or renews, refinance or consolidates the debt. The question is whether the PMSI could cover such intervening advance or renewal and whether the super priority would be lost. This is akin to tacking of mortgages at common law.[144] The question is whether the STMA contemplates this and how such situation should be treated. It appears that STMA does not contemplate this situation as there is no reference to refinancing. Incidentally this is not just a hypothetical issue but one which other some jurisdictions have amended their relevant laws to cater for.[145] In a provision similar to the STMA's, the High Court in *New Zealand Bloodstock Leasing Ltd v Jenkins*,[146] held that refinancing would generally negate a refinancer's entitlement to super priority in PSMI. The court noted that new PMSI could not be created by refinancing of the original debt.[147] The simple logical interpretation for this is that if the purchase money debt is renewed or refinanced, the resulting indebtedness is no longer a debt which the debtor incurred to procure the collateral, rather the debtor already had the collateral before the refinancing or renewal.[148] Meanwhile, procurement of collateral is the fulcrum of PMSI.

In the United States, this transmutation is known as the 'transformational rule'[149] as the security interest is transformed from a PMSI to an ordinary, non PMSI.[150] *In re Manuel*,[151] the court held that a PMSI cannot exceed the price of what is purchased in

[143] STMA, s63.
[144] *Hopkinson v Rolt* [1861] 9 HL Cas 514.
[145] Bill 151 of Saskatchewan Province (assented to 15 May 2019) amended the existing PPSA 1993 and introduced PPSA, 2019, SS 2019, Ch 15.
[146] [2007] 3 NZCCLR 811. (Hereinafter called *Jenkins*).
[147] Ibid,858.
[148] Richard Nowka, 'Allowing Dual Status for Purchase-Money Security Interests in Consumer-Goods Transactions' (2011) 13(1) *The Tennessee Journal of Business Law* 13-61.
[149] Ibid,13-14.
[150] Ibid.
[151] 507 F.2d 990, 993 (5th Cir 1975).

the transaction wherein the security interest was created and *In re Fickey*,[152] the court noted that if an item of collateral secures some other type of debt, for instance antecedent debt, it would no longer be purchase money. And in *Southtrust Bank of Alabama Nat Asso v Borg-Warner Acceptance Corp*[153] it was held that for the court to enforce a PMSI that consolidates a customer's secured debts, the lender must provide some method for determining the extent to which each item of collateral secures its purchase money. So that, unless the lender contractually provides some method for determining the extent to which each item of collateral secures its purchase money, such lender effectively gives up its purchase money status.[154] However, in 2001 when 50 states of the United States adopted the revised UCC9, it came with new features.[155] Article 9, § 9-103(f)(3) clearly provides that in a transaction other than a consumer goods transaction, a PMSI does not lose its super priority even if the purchase money obligation has been renewed, refinanced, consolidated, or restructured.[156]

Australia has a very clear position on this in its PPSA 2009 which, in defining PMSI, clarifies in section 14(5) that PMSI does not lose its status because the purchase money obligation is renewed, refinanced, consolidated or restructured whether or not by the same secured party.[157] In Canada, the position is similar as examined above except for Saskatchewan.[158] The effect of Saskatchewan *Battlefords Credit Union Limited v Ilnicki*[159] decided in the context of debtor protection legislation, was that where a financing pays out a loan secured by a PMSI, the new lender obtains a PMSI in the collateral, or where the same lender renews or refinances, the continuation of the PMSI status will be automatic. Saskatchewan has gone ahead to amend its PPSA 1993 to statutorily reflect elaborate *Ilnicki* amongst others with effect from 22 June

[152] 23 B. R. 586,588 (Bankr ED Tenn 1982).
[153] 760 F.2d 1240,1243 (11th Cir1985).
[154] *In re Blakeslee*, 377 B.R. 724, 730 (Bankr M D Fla 2007).
[155] Arielle Tracey, 'Purchase Money Security Interest Refinancing in New Zealand: A Case for Retention of Super-Priority' (2020) 51(5) *Victoria University of Wellington Law Review* 103-126.
[156] Notwithstanding the seemingly clear provision of revised UCC9, *Lewiston State Bank v Greenline Equipment* LLC 147 P 3d 951 (Utah Ct App 2006) and *Caterpillar Financial Services v Peoples National Bank* 710 F 3d 691 (7th Cir 2013) have held that PMSI that would survive refinancing are those of the original PMSI lender or his assignee.
[157] *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* [2018] 131 SASR 506 where the court applied and interpreted the provision.
[158] David Gerecke and Fraiba Jalal, 'Canada: Amendments to PMSI Rules in Saskatchewan' (18 February 2019) <https://www.mondaq.com/canada/securitization-structured-finance/781846/amendments-to-pmsi-rules-in-saskatchewan> accessed 23 February 2021.
[159] [1991] 5 WWR 673. Hereinafter called *Ilnicki*.

2020.[160] For the other Canadian provinces, the Canadian Conference on Personal Property Security Law Working Group has developed some amendment to their PPSAs which will make it clear that PMSI refinancier itself has PMSI status provided the original PMSI holder has the same priority by was of a deemed assignment.[161]

Even though the position disallowing tacking in PMSI like in *Jenkins* has been recently criticised as being uncommercial,[162] it still accords with the principle against tacking established by the House of Lords in *Hopkinson v Rolt*,[163] however, just like tacking, in should admit of certain exceptions to achieve both equitable and commercial balance. STMA was passed in 2017 at a time when the advanced jurisdictions have started addressing the issue of retaining PMSI status in the refinancing and consolidation of PMSI. The issue had become a topical issue in all the jurisdictions examined, and those jurisdictions had all taken steps to amend their laws in conformity with commercial realities, or are currently doing so. The fact that STMA did not take this PMSI phenomenon into account by plugging the gaping loophole is, by far, one of the major low points of the law and a huge drafting oversight that can only be corrected by an amendment of the STMA. One major disadvantage just like in prohibition of tacking is the propensity to discourage securitisation of PMSI or assignability and tradability of same in a globally sophisticated commercial setting. It is submitted that baring any immediate amendment in the STMA like seen in the United States, Australia, Saskatchewan and as currently proposed for the rest of Canada, the STMA position on PMSI will be judicially interpreted in the line of New Zealand's position typified by *Jenkins*.

3.4 Enforcement and Realisation

STMA also provides that a holder of purchase money security interest may enforce its rights under the STMA or under any other law governing its rights.[164] It means that all the rights available to the creditor at law like right to repossess, sale, licensing, leasing, pay over, duty to account are available to a creditor in the enforcement or realization of PMSI.

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[160] Erin Eccleston, Ryan Hallman, 'Highlights of the Amendments to the Personal Property Security Act, 1993' (10 August 2020) <https://www.mltaikins.com/corporate-finance-securities/highlights-of-the-amendments-to-the-personal-property-security-act-1993/> accessed 23 February 2022.

[161] Anthony Duggan, 'Recent PPSA Reform Initiatives in Canada' presented at the Commonwealth Law Conference in Melbourne, 21-24 March 2017.

[162] Arielle Tracey (n155) 110.

[163] (n144).

[164] STMA, s39(3).

CONCLUSION

One major advantage and disadvantage of statutory PMSI in Nigeria will be considered as closing point. The gains of PMSI under STMA are almost incalculable for the development of the micro, small and medium enterprises in catalyzing the Nigerian economy.[165] The most important significance of the statutory PSI in Nigeria is the enablement of trade credits in a country like Nigeria where businesses are reputed for integrity deficit, a registrable PMSI will ensure that suppliers are able to advance trade credits, not just against the integrity of the sellers but also against the secure interest created and notified to the whole world, and which security interest will enjoy priority over subsequently created ones or any other third party interest. Suppliers granting trade credits with perfected PMSI will also have the statutory right to trace the proceeds of the purchase money into the hands of third parties and to the destination of the purchase money for as long as practicable with statutory backing.

Conversely, while it is good that PMSI as common law principle has been codified, one potential setback is that any creative or development in the common law may have to wait till for legislative intervention. At common law, the courts not only interpret and apply the law, but also filled gaps on a case-by-case basis.[166] With the codification, the job of the judge will be more towards interpreting the statute than anything else. The Nigerian Supreme Court had held in *Harka Air Services (Nig) Ltd v Keazor* [167] that where a domestic or common law right has been enacted into a statutory provision, it is to the statutory provision that resort must be had for such right and not the domestic or common law.[168] Similarly, the court has held that statutory provisions supersede common law or customary law, so that where a statute has provided for certain actions, common law provisions relating to such actions cease to apply.[169]

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[165] Gregory Esangbedo, 'Secured Transactions in Moveable Assets Act, Company Charges and Funding Micro, Small and Medium Enterprises under Nigerian Law (2020) 64(1) *Journal of African Law* 81-105.
[166] Jonathan Teasdale, 'Codification: A Civil Law Solution to a Common Law Conundrum?' (2017) 19(4) *European Journal of Law Reform* 247; GD Nokes, 'Codification of the Law of Evidence in Common Law Jurisdictions' (1956) 5(3) *The International and Comparative Law Quarterly* 347-363.
[167] [2011] 13 NWLR (Pt 1264) 320.
[168] *Aro v Lagos Island LGC* [2002] 4 NWLR (Pt 757) 385.
[169] *UTB Ltd v Koleoso* [2006] 18 NWLR (Pt 1010) 1.