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THE SECURED CREDITOR: IN WORD AND IN DEED? *

Introduction

It is true that the extraction of some form of security from a debtor (or borrower) is as old as it is common worldwide. It is equally globally true that quite a number of hurdles frequently lie in the way of eventual realization of the security. The nature and complexity of the hurdles probably vary from jurisdiction to jurisdiction and indeed, some hurdles are peculiar to particular jurisdictions. For instance, while undue influence is a common problem in realizing a mortgage security in the United Kingdom¹ this is not the case in Nigeria. In Nigeria much of the problem has been whether the requisite consent was obtained to the creation of the security, particularly in the case of landed security. This includes the absence of family or communal consent, where the property is communally owned, and the lack of the overriding consent of the State Governor for all landed properties, whether personally or communally owned.² Some recent decisions now appear to add even more clogs to the realization of the security by the secured creditor. These are the cases of *Union Bank of Nigeria Plc V. Dare & Sons & Anor*,³ *Salawal Motor House Ltd. V. Lawal*,⁴

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1. On this see: *Bardays Bank V. O. Brien* (1994) AC 180; *Massey V. Midland Bank Plc* (1995) All ER 929; *Credit Lyonnais Bank Nederland V. Burch* (1997) 1 All ER 144; *Steeple V. Lea* (1998) 1 FLR 138; *CIBC Mortgages V. J. Pitt* (1994) AC 200; J. O' Sullivan, "Undue influence and Misrepresentation after O' Brien: Making security secure", in F. D. Rose (ed): *Restitution and Banking*, 1998 at p. 44; M. Haley, "Mortgages and the O' Brien Defence" (1998) JBL 355; S. Bridge, "The aftermath of O' Brien: Carte Blanche for banks and Carte jaunes for solicitors?" (1999) 58 CLJ 28; E. E. Essien, "Securing Bank Security: Undue influence and the O'Brien Legacy in Nigeria" (2000) Vol.1 UJMS 32.

2 Ss. 21, 22 of the Land Use Act 1978; *Savannah Bank V. Ajilo* (1989) 1NWLR (Pt.97) 305; Ezejiakor, G. "The consent Requirement of the Nigerian Land Use Act" (1998) 42 JAL 101; Essien, E. E. "The Rise and Fall of Security by Deposit of Title Documents" (1998) *Journal of International Banking Law London*, Vol.13, p.2; Essien, E. E.: "A new dimension to the consent provision in the Land Use Act", Vol.1 UULJ (1997) p.1; Enefiok Essien, "Lending on Land Mortgage or Pledge Security in Nigeria", Vol.10 (1998) *African Journal of International and Comparative Law*, p.496

3 (2000) 9 WRN 101 (CA)

UTSU V. OKO,⁵ and *Omidigi V. Federal Mortgage Bank & Ors*.⁶ This paper sets out to examine the decisions in these cases to see if or/and how far they have given reality to the supposed security of the creditor.

Definition/ Explanation

It is not impossible that the word "security" or the phrase "security interest", may be easily confused with "national security" or a nation's "security interest".⁷ Indeed, it may even be confused with corporate investment securities such as shares and debentures issued by a company. As used in this paper, "security" refers to a transaction whereby a person to whom an obligation is owed by another person called the "debtor" is afforded, in addition to the personal promise of the debtor to discharge the obligation, rights exercisable against some property of the debtor in order to enforce discharge of the obligations.⁸ Obviously therefore, the main reason for taking security is the creditor's aim to be in a position to recover the debt in the event of default in payment by the debtor. The creditor thus insists on something he can hold onto in the event of non-payment by the debtor.

Other reasons exist why the creditor seeks security for his credit. It may, for instance, be so as to get priority over other possible competing creditors of the debtor as regards the property set aside. Security thus prevents the creditor's debt from being subordinated to unsecured debts of the same debtor and ensures that the creditor is paid his money in full, provided of course that his security is sufficiently valuable.⁹ This aspect is of especial importance where the debtor's total debts are more than his assets.

4 (1999) 9 NWLR (Pt.620) 692 (CA)

5 (2001) 33 WRN 131 (CA)

6 (2001) 40 WRN 118 (CA)

7 It has indeed been judicially acknowledged that the word "security" is capable of more than one meaning. See *Handevel Pty Ltd. V. Comptroller of Stamps* (Victoria) (1985) 157 CLR 177 at 196, per Mason, Wilson, Deane and Dawson, JJ.

8 Sykes & Walker, *The Law of Securities*, 5th edn. (1973) p.3: See Further: Sheridan, L. A.: *Rights in Security* (1974) p.1; Gough, W. J.: *Company Charges*, 2nd edn. (1996), p.3; Goode, R. M.: *Legal Problems of Credit and Security*, 2nd edn. (1988) p.1; Waldock, C. H. M.: *The Law of Mortgages*, 2nd edn. (1950) pp.1 - 2

9 Nolan, R. C.: "Less Equal than others – Maxwell and Subordinated Unsecured Obligations" *The Journal of Business Law*, September 1995, p.495.

There is also the further view that if the debtor's property is set aside in the creditor's favour as security for the loan, overdraft or other financial accommodation or to secure the discharge of some other obligation, the debtor will be afraid that if he defaults in payment or in fulfilling his obligation the property so earmarked will be seized and probably sold to recover the debt. The fear is expected to goad the debtor to pay the money or discharge the obligation. This fear element is why, writing about a similar experience in the United States of America, Mann said:

The security gives two types of advantages to the lender: the lender's direct legal rights to force repayment by taking collateral, and the less direct advantages that operate before the lender tries to obtain payment forcibly. The direct legal advantages increase the likelihood that the lender can forcibly collect on default. *The indirect advantages give the borrower a powerful incentive to repay voluntarily by enhancing the consequences of non-payment*¹⁰

The fear sometimes yields the expected result of making the debtor pay up. This is particularly so because in practice the property of the debtor which the creditor takes as security is normally of a much greater value than the amount of money lent to the debtor. The thought of losing such valuable property for a relative pittance compels the debtor to pay the debt and retain the property. The fear is however misconceived and based on ignorance of the law and particularly the ameliorating role of equity in such cases. Definitely the creditor in such case has a duty to take reasonable care to ensure that the price at which the property is sold is the best price which can reasonably be obtained,¹¹ and to account for the surplus to the debtor or to other persons interested according to their priorities.¹²

A recent case which illustrates in practical terms an attempt to exploit the fear element in secured credit transactions is that of *Esu V. Co-operative Development Bank Plc.*¹³ The defendant/creditor bank had advanced a loan of about N1.4m to the plaintiff/debtor on the security of two duplex buildings owned by the plaintiff/debtor. Upon the debtor's refusal/failure to pay the loan despite repeated demands by the creditor bank, the latter

10 Mann, R. J.: "Explaining the Pattern of Secured Credit" (1997) Vol. 110 *Harvard Law Review*, p. 625 at 638 – 639 (Emphasis mine).

11 *Reliance Permanent Building Soc. V. Harwood – Stamper* (1944) Ch. 362.

12 Cousins, E. F. : *The Law of Mortgages* (1989) pp. 237 – 239; Tyler, E. L. G. : *Fisher and Lightwood's Law of Mortgage*, 19th edn. (1988) pp. 386 – 399.

Suit No. HU/155/94 at Uyo High Court No.1 in Akwa Ibom State.
Judgment was delivered on 24/10/96.

engaged a licenced auctioneer who went to the debtor's house and, not finding him at home, left his business card for the debtor with a note on it that he had come in connection with the duplexes which were securities for the bank loan. The immediately obvious intention here was to stampede the debtor to pay up and avoid the shameful consequences of non-payment.

Some have argued that a guarantee is not contemplated within the meaning of "security" because it does not create a security interest,¹⁴ and that though the guarantor's obligation reinforces the position of the creditor, it still remains a personal obligation because no *res* has been appropriate to it. However, as is clear from the cases discussed in this paper, Nigerian courts regard guarantee as a security.

As a working definition, a guarantee is a contract whereby a guarantor promises the creditor to be responsible, in addition to the principal debtor, for the due performance by the debtor of his existing or future obligations to the creditor, if the principal debtor fails to perform those obligations.¹⁵ In fact, in some cases in Nigeria, the extraction of guarantee is statutorily required. An example is provided in the National Board for Community Banks Operational Guidelines which empowers Community Banks to extract personal obligations from the debtors/borrowers and in some cases to also get further personal obligations of referees and guarantors.¹⁶ Significantly, it should be borne in mind that most guarantees normally give rise to what is generally referred to as "indirect security" e.g. where the surety or guarantor furnishes property under the personal security, thus becoming, say, a guarantor/mortgagor.¹⁷ Nigeria is not alone. In England the Consumer Credit Act of 1974 defines security widely to include guarantees. By Section 189 (1) of the Act, security is:

A mortgage, charge, pledge, bond, debenture, indemnity, guarantees, bill, note or other right provided by the debtor or hirer, or at his request (express or implied), to secure the carrying out of the obligations of the debtor or hirer under the agreement. Whether the security is by way of indirect security arising out of guarantee or in the form of a charge,¹⁸ registered

14 Sykes, E. I. & Walker, S., op. cit at p.11

15 Andrews, G. and Millet, R.: *Law of Guarantees* (1992) at p.3. For a list of the various definitions of guarantee that have been given in text books, see: *Re Conley* (1938) 2 All AR 127

16 At pp. 59-60

17 *Pinnock V. G. B. Ollivant & Co. Ltd.* (1934) 2 WACA 164.

18 As in company charges

charge,¹⁹ charge by way of legal mortgage,²⁰ pledge²¹ or mortgage,²² its ultimate realization by the creditor is, in the words of Goode,²³ predicated on at least three distinct legal facts: first, that his security has attached, in the sense that it has become realizable or, in the case of a charge, it has fastened on the asset so as to give the creditor rights over the asset vis-à-vis the debtor; secondly, that it has been perfected, i.e. all steps have been taken to preserve its validity against third parties; thirdly, that it will have priority over the claims of other parties asserting rights over the same asset. As recent cases have shown, the secured creditor may remain "secured" only in name unless he takes steps to perfect his security. Whatever the form of security, perfection as used here means one and the same thing. "Perfection" is used here as synonymous with "due execution", i.e. fulfilling all the legal requirements and formalities to ensure that the secured creditor is truly secured.

In the case of mortgage security in Nigeria, it is now generally agreed that the Governors consent (or consent of the Local Government Council as the case may be) to the mortgage must in all cases be sought and obtained.²⁴

However, in the case of *Union Bank of Nigeria PLC & Anor V. Ayo Dare & Sons (Nig.) Ltd.*²⁵ the consent question assumed an interesting twist:

- 19 Under the Registration of Titles Act which applies in some parts of Lagos
 20 Under the Property and Conveyancing Act 1959 which applies in States which constituted the former western Nigeria. See also the Law of Property Act 1925 of England (as amended).
 21 Whether of realty under customary law or of chattel under the general law.
 22 Under the Conveyancing Act 1881, a statute of general application which is still applicable in states carved out of the former Southern and Northern Nigeria.
 23 Goode, R. M.: *Legal Problems of Credit and Security*. 2nd edn, (1988) p.1.
 24 SS. 22, 26, Land Use Act 1978; *Savannah Bank Ltd. & Anor V. Ajilo & Anor* (1989) 1 NWLR 9Pt. 97) 305; *Adeniji, V. NBN Ltd* (1991) 1 NWLR (Pt. 96) 212. However, the Supreme Court has admitted that *Savannah Bank V. Ajilo* is now creating a lot of problems, for it is now "a vogue ... for mortgagors to fall upon the decision of the court in *Savannah Bank V. Ajilo* as a vehicle to escape from liability under the mortgage deeds they have entered into", *per Ogundare JSC in Ugochukwu V. CCB Ltd* (1996) 6 NWLR (Pt.456) 524.

25 (2000) 9 WRN 101

there, consent was admittedly sought and obtained but it was contended that it was "not sought and obtained from the appropriate authority". In this case the consent to the legal mortgage was given by the Ag. Chief Lands Officer. Upholding the trial court's decision that "in the absence of any instrument authorizing the Lands Officer to issue the consent by the Governor, the Lands Officer cannot issue a valid consent",²⁶ the Court of Appeal drew further strength from the maxim, *delegatus non potest delegare*.

This case now places a further unjustified burden on the secured creditor even where consent has been obtained, to make further inquiries to ensure that the "respective appropriate authority" properly empowered the consenting authority. Consent in itself is therefore not enough; the source of the consent is of great moment. In the words of the court, "the appellants should have checked the source of the consent before executing the deeds and parting with their money".²⁷ It may be argued that there should be a presumption of regularity in this circumstance so that the security can be meaningful and the intention of the parties can be effectuated. It is remarkable that in this case it was the debtors/borrowers (as mortgagors) who applied for and obtained the "consent". Under the Land Use Act, the mortgagor is the "holder"²⁸ of the right of occupancy over land. Section 21 of the Land Use Act does not say whose duty it is to obtain the "approval" or "consent" to mortgage, but section 22 states impliedly that it is the duty of the "holder" of right of occupancy to obtain the Governor's consent to the mortgage. In *Solanke V. Abed & Anor*,²⁹ the Federal Supreme Court, considering a similar consent provision in the Land and Native Rights Act 1916 (of the then Northern Nigeria) held, *inter alia*:

An occupier of land subject to the Land and Native Rights Act who, without the consent of the governor lets part of the land to a Tenant under a Tenancy Agreement and permits him to enter into occupation under the agreement, cannot, as against the Tenant, in an action for trespass brought by the Tenant, rely upon his own wrongful act, so as to allege that the Tenancy Agreement was null and void and unenforceable under section 11 of the Act.

- 26 Ibid, at p.109
 27 Ibid, at p.109
 28 A "holder in relation to a right of occupancy means "a person entitled to a right of occupancy": S. 50 (1) of the Act. The Act expressly excludes a mortgages from the definition of a "holder".
 29 (1962) ALL NLR (Pt. 1) 230

Indeed, the court is categorical that "equity will not permit an action, that is a complaint by the (mortgagors), based on their own default to arise"³⁰ In *Adedeji V. National Bank of Nigeria Ltd. & Anor*,³¹ the appellant had by deed of legal mortgage mortgaged his property for a loan from the first respondent.

The second respondent was an auctioneer who threatened to sell the property under the terms of mortgage. The appellant argued that the deed of legal mortgage was null and void because the Governor's consent was not obtained. Rejecting this contention, the Court of Appeal held that the duty of obtaining consent was on the appellant and so he could not be allowed to rely on his failure [to obtain consent] to declare the mortgage void. As Akpata, JCA put it, "Apart from the principle of law involved.....It is morally despicable for person who has benefited from an agreement to turn round and say that the agreement is null and void".³² In view of this commendably equitable stance, it is not immediately obvious why the court in the *UBN V. Dare* case allowed the borrower/plaintiff/respondent, whose duty it was as the "holder" to seek and obtain consent to afterwards, after drawing down and utilizing the loan, turn round to claim that the consent was not obtained from "appropriate authority" and therefore the mortgage which secured the loan is void, thereby rendering the creditor unsecured. The court indeed agreed that "it is despicable and morally wrong for the respondent who had initiated wrong doing, i. e., obtained consent from inappropriate authorities, and after obtaining benefit to resile from the same, but stated that "the law must be applied". One would have thought that since law and equity have since met and now flow in the same channel, with their waters mixing freely, and since the court now sits as a court of law and equity, the appellate court ought to have allowed equity to prevail in this conflict between law and equity, since equity is neither supposed to follow the law slavishly nor always. As it is, the

30 (1962) All NLR (Pt.1) 230

31 (1962) All NLR (Pt.1) 230

32 *Ibid.*, at pp. 226 – 227. *Attorney General of the Federation V. Sode* (1990) INWLR (Pt. 128) 500; *Adetuyi V. Agbojo & Anor* (1997) INWLR (Pt. 484) 705 at 717. More recently, in *Union Bank of Nigeria Plc V. Orharhuge* (2000) 2 NWLR (Pt.645) 495 at 514 the Court of Appeal said: "It was the duty of the plaintiff, as mortgagor, to seek the consent of the Governor for him to mortgage his property to the defendant. That is the Law for him to turn round a few years after executing the mortgage deed (and when as a result of his default the mortgagee, that is the defendant, sought to exercise its rights under the mortgage deed) to assert that the mortgage deed was null and void for lack of the Governor's consent, is, to say the

borrower/respondent was judicially enabled to have his cake and eat it while the secured creditor's security remained security only in name.

It can never be over-stressed that the statutory requirement for consent in the Land Use Act 1978 was motivated by a desire to stem the tide of fraudulent and speculative land deals. The court should therefore not allow the mortgagor who has refused to obtain (appropriate) consent to thereafter use that lack of (appropriate) consent as an instrument of fraud on the mortgagee. Perhaps we should borrow a leaf from the 1783 decision of Lord Thurlow in *Russel v. Russel*.³³ Before that year, the Statute of Frauds 1677, the object of which was to prevent many fraudulent practices which were commonly to be upheld by perjury, required, by section 4, that contracts for the disposition of land or interest in land were not enforceable unless there was some memorandum or note thereof in writing, and signed by the party to be charged or by his duly authorized agent. Some fraudulent parties to a contract started to take undue advantage of the statute by claiming that the bargain which they had voluntarily entered into, and out of which they derived a benefit, was unenforceable because it was not in writing as required by the Statute of Frauds. It was in this circumstance that equity intervened to enforce the contract (through the doctrine of part performance), so that unmeritorious people could not, by hiding under the Statute of Frauds, thereby use it "as an instrument of fraud".³⁴

It is not only with respect to appropriateness of consent that the court has emasculated the security of the creditor. Even where the consent has been obtained from appropriate authority, the secured creditor soon realizes that when it comes to exercising his right of sale, the law may be giving him the right with one hand and at the same time taking it away with the other. Well, is it not always said that a law(yer) has two hands? Perhaps not in this skewed sense! The recent case of *Omidiji V. Federal Mortgage Bank & 2 Ors* 35 easily come to mind at this point. In this case the sale by the mortgagee was declared invalid for the reason, *inter alia*, that the purchaser of the mortgaged property was an infant and therefore caught by section 17

33 (1783) 1 Bro. C. C. 269, Vol. 28 ER 1121.

34 As, e.g., in *Butcher V. Stapely* (1685) 1 Vern. 636, less than 10 years after the enactment of the Statute of Frauds. See generally, Enefiok Essien: *United Bank of Kuwait v. Sahib: The Rise and Fall of Security by Deposit of Title Documents*, (1998) Vol.13, *Journal of International Banking Law*, Sweet & Maxwell, London, p. 80

(5) of the Property and Conveyancing Law,³⁶ which is on all fours with section 19 (6) of the law of Property Act 1925³⁷ of England.

The section provides:

A grant or transfer of a legal mortgage of land to an infant shall operate as an agreement for valuable consideration to execute a proper conveyance when the infant attains full age and in the meantime to hold any beneficial interest to the mortgage debt in unit for the persons for whose benefit the conveyance was intended to be made. Provided that if the conveyance is made to the infant and another person or other persons of full age it shall operate as if the infant had not been named therein, but without prejudice to any beneficial interest in the mortgage debt intended to be thereby provided for the infant.

It is submitted, firstly, that this section does not deal with a sale by the mortgagee but rather, it deals with a grant or transfer.³⁸ It may of course be argued that just like a sale, both a grant and a transfer involve a conferment of a legal estate. Admittedly, by section 3(6) of the PCL [section 1(6) LPA] a legal estate is not capable of subsisting or of being created or of being held by an infant. However, it is noteworthy that mortgage to infants (and, *afore tiori*, sale to infants) is protected by the self-same Property and Conveyancing Law, and so also the manner by which the property would vest. These are provided for in the First Schedule, Part III paragraphs 3 and 4 of the Law of Property Act 1925 (England) and First Schedule, Part III paragraphs 3 and 4 of the Property and Conveyancing Law Cap. 100. It is therefore obvious that a purchase by an infant (which would have the effect of vesting the legal estate in him) is not void but rather, vests in the manner provided by law, so that the infant has a beneficial interest. This is so even where the infant was expressly named as purchaser or transferee of the legal estate. This is abundantly clear

³⁶ Cap. 100, Laws of Ogun State. The Property and Conveyancing Law (PCL) was originally applicable to Western Nigeria but on creation of States from Western Nigeria the states automatically adopted the PCL. The PCL of Western Nigeria was itself a carbon copying of the Law of Property Act 1925 of England

³⁷ As amended by the Law of Property (Miscellaneous Provisions) Act 1989.

³⁸ Transferees include sub-mortgages, who may either sell, the mortgage debt only, leaving the original mortgagor's equity of redemption outstanding, or else sell, as assignees of the mortgage, and destroy also the original equity of redemption: Waldock, *The Law of Mortgage* (1950) p. 257.

from the wordings of the proviso to section 17(5) PCL and S.19(6) LPA respectively. It is submitted, in the second place, that where the infant has no capacity to enter into a contract, the other contracting party, and more so an adult third party, in this case the borrower, cannot be allowed to benefit from the incapacity.

The transaction is voidable only at the instance of and in relation to the infant³⁹ It has for long now been agreed that "infancy is a personal privilege of which no one can take advantage but the infant himself".⁴⁰ Indeed, were it otherwise, the infant's incapacity, instead of being an advantage to him⁴¹ might in many cases turn greatly to his disadvantage.⁴²

Indeed, the courts have repeatedly held that if the creditor/mortgagee exercises his power of sale bona fide for the purpose of realizing his debt, without corruption or collusion with the purchaser, the court will not interfere, even though the sale is very disadvantageous, unless the price is so low as in itself to be evidence of fraud.⁴³ Nor will the court inquire into a mortgagee's motive for exercising his power, provided the sale itself is fair. What the law requires therefore is simply good faith in the conduct of the sale. For this reason, a secured creditor should not be denied the just realization of his security when he bona fide sells to a purchaser who turns out to be an infant.

Where the creditor is secured by a guarantee, it is also very necessary that all legal steps be taken to ensure that the guarantee is enforceable whenever the need arises. In some cases the realiseability of the security may turn merely on the propriety of the debtor's name. For instance, in *Saiawal Motor House Ltd & Anor. V. Lawal & Anor*⁴⁴ the creditor failed to realise the indirect security of the guarantor simply on the ground that the name of the principal debtor as published by the auctioneer differed slightly from the principal debtor's real name this was so notwithstanding that the debtor admitted the debt and its non-payment. The non-enforceability of the guarantee was for some other reason in *UTSU & Anor. V. Oko*.⁴⁵

³⁹ Infants Relief Act 1874, a pre-1900 statute of general application in Nigeria.

⁴⁰ Bacon's Ab. "Infancy", 1, 4.

⁴¹ Which in fact is the intention of the Infants Relief Act 1874.

⁴² *Warwick V. Bruce* (1813) 2m. & S. 205; *Shannon V. Broadstreet* (1803) 1 Sch. & Lef. 52, 58.

⁴³ *Warner V. Jacob* (1882) 20 Ch. D. 220, 224, per Kay, J.

⁴⁴ (1999) 9 NWLR (Pt. 620) 692

⁴⁵ (1999) 9 NWLR (Pt. 620) 692

In that case the court held that an admission of liability by a principal debtor (borrower) is not necessarily an admission of liability by his guarantor. From the facts of the case this can be explained on the basis that despite the principal debtor's admission, the guarantor may have a technical or legal defence which absolves the guarantor of liability under the guarantee. Here, the facts show that there was no written agreement between the parties evidencing the guarantee or promise or undertaking by the appellant to satisfy or to be answerable for the debt owed by the 2nd appellant to the respondent. To quote the court, "it is elementary but a fundamental principle of law that a contract of guarantee which the term implies an undertaking must be in writing in order to be binding on the guarantor. If it is not in writing, it is not a contract of guarantee"⁴⁶. The court cited many authorities to support this view⁴⁷. Surprisingly, what was not cited or even referred to was the Statute of Frauds 1677, which is a statute of general application in Nigeria. Section 4 of this statute is the fulcrum for saying that a guarantee must be in writing; for it provides, *inter alia*:

No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

Additionally, the guarantee must be under seal to avoid the requirement of consideration, because if not under seal it is just like any simple contract which can only be enforced where there is valuable consideration.⁴⁸ Even where consideration is afforded, it is still not enforceable if the consideration is past.⁴⁹ In Nigeria, and indeed all third world countries where illiteracy is high, where wholly oral contractual transactions are rampant, and where insistence on writing is viewed as lack of trust or as indication of intent to litigate, it will continue to be the case that a supposed guarantee is in law

46 Ibid., at pp. 141 - 142

47 *Mountstephen V. Lakeman* (1874) LR 7 (H. L.) 17; *Eboni Finance & Securities Ltd. V. Wole Ojo Tech. Services Ltd.*, (1996) 7 NWLR (Pt. 461) 464, 476; *Nigeria LNG Ltd. V. African Development Insurance Co. Ltd.* (1995) 8 NWLR (Pt. 416) 677 at 694; *Royal Exchange Assurance (Nig.) Ltd. V. Aswani Textile Ind. Ltd.* (1992) 3 NWLR (Pt. 227) 1, 13.

48 *Union Bank of Nigeria Plc V. Orharhuge* (2000) 2 NWLR (Pt. 645) 495 at 516.

49 Ibid., at p. 519

no guarantee at all, with the painful result that a creditor who thought he was secured is indeed totally unsecured.

Conclusion

Case Law in Nigeria shows a pattern of judicial over-protection of the borrower. The result is that the security of the secured creditor comes to naught. This cannot be healthy for commercial growth and for national development through private sector participation. It may well be that the judicial protection of the borrow is not out of sympathy: it may just be cases of decisions being reached *per ignorantiam*. In Nigeria, a judge once so appointed handles all types of cases. There is no specialization, whether on the basis of specialized qualification, special interest or pre-appointment practice experience. It is here suggested that one sure way to truly secure the secured creditor is to ensure that the judge to whom such matter is assigned has sound knowledge of secured transactions or, at least, of commercial matters. There is perhaps a need to establish a Debt Recovery Court, or, more generally, a Commercial Court. This will not only improve the speed of trial of the recovery cases but also the quality, or accuracy, of the judgments as the court would be presided over by Judges with known background experience in commercial law practice⁵⁰. That the need for speed and accuracy in a legal system generally, and in commercial matters in particular is the *raison detre* for the commercial court is captured by Lord Justice Scrutton when he said:⁵¹

Now I take it that a good legal system should have four, at least four, attributes. Its Judges should be incorrigible and impartial: that is one. The law they administer should be accurate and founded on recognized principles: that is two. Justice or judgments should be given quickly: that is three. And justice should be accessible to citizens cheaply: and that is four...

50 Right now our court system in Nigeria is not divided into divisions. This is unlike in England where the Court of Appeal is divided into Civil and Criminal Divisions, while the High Court is divided into the Chancery, Queen's Bench and the Family Divisions, and the Chancery and Queen's Bench Divisions have further specialist subsidiaries. The danger in Nigeria is therefore that judges are not put in the divisions where, from their experience in their professional practice, they are most conversant. Thus, for instance, somebody who has throughout been in the Department of Public Prosecution and therefore has only done criminal cases in all his practice may, on appointment as a judge, be assigned civil cases to adjudicate, when he has never even drafted nor exchanged pleadings in all his life and is used to proving cases beyond all reasonable doubts, rather than on the balance of probability.

51 Scrutton, L. J.: "The Work of the Commercial Courts", *The Cambridge Law Journal*, Vol.1 (1921-23) pp. 6-20 at p.7.

It is submitted therefore that the establishment of a commercial court would be one sure way of giving reality to the secured creditor's security. It is noteworthy that England has a commercial court (which is a specialized subsidiary of the Queen's Bench Division of the High Court) and its establishment is attributable partly to the dissatisfaction with the handling of a commercial case⁵² by a judge⁵³ who was not versed with commercial law matters. We definitely have many such Judges on the Nigerian bench. Ghana too has recently set up commercial courts.⁵⁴ It is high time Nigeria followed suit.

52 Bailey, S. H. and Gunn, M. J.: *Smith and Bailey on the Modern English Legal System*, 3rd edn., 1996, at p. 89. First, a Commercial List was established but this transformed into a Commercial Court in 1970 [by the Administration of Justice Act 1970, S. 3(1)].

53 J. C. Lawrence, J., described by Lord Justice F. D. Mackinnon in "The Origin of the Commercial Court" (1944) 60 L.Q.R. 324 as "a stupid man, a very ill-equipped lawyer and a bad judge". See also: V. V. Veeder, Q.C.: "Mr. Justice Lawrence: The 'True Begetter' of the English Commercial Court" (1994) 110 L.Q.R.292.

54 Addeah, K.: "The State of Ghana Banking Law After Restructuring", a paper presented at the Ghana Bar Association's Continuing Legal Education Seminar on Banking Law, held at the British Council Hall, Accra on April 23, 1996. The paper is now published in *The Ghanaian Banker*, 3rd Quarter, July – September 1996, Vol. V, pp.11 – 31 at p.30. I am grateful to Professor G.R. Woodman of the University of Birmingham, England, for affording me both the paper and the Journal.