

AN EXAMINATION OF SALE OF GOODS LAW IN NIGERIA

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ABSTRACT

Certain commercial transactions are not new to our indigenous society. Sale of goods is one of such transactions which were in existence before the introduction of English legal system. These indigenous systems have given way to modern system tailored in line with the English common law and statutes. The sale of goods is essentially a part of law of contract. Contract of sale of goods reflects the transfer or agreement to transfer the property in goods from the seller to the buyer. In a contract of sale, the seller agrees to transfer his interest in the goods. The seller in most cases who was in possession would transfer a possessory title, and the fact of the possession would be strong evidence of ownership. Consequently the laws regulating sale of goods have not therefore, done away with the general rules relating to contract; hence, offer and acceptance, consideration and other elements of a valid contract must be present in a contract of sale of goods. This article examines the sale of goods law in Nigeria and proffer suggestions where necessary.

INTRODUCTION

The law governing sale of Goods in Nigeria is the Sale of Goods Act 1893.¹ The rules of Common Law which are not inconsistent with the express provisions of the Sale of Goods Act 1893 are also applicable. The Law of sale of goods is only a specialised one in the sense that it is a contract involving sale of goods. Sale of Goods is defined as: “A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.”² This means that in addition to the ordinary elements of a contract, two other element, goods and money consideration, must also be present in a contract of sale of goods. The definition also envisages two situations namely; A contract of sale, in which the property in the goods is transferred from the seller to the buyer and an agreement to sell, in which the transfer of the property takes place ‘in future’³ or a fulfilment of certain conditions. A contract for the sale of goods yet to be manufactured is an agreement to sell because the property in the goods cannot pass until they are manufactured and ascertained. That the definition of a contract of sale is recognized in terms of two transactions is indicated by section 1(3) of the Act which states as follows:

Where under a contract of sale 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 called an agreement to sell.

It therefore means that a contract of sale maybe absolute or conditional.⁴

SALE AND OTHER TRANSACTIONS DISTINGUISHED

Sale and Exchange

¹ A statute of General application in force in Nigeria. Herein referred to as the “Act”.

² section 1(1) of the Sale of Goods Act, 1893; *Abba Avo Enterprises(Nig) v Shell Petroleum Dev. Company of Nig. Ltd* (2013) 11NWLR(Pt.1364) 86 at 111

³ At a future time

⁴ S. 1 (2) of the Act.; *Afrotec Technical Services Nigeria Ltd. v MIA & Sons Ltd & Anor* (2001) FWLR 643

The consideration required under section 1(1) of the Act must be money whereas an exchange involves a transfer of goods for other goods. A contract of exchange simply means the giving of goods to the person in exchange for the other persons goods-barter. In other words, money, which is a prerequisite for a contract of sale is not involved in a contract of exchange. When there is an exchange the property in the goods passes.⁵

Sale and Bailment

A bailment is a transaction under which goods are delivered by one party (the bailor) to another (the bailee), on certain specified terms, which generally provide that the bailee is to have possession of the goods and subsequently redeliver them to the bailor in accordance with his instruction. The property in the goods is not intended to and does not pass on delivery, and in fact remains with the bailor, though it may sometimes be the intention of the parties that it should pass in due course, as in the case of ordinary hire purchase contract.

In sale, on the other hand, there is usually an indication that the property in the goods would pass to the other party in the transaction. In other words in a contract of sale for bailment there is no transfer of property in the goods from the bailor to the bailee, whereas in the case of sale, the property in the goods should be transferred from the seller to the buyer.⁶

Sale and Hire Purchase

Generally, contracts of hire purchase resemble contract of sale very closely, and indeed in practically all cases of hire-purchase, the ultimate sale of the goods is the real object of the transaction. The distinction between them is very clear and extremely important at this initial stage. A contract of sale involves two parties, the buyer and the seller, whereas a hire purchase transaction invariably involves three parties⁷ to it, namely, the seller, of the goods who sells them to finance a company, which in turn leaves the goods on hire purchase terms to the hirer.⁸ Under a hire purchase transaction, the hirer has possession of the goods and is entitled to their

⁵ *Sheldom v. Cox* (1824) 3 B & C 420; *Gus Merchandise Corporation Ltd. v Custom & Excise Commissioners* (1981) 1 WLR 1309; *Chappell & Co. Ltd v Nestle & Co. Ltd* (1959) 2 All E R 701

⁶ *Broadline Ent. Ltd. v Monterey Maritime Corporation & Anor* (1995) NWLR 1; *South Australia Insurance Co. v Randell* (1869-71)3 LR PC 101; *Chapman Bros v Verco Bros Co. Ltd* (1933) 49 CLR 306

⁷ Where applicable.

⁸ Who may not become the buyer.

use, although he is not the owner. In *Yakassi v Incar Motors (Nig) Ltd*,⁹ the Supreme Court stated the difference between sale and hire purchase. It stated that sale is an outright sale but in hire purchase, the property in the goods still remains with the owner.

Sale and Gift

A gift is an immediate, voluntary and gratuitous transfer of any property from one person to another. In other words, it is a transfer of property without any consideration. It is, not binding. Sometimes, problems arise with regard to transactions in which what is regarded as “free” gift is offered as a condition of entering into some other transaction. In *Esso Petroleum Ltd v Commissioners of Customs and Excise*,¹⁰ garages selling petrol advertised a “free” gift of a coin (bearing a likeness of a footballer) to anyone buying four gallons. It was held by the House of Lords that, although the transaction was not a gift, in as much as the garage was contractually bound to supply the coin to anyone buying four gallons of petrol, it was not a sale of goods either. The transaction was characterized as one in which the garage promised to supply a coin in consideration of a customer buying the petrol. It was thus, in substance, a collateral contract existing alongside the contract for the sale of the petrol.

CREATION OF THE CONTRACT OF SALE OF GOODS

The creation of a contract for the sale of goods is a matter governed by the general principles of contract as they exist either under common law or as modified by statutory provisions. It follows therefore, that a proper grounding on the basic principles of contract is a condition precedent to the appreciation of the principles governing the creation of the contract of sale of goods.

Capacity to Buy and Sell

As required, under the general law governing capacity to enter into a valid contract, both parties to a Sale of Goods contract must have the requisite capacity to enter into the contract. As

⁹ (1975) 5 SC 105 at 113; *Arab v Joe Allen Ltd*. (1966) NWLR 169

¹⁰ (1976) 1 ALL E.R. 117

demonstrated in the case of *Labinjoh v Abake*¹¹ one has, under the general law of this country, to differentiate between the positions under customary law and the “received law”. Generally, the categories of persons whose capacities are usually discussed are infants, married women, insane persons, drunkards and corporations. It is however germane to note the proviso to Section 2 of the Act, which states that where necessaries are sold and delivered to an infant, or a drunken person, or a lunatic, such a person must pay a reasonable price for the goods. That same proviso defines necessaries as goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of the sale and delivery.

FORMATION OF THE CONTRACT

As required in an ordinary contract agreement, there must be an intention by the parties to a contract for the sale of goods to create a valid and binding contract which affects their legal relationship. Therefore, an agreement that is binding in honour only will not be a contract of sale of goods like every other contract. A contract of sale of goods is made by the express or implied acceptance by one party of an express or implied offer made to him by the other party. The contractual rules as to offer and acceptance, invitation to treat, correspondence of offer and acceptance, the time an acceptance takes effect, mode of communication of offer, and acceptance are applicable to contracts of sale of goods. The principles governing the doctrine of consideration also apply to contract of sale of goods, except that the consideration for the contract of sale of goods must have some money contents which is called the price. It should be noted that, where goods are conveyed without consideration, it amounts to a gift. Such transfer of goods will however be enforceable if the agreement is under seal. Generally, no special form is prescribed for contract of sale of goods. A contract of sale of goods may therefore be made in writing, with or without seal, or orally, or partly in writing and partly orally or it may be implied from the conduct of the parties.¹²

Section 4 of the Act states that:

¹¹ (1924) 4 NLR 33

¹² S. 3 of the Act; *BCC Plc. v Sky Ind. (Nig) Ltd.* (2002) 7 NWLR (Pt. 795) 186

A contract for the sale of any goods of the value of N20 or upwards will not be enforceable by action unless the buyer shall accept part of the goods so sold and actually received the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

This provision which can only hamper transactions of sale of goods was repealed in England by the Lagos Reform (Enforcement of Contracts) Act, 1954. It is not contained in the Sale of Goods Laws of Edo, Delta, Lagos, Ogun, Ondo and Oyo States. Section 1 of the Law Reform (Contracts) Act, 1961 repealed section 4 of the Sale of Goods Act as far as Lagos State is concerned. By this token, a contract of sale of goods of any value may be made orally in the Western state and old Bendel State comprising Edo and Delta States. A Corporation may contract in the same manner as a private person as regards formalities. But such corporations have to adhere to the formalities laid down in their articles of association for their contract.

ELEMENTS OF A CONTRACT OF SALE OF GOODS

The validity or otherwise of any contractual arrangement is usually premised on the presence or otherwise of certain elements. The elements or ingredients for ascertaining whether there exists or not a contract of sale of goods are the price and the goods.

The Price

The basic element in a sale of goods contract is the price which must be in monetary consideration. This usually includes payment by credit card, but excludes contracts of barter. e.g. exchange of goods for good involving no payment. If the parties have not fixed a price, they may not have reached an agreement, in which case, there is no contract. The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined in the course of dealing between the parties. Where the price is

not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price dependent on the circumstances of each particular case.¹³

Therefore, the price in a contract of sale may be fixed (a) by the parties, or (b) may be left to be fixed in a manner provided by the contract e.g. by a valuation or an arbitration, or (c) may be determined by the course of dealing between the parties. If however, the price is not so fixed or determined, there is a presumption that the buyer will pay a reasonable price. In *Matco Ltd v Santer Fe Development Co. Ltd*,¹⁴ it was held that the burden was on the seller to prove that the price he demanded was reasonable. On the other hand in *May & Butcher v The King*,¹⁵ the parties had agreed that the appellants should purchase tentage that should become available for disposal at a price to be agreed upon by the parties themselves. It was also understood that all disputes with reference to or arising out of the agreement would be submitted to arbitration. There was no subsequent agreement as to price. It was held by the House of Lords that, the agreement between the parties did not constitute an effective contract.

If the price is to be fixed by the valuation of a third party and he cannot or does not make such valuation, the contract is voided. But if the goods or any part thereof have been delivered to the buyer and he has appropriated them to his use, he must pay a reasonable price thereof. If not appropriated, there is no contract since the parties could still be restored to their status quo ante. If the valuer is prevented from making the valuation by the fault of the seller or buyer, the non-defaulting party may maintain an action for damages against the party in default.¹⁶

Goods

Generally, Goods are defined by section 62(1) of the Act as to include:

All chattels personal other than things in action and money, emblements, industrial growing crops and things attached to or forming part of the land such as agreed to be severed before sale or under the contract of sale.

¹³ S. 8 of the Act

¹⁴ (1971)2 NCLR 1

¹⁵ (1929) All ER 679

¹⁶ S. 9 of the Act

This definition was adopted in section 7(2) of The Law Reform (contracts) Law, 1961, which applies only in Lagos state. Therefore, the term “Goods” embraces widely varying objects such as clothes, shoes, aircraft, motor cars, machinery, ships, books, furniture and growing crops. However, the term does not include “choses in action” like bills of exchange and cheques. Real property is completely outside the ambit of the Act. In other words, land or any interest therein is excluded from the definition of goods. Although money is excluded, coins brought as commodities¹⁷ which ordinarily lack the usual negotiable attributes of money would be regarded on goods. The term “emblements” which was borrowed from ancient real property law, comprises crops and vegetables (such as corn and potatoes) produced by the labour of man and ordinarily yielding a present annual profit. In other words, the term covers crops which are planted and harvested annually. Such annual crops like yam, cassava, maize, etc are popularly called “emblements” are not part of land, but are regarded as chattels, even before they are separated from the land. The term industrial growing crops,” has not yet been judicially defined, but presumably it is under emblements and may include crops which may be harvested outside the annual period. The second part of section 62(1) refers to “things attached to or forming part of the land which are agreed to be severed.

In this instance, the Act applies to “things” forming part of land but not to the land itself. There is need to briefly discuss the position as regards minerals. The sale of minerals will be regarded as sale of goods, if the minerals have been severed from the land. The mere fact that the minerals have been quarried is not enough to make them “goods” and the question is what state is the quarried minerals as the time of contract.¹⁸ The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale, in the Act called “future goods”, there may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen and where by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.¹⁹

¹⁷ *E. g Roman or Biafran Coins*

¹⁸ *Morgan v Russel and Sons* (1909) 1 KB 357

¹⁹ S. 5 of the Act

PASSING OF PROPERTY IN SPECIFIC GOODS

Section 62(1) of the Act refers to “specific goods” as “goods identified and agreed upon at the time a contract of sale is made”. Ordinarily, property of ascertained goods ought to pass when a contract of sale is made. However, such passing is subject to the overriding provision laid down by Section 17(1) that “the property is transferred to the buyer at such time as the parties to the contract intend it to be transferred”. In a contract for sale of specific or ascertained goods, the property in the goods passes from the seller to the buyer at such time (if any) as the parties, expressly, or impliedly, stipulate in the contract of sale. In order to ascertain the intention of the parties, regard shall be made to the terms of the contract, the conduct of the parties and the circumstances of the case. In practice, the parties do not usually express their intention as to the time property passes. Therefore, where the parties fail to stipulate the time at which the property is to pass, then resort must be made to certain ruler laid down by the Act for ascertaining the time at which the property passes. Unless a different intention appears, there are rules for ascertaining the intention of the parties as to the time of which the property in the goods is to pass to the buyer.

The first of the rules came out in *R. v. Ward Ltd.*²⁰ In that case, Diplock L. J. suggested that in modern times very little is needed to give rise to the inference that the property in specific goods is to pass only in delivery or payment. The dictum of his Lordship clearly shows clearly that the parties can expressly exclude the operation of Section 18, if they so wish. Rule 1 of Section 18 gives rise to a number of questions with regard to the meaning of the term, “unconditional contract”. This may mean a contract which does not contain a condition precedent or condition subsequent that may have the effect of suspending performance of the contract or passing of the property. It may also mean a contract not containing any conditions in the sense of essential stipulations the breach of which gives the buyer the rights to treat the contract as repudiated. In other words, an unconditional contract is one which is not subject to a condition precedent or subsequent Section 1(2) lays down that “ a contract of sale may be “absolute” or “conditional” which clearly means subject to a condition precedent, for otherwise there would be no point in the contract. It should be observed that Rules 2, 3, and 4 of Section

²⁰ (1967)1 QB 534

18 deal with contracts subject to a condition precedent while Rule 1 deals with contracts not subject to such conditions.

The second major phrase under Rule 1 is that the goods must be specific for the property to pass. The question that arises under Rule 1 is as to the meaning of the phrase “specific goods”. Section 62 defines “specific goods” as goods identified and agreed upon at the time a contract of sale is made”. As far as passing of goods is concerned, it is settled that future goods can never be specific, although future goods, if truly identified may be specific goods, and its destruction may frustrate the contract. In *Varley v. Whipp*,²¹ even though the goods were specific, they were held to be “future good” as the seller was not the owner of them as at the time of the contract. The courts have been strict in interpreting the word “specific” under Rule 1.22 By the provision of Section 18 Rule 1, the meaning of the phrase “deliverable state” is that the goods must be in a deliverable state in order to enable property to pass. Section 62(4) provides an aid as to the meaning of this term. It states that;

Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them

The above provision is not all that clear, for it does not give a comprehensive definition of the term “deliverable state”. It also does not say that, if the buyer would not be bound to take delivery of the goods, then the goods are not in a deliverable state. The buyer is not bound to take delivery if the goods are defective goods but it does not follow that all defective goods are not in a deliverable state within the meaning of the above provision. Where this type of situation arises, property would never pass in defective goods. Generally, “defective” does not prevent goods from passing because if the buyer rejects the goods, the property reverts to the seller. Section 62(4) is probably intended to cover the case where the goods could not be said to be in a deliverable state physically yet the buyer had agreed to take delivery. In other words, the expression “deliverable state” cannot be said by reference to mean delivery as in Section 62(4) as a voluntary physical transfer of possession”.

²¹ (1990) 1 Q B 513

²²*Kursell v. Timber Operators and Contractors Ltd* (1972) 1 KB 298

The possession of goods can always be transferred in law, if the parties intend to transfer it, no matter what the physical condition of goods may be. Thus, if this is what “deliverable state” meant, goods would probably always be in a deliverable state. There appears to be a difficulty in getting a clear definition of the term “deliverable state”. It does not appear that there is any known local authority on this matter but there are foreign authorities. In *Kursell v Timber Operator*,²³ the court of Appeal decided that not only was the timber not specific but could also not be regarded as being in a “deliverable state”. The question now is what constitutes goods to be in a “deliverable state”.²⁴

The application of the rules in Section 18 depends upon the existence of the intention of the parties. This is usually discernible from evidence. According to Rule 1, the fact that the time of delivery or the time for the payment of the price is postponed does not prevent the property from passing when the contract is made. In an ordinary sale in a shop, property does not pass until the parties have agreed in the mode of payment. And in big departmental shops, where the buyer usually goes round the shop to collect items he wishes to buy, property does not pass until the price is paid. It should be noted that Rule 1 does not take the time of payment as crucial since it may be postponed. Another factor that may point to a contrary intention is the existence of a specific agreement on the transfer of risk. Generally, risk in goods passes with the property, so that where the risk has passed, it will be that the property also passed. Conversely, where the risk remains with the seller, the property has not passed.

Rule 2 provides as follows;

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such things be done, and the buyer has notice thereof.

For the principle under Rule 2 to apply, reference must be drawn from the terms of the contract and the circumstances of the case. It is only when it is for the seller to put the goods in a deliverable state that the Act draws that inference. For example, if Inyang sells a house to Bitrus and agrees to replace the roof with a new one, property will not pass until Bitrus has notice that

²³ *Supra*

²⁴ *Underwood Ltd v Burgh Castle Brick and Cement Sundry Co* (1921) All ER 575

this has been done. It is presumable that the rule is also applicable where the buyer has to do something to the goods, although Rule 2, refers to the seller only. The fact that goods have to be repaired or altered before delivery is more likely to lead a court to conclude that the property is not to pass until delivery. This rule is basically applied to “goods not in deliverable state”.

Rule 3 provides as follows;

Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof.

The Rule is explicit in that it makes it clear that where the passing of the property is conditional upon the performance of some act with reference to the goods property does not pass until the buyer has notice of the fulfilment of that condition.²⁵ Thus, for instance, an agreement to sell a fairly used Peugeot car, the ownership of the car does not pass to the buyer until the seller has tested the car and the buyer has been informed.

Under Rule 3, goods do not acquire the character of being in a deliverable state until the seller has done all that he was supposed to do, including measuring or testing them. If the seller of specific goods in a deliverable state is required to carry out some procedure to ascertain the price, such as weighing testing or measuring, property will not pass until that has been done and the buyer notified. It therefore follows that if the contract demands that someone other than the seller is to undertake this task, Rule 3 will not apply if it is the buyer or the third party and not the seller who has to do something to the goods.²⁶

The above rule deals with different types of transactions altogether, although similar to a conditional sale and may become a sale in course of time. It is necessary to discuss the two arms of rule 4. Firstly signifying his approval or adopting the transaction; under this Rule property will pass to a buyer who takes property on sale or return, if he signifies his acceptance to the seller or does any act which shows that he adopts the transaction, or keeps the goods for longer time than the period agreed for their return, or for an unreasonable length of time. Where

²⁵ Examples of this include weighing, testing e.t.c.

²⁶ *Turley v Bates* (1863)2 H and C 200

the prospective buyer informs the seller that he wishes to buy, this is enough to allow the property to pass.

Similarly, where the buyer does an act in relation to the goods which is consistent only with having become owner of them, for example, pledges or resells the goods, this is an act adopting the transaction within the meaning of Rule 4. The case of *Kirkham v. Attendborough*²⁷ is an example of “an act adopting the transaction”. There, the plaintiff, allowed W to have jewellery on sale or return and W pawned the jewellery with A, the defendant. The plaintiff brought an action to recover the jewellery from the defendant. It was held that, the action must fail as W’s act of pawning the jewellery was “an act of adopting, and therefore, the property in the jewellery passed to him, so that K could not recover it from A.

PASSING OF PROPERTY IN UNASCERTAINED OR FUTURE GOODS

The essence of sale of goods is the transfer of ownership or title in a property from the buyer to the seller. By the provision of Section 18 Rule 5, no matter what the parties may wish, property does not pass until the goods are ascertained. The fundamental rule in Section 16 of the Act is that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. The word “ascertained” was defined by Atkin, LJ in *Re Wait*,²⁸ as “goods identified in accordance with the agreement after the time a contract of sale is made”. An analytical illustration of Section 16 of the Act came up in the case of *Healey v. Howlett and Sons*,²⁹ where the plaintiff, a fish exporter carrying on business in Ireland, dispatched 190 boxes of mackerel by rail and ship to his customers in England and instructed the railway officials to earmark twenty boxes for the defendant and the remaining boxes to two other consignees. The train was delayed before the defendant’s boxes were earmarked and by the time this was done the fish had deteriorated. The court held that the defendant was not liable because the property in the fish had not passed to

²⁷ (1897)1 QB 201

²⁸ (1927) 1 Ch 606

²⁹ (1917) 1 KB 337

the defendant before the boxes were earmarked and they were therefore still at the sellers risk when they deteriorated.³⁰

Passing of Property is Dependent upon the Intention of the Parties

Property in unascertained goods can only pass when the goods become ascertained. It is worthy of note that whether the property in the goods will pass at the particular point in time depends on the intention of the parties as provided for in Section 17 of the Act. ³¹ The court held that ordinarily, the price fixed in respect of a contract of sale is payable in money. Where the consideration is partly in money and partly in goods on which a fixed value is placed by the parties the contract may, depending upon the intention of the parties, be treated as one of sale, the price being the aggregate sum. The provision of section 17 dealing with ascertaining the intention of parties also deals with ascertained goods. It should be noted that it also deals with ascertained goods. Section 16 of the Act states that no property will pass in ascertained goods, until fully ascertained or specified.

However, section 18 sets out five rules for ascertaining the intention of the parties, where their intention cannot be made out under section 17 (2). In practice, it is important to lay a good emphasis on the usefulness of the Rules set out as parties more often than not do not have a clear intention as to the exact time at which property will pass. A contrary intention expressed subsequently by the parties may be ineffective to defeat the passing of the property under the Rules.³²

TRANSFER OF PROPERTY BY NON OWNER

In some situations, a person who has either no property or whose rights are defective disposes of goods in circumstances that enable the buyer to acquire rights to the exclusion of the true owner. Usually good title would not pass, unless the buyer gets a good title free from any

³⁰ *Re Goldcorp Exchange Ltd* (1994) 3 WLR 199

³¹ *Mountbatten Investments (Pty) Ltd v Mohamed* (1989) 3 (1) SA 171 at 177J178C

³² *Dennant v Skinner and Collom* (1948) 2 KB 164

encumbrance by buying from the owner or his authorized agent. The rule of *nemo dat quod non habet* means that no one can give what he or she does not have. The purpose of this rule is to protect the interest of the property owners. It sometimes happens that the buyer discovers the seller was not the true owner and his possession of the goods may be disturbed by the true owner, in that case the buyer may be entitled to an action for damages against such a seller. The Act in Section 21 (1) states that where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. Such a situation could occur where a thief sells a stolen car to an innocent purchaser, or a person misguidedly sells to an innocent buyer a car that is the subject of a hire purchase contract and is therefore is the property of the finance company. In effect, the main point of Section 21 is that a person who is not the owner of a property cannot transfer title. As a general rule, a person who buys goods from someone other than the owner of the goods will not obtain good title to them, and it makes no difference if he acted in good faith. If a seller of goods has no property in the goods and does not sell with the prior consent or authority of the owner, then he cannot transfer a good title in the goods. This general rule is expressed in the latin maxim *nemo dat quod non habet*.³³ Section 21(1) of the Act also emphasizes this general rule.³⁴ The second aspect of the principle laid down by Denning LJ in *Bishopgate Motor Finance Corp Ltd v Transport Brakes Ltd*,³⁵ is discussed as the principle for the protection of commercial transactions, that is, the person who takes in good faith and for value without notice should get a good title.

Sale under agency

The main exception under this head is the sale by an agent. This is created by Section 21 Rule 1 and it states that an innocent buyer would acquire a good title where the seller sells under the authority or consent of the owner. In this instance, it means that a sale by an agent without actual authority will give the purchaser a good title if the sale is within the agent's apparent or usual authority. In essence, the principle of agency may permit a seller who is not the owner to transfer title to the buyer. The rule is further emphasized in Section 61 (2) that

³³ No one can give what he has not got.

³⁴ *Hollins v Fowler* (1875) LR7 HL 757

³⁵ (1949) 1 KB 322

The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent... shall continue to apply to contracts for the sale of goods.

In *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd.*,³⁶ Denning LJ explained that in the development of law, two principles have striven for mastery; the first is for the protection of property, no one can give a better title than he himself possesses. The second is for the protection of commercial transaction: the person who takes in good faith and for value without notice should get a good title.

Note that the first condition can be overridden by the second. Merely being in possession of goods or even document of titles does not in itself, amount to the person having a good title to sell. However, one of the main exceptions to this is where the person has authority to sell, either genuine or otherwise. Section 21 (1) of the Act has done a great deal in protecting the owner of the goods from fraudsters, while section 61 (1) of the Act also protects the innocent buyer with good faith through the principle of Principal and Agent relationships. This is done to protect commercial transaction.

Estoppel

If the owner of goods represents that another is his agent or allows a person to represent himself as his agent, although no such agency exists in fact, he, the owner will be estopped from denying the existence of his agents authority to act, on his behalf, in relation to the goods. This exception is created by the later part of Section 21(1) of the Act which states that "...unless the owner of the goods is by his conduct precluded from denying the sellers authority to sell".

However, this principle is also well preserved by Section 61(2) of the Act which states that

The rule of the common law, including the law merchant, save in so far as they are inconsistent with the express provision of this act, and in particular the rules relating to the law of principal and agent...shall continue to apply to contracts for the sale of goods.

³⁶ *Supra*

Estoppel could be by representation or by negligence. In *Henderson & Co. v Williams*,³⁷ the true owner of the goods represented to the buyer that the person selling was acting as an agent with authority to sell or is the owner. The owner was held estopped from denying that authority to sell and the buyer acquired good title, because he had represented to the buyer in that regard. On the other hand, it may be otherwise if it could be shown that the owner has breached the duty of reasonable care owed to the third party and that this induced the third party to buy the goods so that the negligence was the proximate cause of the buyer's loss.³⁸

Sale by a Person with Voidable Title

By section 23, the buyer, who buys in good faith and without notice of any defect in the title of the seller, will acquire good title if the goods are bought from a seller whose title is voidable but at the time of the sale it has not been avoided.³⁹

Sale by a Seller in Possession

Where a person who sold goods retains possession of them and resells them, for instance, where A, the seller, sell goods to B and then resells the same goods to C. If property has passed to B, but the seller is still in possession of the goods or documents of title to the goods, and the seller sells them to C, who purchased in good faith and without notice of the sale to, this second transaction passes title to C. B will only have an action for breach of contract against the seller. Section 25 of the Act. For the second buyer to acquire good title, the seller must deliver possession of the goods or documents of title. merely contracting a second sale is not sufficient to give title to the second buyer.⁴⁰

Sale by a Buyer in Possession

Section 25 (2) of the Act states that:

where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that

³⁷ (1895) 1 QB 521

³⁸ *Mercantile Credit Co Ltd v. Hamblin* (1965) 2 QB 242; *Mercantile Bank of India Ltd v. Central Bank of India Ltd* (1938) AC 257

³⁹ *Kings Norton Metal Co Ltd v Edridge, Merrette Co Ltd.* (1897)14 TLR 98,

⁴⁰ *Michael Gearson (Leasing) Ltd v Wilkinson* (2001) QB 514

person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The goods or title to the documents of title must have been obtained under a sale or an agreement to sell that is bought or agreed to buy.⁴¹

Sale in Market Overt

The word market overt has been defined by Jervis, J in *Lee v. Bayes*⁴² as an open, public and legally constituted market. Note that an unauthorized market does not qualify as a market overt. To constitute a sale in a market overt, it must be shown that the sale took place within the premises of the market, during ordinary business day, provided it is a sale of goods of the kind normally sold in the market. Not only must the sale be in a market overt and the whole transaction effected there, it is vital to show that the sale was open and public. In *Reid v. Metropolitan Police Commissioner*,⁴³ the sale of stolen goods took place in a market overt in the morning when the sun had not risen and it was still only half light. The court held that the goods should have been sold in day time when all who passed could see the goods. In *Mbanugo and Ors v. UAC (Nig) Ltd.*,⁴⁴ it was held that a sale at an auction sale by the court is not a sale in a market overt. For a sale in a market overt to be effective to pass good title, it can only be if it takes place as provided by section 22 (1) of the Act.⁴⁵ Where stolen goods are sold in market overt, the buyer acquires good title under section 22 (1) provided he buys in good faith and without notice of the seller's lack of title.

Sale by Court Order

The second arm of section 21(2) (b) of the sale of Goods Act protects all sales carried out under the order of a court of competent jurisdiction. The High Court has the power to order the sale

⁴¹ *Cahn v Pocketts Channel Steam Packet Co. Ltd* (1889) 1 QB 647

⁴² (1856) 18 CB 599

⁴³ (1973) 2 AER 97

⁴⁴ (1961) All NLR 775

⁴⁵ *Bishopgate Motor Finance Corporation v. Transport Brakes Ltd, supra*

of any goods which may be of perishable nature, or likely to deteriorate from keeping or which for any other just and sufficient reason it may be desirable to have sold at once. Consequently, a court bailiff acting in compliance with such an order may exercise a valid power of sale.

DUTIES OF THE SELLER

It might have been thought that in a sale of specific goods there would be an implied condition on the part of the seller that the goods were in existence at the time when the contract was made. It is the duty of the seller to deliver the goods, while the buyer has a duty to accept and pay for the goods. It is important to note that performance of the contract under sale of goods entails three main things: delivery by the seller, acceptance by the buyer and payment by the buyer. The duty of one party is the right of the other. Section 27 of the Sale of Goods Act provides for the rights and duties of both the seller and the buyer. It states that it is the duty of the seller to deliver the goods and that of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Duty to Deliver Goods at the Right Time

Delivery is the voluntary transfer of possession from one person to another.⁴⁶ It does not necessarily mean transportation. Transfer of possession may be actual or constructive or conceptualized as legal possession. It could also be atonement. This occurs where the goods are in possession of a third party, and delivery takes place when the third party acknowledges to the buyer that he holds on his behalf. Stipulation as to time is of essence in the contract of sale of goods.⁴⁷ It does depend on terms of the contract but in the case of *Hartley v Hymans*,⁴⁸ the court held that in ordinary commercial contracts for the sale of goods, the rule is that time is prima facie of the essence in the contracts. If the time for delivery is fixed by the contract, then failure to deliver at that time will be a breach of condition which justifies the buyer in refusing to take the goods or where the seller fails to collect the goods on the appointed day, the seller will be entitled to repudiate the contract. ⁴⁹ Where no date is fixed in the contract,

⁴⁶ S. 62(1).

⁴⁷ S. 10 (1) & (2).

⁴⁸ (1920) All E.R 328; *Mazin Engineering Ltd v. Tower Aluminium Nig. Ltd* (1993) 5 NWLR (Pt. 526) 532

⁴⁹ *Bunge Corp. v. Tradax S A.* (1981) 2 All ER 513; *Bowes v. Shand* (1877) 2 App. Cas 455

delivery by the seller must be within a reasonable time which will be determined by matters such as the nature of the goods. 50

Delivery to a Carrier

Where in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.⁵¹

Cost, Insurance and Freight (C.I.F Contract)

A contract for the sale of goods often requires a shipment by sea of the goods by the seller to the buyer. There are various types of contract of sale of goods where the subject-matter of the contract is being exported. The contract of C.I.F contracts is derived from customs and usages of merchants rather than being a product of legislation. This kind of contract is referred to as cost of the goods, insurance of the goods as well as the amount for the freight. All these are as C.I.F contract. A C.I.F Contract is one in which the seller undertakes to ship the goods at a price which will include the cost, insurance and freight. It is a kind of contract derived from customs and usages of merchants. A sale of timber at N10 000 dollars per ton C.I.F Lagos means that the amount includes the cost of the cotton, the transportation cost to Lagos and the cost of insurance premium. The main feature of a C.I.F contract is that, unlike ordinary contracts, the delivery of the shipping documents⁵² transfers the property in and possession of the goods to the buyer.⁵³ The risk on the goods passes to the buyer once the goods have been put aboard the ship. Consequently, if they are lost or damaged, the loss will fall on the buyer, who will be able to take the benefit of the insurance policy. The C.I.F contract, which is more commonly in use than any other contract used for purposes of contract of sale of goods by export trade. Under the C.I.F contract, it is immaterial whether the goods arrive safely at the port of destination. If they are lost in transit, the marine insurance policy would cover the loss or damage.

⁵⁰ S. 29 (2)

⁵¹ S. 32(1) of the Act; *Nads Imperial Pharmacy v. Messrs Siengluse and sons* (1959) LLR 21

⁵² The emphasis on the shipping documents-Bill of lading, policy of insurance and invoice.; *C. Groom Ltd. v. Barber* (1915) 1 KB 316

⁵³ *Arnhold Karberg & Co. v. Blythe* (1916) 1 KB 495 at 510

The Free On Board (F.O.B) Contract

Although generally employed in international commerce, it is also a transaction that is applicable to local transactions. The basic feature of this type of contract is that the seller must pay the cost of the goods and bear the responsibility of putting goods 'free on board' (f.o.b) and until they pass the ship rail. After this delivery is complete and the risk of loss in the goods is there and then transferred to the buyer. An f.o.b contract is one in which the seller undertakes to supply the goods and places them free on board the ship to be named by the buyer who in turns pays the freight and the cost of insurance.⁵⁴ Since f.o.b contracts are meant to serve different commercial interests in different periods or times, they have different variants.

In an f.o.b contract there is strong presumption that the parties intend property to pass as soon as the goods cross the ship's rail. Most f.o.b contract are concerned with unascertained goods in which property cannot pass until the goods have been ascertained by being unconditionally appropriated to the contract and the parties intend it to pass. The appropriation usually occurs when the goods pass over the ship's rail for loading. Risk of the goods will usually pass on shipment, even if property has not passed. ⁵⁵ Risk may not pass if the seller fails to provide sufficient information to enable the buyer to insure the goods.⁵⁶

Duty to Pass Good Title

This is a condition of the contract for which the buyer can terminate the contract and seek damages for any loss, or affirm the contract and recover damages for loss. The right of the buyer is to receive the best title to the goods, that is, title that cannot be defeated by another person. Under common law, the general principle of contract was that of caveat emptor. It may appear that the seller is not deemed to be given any undertaking as to title but section 12 of the Sale of Goods Act protects the title of a buyer by imposing a duty on the seller with regard to good title of the goods sold.⁵⁷

Duty to Supply Goods of the Right and Satisfactory Quality

⁵⁴ *Thomas Young & Sons Ltd v Hobson and Partners* (1949) 65 TRL 365

⁵⁵ *Inglis v Stock* (1885) 10 AC 263

⁵⁶ Section 32(3) of the Act Act

⁵⁷ *Butterworth v Kingsway Motors Ltd.* (1954) 1 WLR 1286; *Rowland v Divall* (1923)2 KB 500

There is usually an implied term that the goods supplied under the contract are of satisfactory quality and correspond with the description. Goods are regarded as sold by description, where the buyer contracts to buy the goods in reliance on the description given by or on behalf of the seller.⁵⁸ With reference to satisfactory quality, section 14(2) (b) states that; “the quality of goods includes their state and condition, fitness for all the purposes for which goods of the kind in question are commonly supplied,⁵⁹ appearance and finish, freedom from minor defects, safety and durability.⁶⁰ However, where there is contract for the sale of goods by description, the goods must correspond with that description and goods supplied under contract of sale of goods must be of satisfactory quality.⁶¹ The comparison between the goods as described and the goods as delivered is made according to the assessment of a business person or a reasonable consumer and not that of a scientist. Moreso, where there is an implied condition that the seller must have a right to sell the goods, so where the seller is in breach of the term, then the buyer is entitled to the return of the entire purchase price, irrespective of the fact that the buyer may have used it.

DUTIES OF THE BUYER

Once an agreement with respect to goods has occurred between two or more people for the purpose of business, they both have duties to fulfil as buyer and seller of such good. It is however important to note that these duties are paramount to the success of the business transactions and will also enhance the growth of commercial transactions world over. Payment for the goods is a major duty of the buyer as well as the duty to accept the goods as transacted after the seller fulfils its duty in the transaction.

Duty to Pay the Price

It is the primary duty of the buyer to pay for the price of the goods supplied to him. Payment for the goods and delivery of the goods are concurrent conditions and the buyer is not entitled

⁵⁸ *Varley v Whipp* (1900) 1QB 513

⁵⁹ S. 14 (1) of the Act.

⁶⁰ *Clegg v. Olle Anderson T/A Nordic Marine* (2003) EWCA Civ 320

⁶¹ *Pinnock Bros v Lewis & Peat Ltd* (1923) 1 KB 690

to claim possession of the goods unless he is ready and willing to pay the price in accordance with the contract.

Section 28 of the Act states that:

Delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods in exchange for the price, and the buyer must be ready and willing to pay in exchange for possession of the goods.

It is important therefore that the principle of cash on delivery is implicit in a contract of sale, if the buyer pays by cheque or any negotiable instrument that is regarded as a conditional payment, because if the cheque is dishonoured, the seller may sue for the instrument or for the price of the goods.⁶²

Duty to accept the Goods

This is also one of the major duties of the buyer, the duty to accept the goods in accordance with the terms of the contract. S. 35 of the Act provides that the buyer is deemed to have accepted the goods when he intimated to the buyer that he has accepted the goods⁶³ or where the goods have been delivered to him. In this instance, acceptance in essence involves taking possession of the goods by the buyer. And delivery of the goods by the seller is of the essence in the contract. If the buyer fails to take delivery in time, that will not justify the seller in selling the goods to another person, unless the delay is clearly unreasonable to justify the seller to conclude that the buyer has repudiated the contract.

Acceptance and Examination

Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them, unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.⁶⁴ By virtue of Section 34(2) of the Act, unless otherwise agreed, when the seller

⁶² *Bekederemo v Colgate-Palmolive (Nig)* (1976)6 SC 35

⁶³ *Ajayi v Eburu* (1964) NWLR 41, here, the buyer having taken delivery of the goods resold them to sub-purchasers. It was held that the act of acceptance of the goods by the buyer had been made. Also in *D. I.C Industries Ltd v Jifat Nigeria Ltd* (1955) 2 CCHCJ 175, it was held that an acknowledgment by an employee of the buyers was sufficient to constitute acceptance within the meaning of the provision.

⁶⁴ S. 34(1) of the Act

tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose ascertaining whether they are in conformity with the contract. The conduct of the buyer could amount to an acceptance of the goods having regard to the provisions of section 35 of the Act.⁶⁵ It is important to note that the duties of the buyer are paramount in the contract between the buyer and also the seller in the contract of sale of goods. The duty of the buyer is the acceptance of the goods and the payment of the said goods. In some instances, the conduct of the buyer may make him forfeit his right of rejection after examination of the goods.

REMEDIES OF THE SELLER

It is important to note that the remedies available to the seller are concurrent with the one available to the buyer. Apart from personal action on the contract which is available to the seller where the buyer defaults in payment of the price of goods sold, the seller may also exercise some real rights to the goods. Note that personal remedies will only be against the buyer and not third party in case the goods have been resold, as against real remedy which is against the goods sold. The personal remedy of the seller against the buyer is the right of payment and also right to damages. It is a personal right which a third party who benefits from the goods will not share as against the real remedy of the seller.

The seller of goods under a sale of goods contract has two remedies under this head available to him as against the ones available under the real remedies. This is an action that directly affects the buyer for the seller to recover sums of money representing that he has lost, it is a right in personam. There are action for the price and action for damages. An action for the price is an action in debt. The seller has the right to bring an action for the price. This action could come in two folds under section 49 of the Act. Firstly, if property has passed and the buyer has wrongfully failed to pay according to the terms of the contract. This is well enunciated under section 49(1) of the Act. In this instance, the seller can sue for the price of the goods.⁶⁶

⁶⁵ *Hardy and Co. Ltd v Hillerns and Fowler* (1923) 2 KB 490

⁶⁶ *Colley v. Overseas Exporters Ltd* (1921) 3 KB 302.

Secondly, if the contract stipulates a date for payment without requiring delivery and the buyer wrongfully fails to pay, then the seller can bring an action for the price of the goods.⁶⁷

Under 50 (1) of the Act, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller will have an action for damages for non-acceptance. The action may be brought whether the property in the goods has passed or not to the buyer. Note that the measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract.⁶⁸

The seller may exercise some real rights against the goods as against the personal remedies discussed above. These are real rights and are in relation to the goods. They are rights in rem. An unpaid seller is a seller who has not been paid the whole of the price or when the bill of exchange or other negotiable instrument has been received as conditional payment and the condition for which it has been received has not been fulfilled by reason of the dishonour of the instrument it.⁶⁹ It does not matter that the time for payment has not arrived, note that if the buyer has tendered the price and the buyer has refused to accept, he cannot be an unpaid seller within the meaning of the Act.⁷⁰

Unpaid Sellers Lien

The unpaid seller's lien is the right to retain possession of the goods until payment, even if the title has passed to the buyer. A lien is a right to retain possession of goods until payment or tender of the whole price is made. The lien is available where an unpaid seller is in possession and section 41 (1) of the Act provides that where the goods have not been sold on credit, where it has been sold on credit and the term of it has expired or where the buyer has become insolvent. The lien may be exercised against part of the goods where the rest have been delivered unless delivery indicates an agreement to waive the lien.

Right of Stoppage in Transit

⁶⁷ S. 49 (2) of the Act.

⁶⁸ S. 50 (2) of the Act; *Thompson Ltd v. Robinson (Gunmakers) Ltd.* (1955) Ch. 177.

⁶⁹ S. 38 (1) of the Act.

⁷⁰ *Lyons and Co v. May and Baker Ltd* (1923) 1KB 685.

The right is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment of the price. The unpaid seller has the right to resume possession of goods which are left in his possession as long as they are still in the course of transit.

Rescission and Re-sale

A contract of sale is not rescinded by the exercise of the rights of lien or stoppage. Here, the buyer may be able to require delivery on tendering payment of the price. Where property in the goods has passed to the buyer, it will not revert in the seller merely because they exercise the right of lien or stoppage. Note that the seller must terminate the contract before property in the goods will revert. The property will revert in the seller if they exercise the right of resale. This is a right that arises if the seller defaults in which case the original sale contract is rescinded.⁷¹ This right may also arise under section 48 (3) where there is an unpaid seller, either the goods are perishable or the seller gives notices of the intention to resell or the buyer does not pay or tender the price within a reasonable time.

Note that the unpaid seller may resell the goods and recover from the original buyer damages for any loss caused by this breach. In *R v. Ward Ltd v. Bignall*,⁷² the court held that reverting of property in the seller occurred as a result of rescission of the contract by the seller following the buyer's breach. The seller elected to rescind by reselling the goods. The seller can bring actions against the buyer for price where property has passed and the buyer has wrongfully failed to pay or for damages where the buyer wrongfully fails to accept and pay for the goods.

REMEDIES OF THE BUYER

As had been said, the remedies of the seller and those of the buyer are concurrent to each other as they both have duties to perform in a contract of sale of goods. Both parties therefore, also have remedies that also go with them where contract is breached. The buyer may sue for the price, or/and for damages. If the buyer has paid the price, he may sue the seller to recover the

⁷¹ S. 48 (4) of the Act.

⁷² (1967) 1 QB 534

amount paid if the goods are not delivered or the consideration for the payment has failed.⁷³ The buyer can repudiate the contract if the seller is in breach and the breach goes to the root of the agreement. If the buyer wrongly rejects goods, the seller can treat this as a repudiation of the contract and, if property has passed to the buyer, it will revert in the seller. The buyer loses the right to reject the goods if all or part of the goods are accepted, unless the contract permits rejection after acceptance.⁷⁴ Where a breach justifies rejection, unless there is agreement to the contrary, the buyer may reject all of the goods or may take those that are not defective, or may take some of the defective goods and reject the rest.⁷⁵ In *J & H Ritchie Ltd v Lloyd Ltd*,⁷⁶ it was held that where the buyers agrees to the repair of the goods and the repair was properly effected so that the goods conformed with the contract, the buyers lost the right to reject. It is worthy to note that the buyer will not be able to claim damages where the loss was not caused by the breach. In *Lambert v. Lewis*,⁷⁷ the seller of a defective towing equipment was liable for the breach of section 14(3) of the Act, but not for the damages the buyer had to pay to a third party who was injured when the buyer continued to use the equipment in spite of knowing that was defective. The buyer can reject goods for defective delivery, breach of an implied or express condition, or serious breach of an innominate term, unless they have accepted the goods or where there is a minor breach. Rejection does not necessarily constitute rescission of the contract and it may be possible for the seller to cure a defective delivery.

CONCLUSION

There are numerous factors that may affect the smooth running of the concept of sale of goods. The important ones to be discussed are the doctrines of risk, frustration and mistake. These factors such as risk, frustration and mistake can terminate a contract without damages or right to sue for the price of the goods. It is however important to note that an act of God or King's enemies' act can also bring the contract to an end with both the seller and the buyer losing. If the goods sold are accidentally lost or damaged, then the loss or damage will fall on the party

⁷³ S. 54 of the Act

⁷⁴ S. 35 of the Act

⁷⁵ S. 35A (2)) of the Act

⁷⁶ (2005) SLT 64

⁷⁷ (1982) AC 225

who bears the risk and the general rule of *res perit domino*, that is, the risk of accidental loss, falls on the owner.

