

Law of Sale of Goods in Nigeria: Interrogating Key Elements of the Sale of Goods Act Relating to the Rights of Parties to a Sale of Goods Contract

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Abstract

This paper came against the backdrop of the need to clarify and appraise the law relating to rights of parties to a sale of goods contract in Nigeria. And this is with the objective of engendering a better legal regime for business contracts in particular and economic transactions in general. The paper has therefore appraised the Sale of Goods Act especially as it relates to the rights of parties to a contract of sales; examined various court decisions on the subject; and highlighted weaknesses in the law that require remedial action.

Keywords

Contract of Sale, Price, Property in Goods, Lien, Specific Performance

1. Introduction

In the last couple of decades, the Sale of Goods Act has increasingly proven problematic in application and has generated enormous confusion and controversies resulting in discordant court decisions. This is principally owing to the nature of the law that has been in operation for over a hundred years, notwithstanding contrasting socio-economic transformations that have taken place in the last century. The law of sale of goods in Nigeria is principally governed by the Sale of Goods Act, 1893, an English Law adopted in Nigeria long before political independence as one of the statutes of general application in the country

(Obilade, 1979).¹ As is with a number of other statutes of general application, this statute has become outdated and out of tune with current realities of business and contractual transactions involving both movable and immovable properties. As such, certain of its provisions have become either moribund or inapplicable in given sets of circumstances; hence this research undertakes a critical review of some of the major provisions relating to the rights of parties to a sale of goods contract with the aim of strengthening the law and its application for better business and contractual transactions. Particular focus is on the validity of a contract for sale of goods and the rights and remedies available to both the buyer and the seller.

2. Conceptual Framework

Section 1 of the Sale of Goods Act states that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. As Okany has stated, going by the above legal definition, in addition to the ordinary elements of a contract, two other elements, namely, goods and monetary consideration, must also be present in a contract of sale of goods (Okany, 2000). In *Nidocco vs. Gbajabiamila*² and sundry other cases, the Nigerian Supreme Court has held that failure to pay the purchase price under a sale of land is a fundamental breach which goes to the root of the contract of sale; and, secondly, that the effect of the contract without consideration is that it cannot be taken as complete, nor can the court decree specific performance of it. The term *contract of sale* is used in the Sale of Goods Act to include both a sale and an agreement to sell.³ Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract becomes a sale, and where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled then the contract is only an agreement to sell. However, an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.⁴

Section 62 of the Sale of Goods Act defines goods to include all chattels personal other than things and money; and including emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of Sale. In *Berende vs. Usman &*

¹Statutes of General Application are laws applicable in England as at 1st January 1900 which were absorbed into the Nigerian legal system, being a former British Colony, by virtue of the Colonial Ordinance No. 3 of 1863. Current Nigerian enactments have entrenched these statutes as part of the *lex lata* including the Law (Miscellaneous Provisions) Act, the Interpretation Act, and Section 315 of the Constitution which includes such statutes among existing laws. Note further that, many States in the country have re-enacted the Act into their State statute books as for example Lagos and Kwara State.

²(2013) 56 (pt. 1) NSCQR 230.

³Section 1 permits a contract of sale *between* one part owner and another.

⁴See further *Afrotec Technical Services (Nig.) Ltd. vs. M.I.A. & Sons Ltd.* (2000) 15 NWLR 730; *Punch Nigeria Ltd. vs. Jumsum Nigeria Ltd.* (2011)12 NWLR 162.

Anor,⁵ the Court of Appeal attempted a classification of chattels when it held that chattels are either personal or real. Personal may be so called in two respects; one, because they belong immediately to the person of man, as a bow, horse, etc. The other, for that being any way injuriously withheld from a person and there are no means to recover them, but personal actions.⁶

The Black's Law Dictionary defines *personal action* as action brought for the recovery of debts, personal property or damages arising from any cause (Garner, 2009). Okany has viewed property from three dimensional standpoints, firstly, as the thing or *res* over which ownership may be exercised; secondly, as ownership itself such as when one says that he has the property in the goods; and thirdly, as an interest in a thing less than ownership but nevertheless conferring certain rights, as when it is said that a bailee has special property as opposed to general property in the thing bailed (Okany, 2000).

3. Validity of a Contract of Sale of Goods

A contract for sale of goods is, first and foremost, a contract and by section 2 of the Sale of Goods Act, is regulated firstly by the general law of contract and, secondly, by the law of acquisition and transfer of property. In general terms, for a contract to be valid, there must exist an offer, acceptance, consideration, and intention to create legal relations (Sagay, 1993).⁷ In addition, an enforceable contract must be valid with regard to capacity of parties; form of contract in relation to whether it is oral, written, or by deed; content, as it relates to express and implied terms; genuine consent, in that the contract must not have been induced by misrepresentation, mistake, duress or undue influence; and such contract must not be illegal or contrary to public policy. A contract which does not satisfy these relevant requirements may be void, voidable or unenforceable (Abbott et al., 2013).⁸

With regard to the acquisition and transfer of property, the basic law of transfer of property centres on ownership and possession. Possession comprises the power over an object; the will to exercise exclusive control and a reasonable security for continued exclusive use. Similarly, ownership has been described as the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. It implies the right to possess a thing, regardless of any actual or constructive control.⁹ A person must first acquire own and, in most cases, possess a property before he can legitimately sell, convey or transfer ownership or title of same to another person. This principle of law is captured in

⁵Statutes (2005) 14 NWLR 1.

⁶This definition was adopted from *Nomo-Lexicon: A Law Dictionary* (1670) by Thomas Blount.

⁷Sagay defines a contract as an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties.

⁸Abbott et al. clarify that a void contract has no legal effect, a voidable contract allows a party to render it void at his will, and an unenforceable contract is one devoid of the written evidence of its terms by which it could have been enforced such as the written evidence of a contract for the sale of land. Notwithstanding its unenforceability the contract remains valid and any goods or money transferred cannot be recovered.

⁹Garner, op. cit.

the Latinic maxim of *nemo dat quod non habet* meaning that no one can give what he has not got. This principle is based on the logic that a person who does not own property cannot confer it on another except with the true owner's authority under an agency relations; where he is selling under statutory powers; or in cases which the doctrine of estoppel prevents the true owner from denying the authority of the seller to sell.¹⁰

There are other basic elements for a valid contract of sale. The consideration for a contract of sale of goods is the price which must be expressed in monetary terms (Macintyre, 2008). Exchange of goods *simpliciter* cannot, therefore, come within the confines of sale of goods. Section 8(1) of the Sale of Goods Act provides that the price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing, the buyer must pay a reasonable price.¹¹ Again, where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation where the goods or any part thereof have been delivered to and appropriated by the buyer, such buyer must pay a reasonable price for them; and secondly, where such third party is prevented from making the valuation, by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault (Yerokun, 2005).¹² According to Okany, 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 valuation or an arbitration; or (c) may be determined by the course of dealing between the parties, e.g. previous transactions between them or any relevant custom of the trade or profession. If, however, the price is not so fixed or determined, there is a presumption that the buyer will pay a reasonable price (Okany, 1992).

The problem, though with section 8 of the Sale of Goods Act is that unless the price of the goods is fixed in the contract, it is difficult to see how we can assume a concluded contract. In either case where the price is *left to be fixed in a manner agreed by parties; determined by the course of dealing between the parties; or fixed by a third party through valuation*, we find only a future contract to be concluded on the happening of any of these events. As such, whatever contract that has been made is inchoat and merely futuristic. And this poses a challenge to the judiciary that has to interpret and determine each case on its merits without forming any coherent body of case law on the subject capable of ushering in some certainty.

¹⁰Statutes See generally Section 9 of the Sale of Goods Act.

¹¹What is a reasonable price is a question of fact dependent on the circumstances of each particular case. See especially Section 8(2) of the Sale of Goods Act.

¹²Yerokun has enumerated the exceptions to include: Sale under estoppel; sale by agents; sale by mercantile agent; sale under special powers; sale in market overt; sale under a voidable title; sale by seller in possession and sale by buyer in possession. Okany adds sale under common law power; sale under statutory powers; and sale under order of court to Yerokun's list of exceptions but does not treat sale by agents separately.

Another important element of the sale of goods contract is the *goods* itself, otherwise referred to as the property (Bose, 2008). There must be some goods or interest in goods to be transferred. By section 16 of the Act, 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. Furthermore, where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. And by section 17, for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of parties, and the circumstances of the transaction. Similarly, the seller must be the owner of the property or a lawful or authorized agent of the owner of the property. Thus, the court stated in the early English case of *Eicholz vs. Bannister*¹³ that *in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale; and that the sale of a chattel is the strongest act of dominion that is incidental to ownership*. Furthermore, there must be a transfer of the property or interest in the property from the seller to the buyer.

4. Rights and Remedies Available to the Seller for a Breach of a Contract of Sale

By section 38(1) of the Sale of Goods Act, a seller of goods is deemed to be an unpaid seller when the whole of the price has not been paid or tendered to him; or when a bill of exchange or other negotiable instruments has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument. This clarification is significant because it has a direct bearing to who has rights as a seller and what remedies are available to him should the buyer default in making payment for the goods delivered to him. As is to be noted, the completion of a contract of sale is signified by the payment of the purchase price. Accordingly, when the seller collects the full payment for the goods which he has duly delivered to the buyer, all his rights over the goods are completely extinguished. As Yerokun has noted, payment, which is an important element in contract of sale, appears to be the most difficult requirement to meet in commercial transactions (Yerokun, 2005). Traders particularly are enthusiastic to collect the goods or have the good delivered to them. However, to make payment is sometimes difficult as some buyers may foot-drag and like to bargain, or extend payment to cover a period of time.

To relief the seller of the above difficulty, section 39(1) of the Act has granted to the unpaid seller three important rights, namely, a lien on the goods or right to retain them for the price while he is in possession of them; in the case of insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them; and a right to re-sale such goods in compliance with the provisions of the Act. Furthermore, section 39(2) of the Act

¹³(1864) 17 CNNS 708.

stipulates that where the property in goods has not passed to the buyer, the unpaid seller has, in addition to the above remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

As it relates to the seller's lien over the goods, section 41(1) of the Act empowers the seller to retain possession of the goods until payment is made or price tendered, but only in circumstances where the goods have been sold without any stipulation as to credit, where the goods have been sold on credit, but the term of credit has expired; or where the buyer has become insolvent. In addition to this, the unpaid seller would lose his right of lien or retention of the goods when he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods; when the buyer or his agent lawfully obtains possession of the goods; or where he has waived his right of lien.¹⁴ A major problem here, though, is that the Act does not prescribe what constitutes a waiver and has abandoned the subject to the unpredictable vagaries of judicial interpretation. As a consolation, section 42(3) of the Act states that the unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment for the price of goods. This notwithstanding, it is our view that where, however, such judgment has been levied on the buyer and the debt recovered, there is no justification for the seller continuing to place a lien on the goods and such right should automatically abate and extinguish.

Furthermore, sections 49 and 50 of the Sale of Goods Act provide basic remedies for the seller against a breach of contract by the buyer. The most important of such remedies is an action for price. Thus, where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.¹⁵ And where the price is payable on a specified day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price even though the property in the goods has not passed and notwithstanding that the goods have not been appropriated to the contract. Another significant remedy for the seller is that where the buyer wrongfully neglects or refuses to accept and pay for the goods, he may maintain an action against him for damages for non-acceptance of the goods.¹⁶ The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. The Nigerian Supreme Court has affirmed in a plethora of cases, illustrated by *Aminu Ishola vs. Afribank*,¹⁷ that, in general,

¹⁴(1864) Section 43(1) Sale of Goods Act.

¹⁵Section 49(1) of the Sale of Goods Act

¹⁶Section 50(1) of the Sale of Goods Act.

¹⁷(2013) 54.2 NSCQR 717; See also *Chief Paul Ordia vs. Pied Mont (Nigeria) Ltd.* (1995) 2 NWLR (pt. 379) 16; *Universal Vulcanizing (Nigeria) Ltd. vs. Ijesha United Trading & Transport Ltd.* (1992) NWLR (pt. 266) 388.

the damages to which a plaintiff who has been deprived of his chattel is entitled to is, *prima facie*, the value of the chattel together with any special loss which is the *natural* and *direct* result of the wrongful act. The court went further to state that the object of awarding damages for each of contract is to put the injured party so far as money can do it in the same position as if the contract had been performed. The injured party can never get more in damages than the loss which he has suffered. In fact, the injured party can even get less than the loss he has suffered under the exclusion principle of remoteness of damages.

It appears that the principle of remoteness of damages is not the only factor that can work against an unpaid seller with regard to a claim for damages, for, under Nigerian law, an injured party is expected to take steps to mitigate his loss otherwise his claim for damages may be negatively impacted. In *Okongwu vs. Nigeria National Petroleum Corporation*,¹⁸ the Supreme Court stated that a plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages from any such loss which he could have avoided but had failed, through unreasonable action or inaction to avoid.²⁰ This position was re-affirmed by the court in *Onwuka vs. Omogui*,¹⁹ to the end that in law, a claimant is under obligation to minimize his loss in relation to damages. It is noteworthy, however, that both the seller and the buyer are subject to this obligation. Notwithstanding the foregoing analysis, where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept.²¹

5. Rights and Remedies Available to the Buyer for a Breach of Contract of Sale

As with the seller, the Sale of Goods Act has granted a number of rights and remedies to the buyer and by so doing fortified his position in the contractual relationship. Among the remedies is an action for damages for non-delivery of goods specified under the contract of sale. By section 51(1) of the Sale of Goods Act, where the seller wrongfully neglects or refuses to deliver the goods to the buyer, such buyer may maintain an action against the seller for damages. The threshold for the delivery of the goods has been established by the courts to be the standard of *due delivery* which, as the Supreme Court in *Abba vs. Shell British Petroleum*²² has clarified, requires the buyer's acceptance of the goods delivered by the supplier, and, unless and until the buyer accepts and signs the way-bills, due delivery is not done. Again, as is with the case of the seller, the measure

¹⁸(1864) (1989)4 NWLR (pt. 115) 296.

¹⁹See further Sagay (supra).

²⁰(2015)4 NSCQR 412.

²¹Section 50(3) Sale of Goods Act.

²²(2013) 54.3 NSCQR 1363.

of damages which a buyer can claim is the estimated loss directly and natural resulting, in the ordinary course of events, from the seller's breach of contract.²³ Furthermore, the Supreme Court has held in *Artra Industries (Nigeria) Ltd. vs. Nigerian Bank for Commerce and Industry*,²⁴ that damages for breach of contract are not awarded for anticipated gross income but for net income or profit, such that in considering a claim for loss of anticipated profit, the projection of an anticipated profit in a feasibility report without more has no weight and is not acceptable as proof of such anticipated profit.

Another important remedy for the aggrieved buyer lies in specific performance which the court may grant upon his application. This is a remedy ordered by the court requiring the fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate.²⁵ Section 52 of the Sale of Goods Act provides that in any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as the court may deem just, and the application by the plaintiff may be made at any time before judgment or decree. There are many advantages of specific performance including that it may be difficult to revert the parties to the *status quo ante* merely by the payment of damages. However, the greatest obstacle to the enjoyment of this remedy is that it is purely discretionary on the presiding Judge to grant or refuse and this is further complicated by the fact that there is no objective yardstick by which the court's discretion may be measured thereby throwing the entire enterprise to his whims and caprices. To this extent, specific performance is in effect a shaky and uncertain remedy. This uncertainty is amplified by the Supreme Court in *Help (Nigeria) Ltd. vs. Silver Anchor (Nigeria) Ltd.*,²⁶ when it held that specific performance is a discretionary remedy. It will not be granted if the contract suffers from some defect or if damages constitute an adequate remedy. The language of section 52 of the Act supports this view particularly when it uses non-obligatory phrases such as *the court may* and *if the court thinks fit* to describe what the court can or cannot do when considering an order for specific performance. Therefore, specific performance, in the final analysis, is not a right but a clearly uncertain remedy. This is more so since the court can only grant specific performance for a purpose which can be achieved or enforced. It cannot command the impossible or decree specific performance in vain. Accordingly, the court must examine and weigh carefully every competing interest before making an order of specific performance.

The Sale of Goods Act also grants the buyer a remedy for breach of warranty

²³(1864) Section 51(2) Sale of Goods Act.

²⁴(1998)4 NWLR (pt. 546) 357.

²⁵*Best (Nigeria) Ltd. vs. Blackwod Hodge (Nigeria) Ltd.* (2011)5 NWLR (pt. 1239) 95.

²⁶(2006) 5 NWLR (pt. 972) 196.

by the seller. However, by section 53(1) of the Act, the buyer is not thereby allowed the right to reject the goods or repudiate the contract but rather a remedy of set up against the seller; the breach of warranty in diminution or extinction of the price; or of maintaining an action against the seller for damages for the breach of warranty. This remedy derives from the fact that there is always the implied warranty by the seller that the goods shall be free from any charge or encumbrance from any third party not declared or known to the buyer. Specifically, in a contract of sale of goods, the law imposes upon the seller a warranty that he has title to the property.²⁷ Notwithstanding the foregoing, the Supreme Court in *Metal Construction (WA) Ltd vs. Meridian Trade Corp. Ltd.*,²⁸ stated that a buyer complaining about non-merchantability of goods purchased must do so and reject the goods timeously and that the appellant in that case having accepted the goods which it had ample opportunity to examine, cannot later reject them and must be taken to have examined them.²⁹ In *Elf Petroleum Nigeria Ltd. vs Onyekwelu*,³⁰ the Supreme Court laid out the ground rules as to when a buyer would be deemed to have accepted delivery of any goods to include when he intimates the seller that he has accepted them; when the goods are delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller; or when after the lapse of a reasonable time, he retains the goods without intimating the seller that he has rejected them.³¹ Nonetheless, by section 36 of the Act, where goods are delivered to the buyer and he refuses to accept them, he is not bound to return them back to the seller, rather, it is sufficient if he intimates the seller that he has rejected them.

6. Recommendation

To strengthen the Sale of Goods Act for better performance particularly as it relates to the rights of parties to a sale of goods contract, a number of amendments need to be carried out. First, section 8 of the Act should be amended to avoid appearances of inchoat contracts where price is not fixed on the contract of sale. This can be done by introducing a standard objective guide for determining price where it is not already fixed on the contract. Second, section 39(2) providing that where the property in goods has not passed to the buyer, the unpaid seller has a right of withholding delivery similar to and co-extensive with his right of lien and stoppage *in transitu* should be expunged as same is merely duplicative of section 39(1) and so unnecessary in the practical sense of contemporary business. Third, section 43(1) of the Act should be amended to prescribe what constitutes a waiver rather than abandon it to the vagaries of judicial interpretation.

²⁷1864) See *Abba vs. Shell Petroleum* (Supra); *Akerele vs. Atunrase* (1969) 15 CNLR 323; *Adlaju vs. Fanoiki* (1990) 2 NWLR (Pt. 131) 137.

²⁸(1990) 5 NWLR 145.

²⁹See also *British Overseas Credit Ltd. vs. Animashaun* (1961) ANLE 343.

³⁰(2002) 7 NWLR 461.

³¹See also Section 35 of the Sale of Goods Act.

7. Conclusion

The Sale of Goods law is a statute of general application in Nigeria. Though a number of States of the Federation have re-enacted them into their State legislations with slight amendments to suit their local requirements, the vast majority of states where this has not been done still rely on and apply the Sale of Goods Act, 1893. This Act requires amendment in line with recommendations made to deliver its purposes within the context of the twenty-first century business complexities in the country. The courts have for decades offered insight into various dimensions of the law through their interpretative actions, and for that, have provided the clarity and guidance needed to balance the divergent and competing interests of both the buyer and the seller in an ever expanding contemporary business networks. This would certainly be enhanced when the recommendations carry through.

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