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A CRITICAL APPRAISAL OF CONDITIONS AND WARRANTIES UNDER THE SALE OF GOODS ACT 1893

BY

OSUNTOGUN ABIODUN JACOB*

1.O INTRODUCTION

Caveat emptor is an offshoot of Laissez-faire. Laissez-faire as an economic theory postulates that government should deregulate the market to ensure free competition, which itself, was an adequate control rather than making unnecessary rules and regulations.[1]

Laissez-faire is a general philosophy capable of political and economic interpretation.[2] However, caveat emptor is a doctrine, applicable to commercial transaction in the aspect of sale of goods. It is a latin word which means "*let the buyer beware*"[3]. Under this doctrine, "*the buyer could not recover from the seller for defects on the property that rendered the property unfit for ordinary purposes*" unless, if it is proved, that the seller "*actively concealed latents defects*"[4].

The doctrine of caveat emptor was in full operation under the common law. Consequentially, conditions or warranties as to the quality of fitness of purpose could not be implied in favour of the buyer.[5] It was the duty of the buyer therefore to exercise restraint, in the purchase of goods, more likely than not, he had himself to blame for poor and shoddy bargain.

The situation is not the same, under the sale of Goods Act, 1893[6],

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[1] See Laissez-faire – Wilkipedia, the free encyclopedia (http://en.wikipedia.org/wiki/ laissez-faire) accessed 1 January 2007 See also T. Akinola Aguda, Nigeria in search of Social Justice through the law a monograph published by Nigerian Institute of Advanced Legal Studies 1979 pg. 2 to 5.

[2] Wilkipedia Ibid.

[3] See Caveat emptor – Wilkipedia, the free encyclopedia (Http://en.wikipedia.org/wiki/caveat-emptor) accessed 1 January 2007.

[4] Ibid.

[5] M.O. Adesanya and E. O. Oloyede, Business Law in Nigeria (University of Lagos Evans Brothers Limited) Lagos 1972 pg. 92-93.

[6] Sale of goods Act, 1893 has been repealed in Britain and replaced with the sale of Goods Act, 1979 but the 1893 Act is still applicable in Nigeria as an Act of general application. Though some of the states in Nigeria have enacted their own statutes yet the statutes are nothing but a reproduction of the 1893 Act. For convenience and easy reference to one single act in Nigeria, it is safer to rely on 1893 Act.

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which has provided for implied terms of conditions and warranties into every contract of sale. The basis for the provision of implied terms is to protect the buyers, who may be regarded as the weaker parties in commercial negotiation.[7] In addition, it guarantees *"the sanctity of commercial transactions"* by making it difficult for parties to flout their obligations without redress from the victims of such impunity.[8]

This paper discusses the condition and warranties under the sale of Goods Act 1893. It consists of four parts. The first part is an introduction, which examines the background to the codification of conditions and warranties under the 1893 Act, while the second part deals with meanings of implied terms and related issues. In part three, we provide analysis of condition and warranties particularly the requirements for their application and conclusion is in part four.

2.O DEFINITIONS AND RELATED ISSUES

Condition is not defined in the 1893 Act[9] but section 3(1) of the Kaduna State Sale of Goods Law[10] defines it as a term which goes to the substance of the contract for the sale of goods and so important to its very nature that non performance of it may entitle the other party to reject the good and repudiate the contract in addition to a claim for damages. Fletcher Moulton L.J[11] defines it as a term which goes *"so directly to the substance of the contract, or in other words, so essential to its very nature that its non performance may fairly be considered by the other party as a substantial failure to perform the contract at all"*.

On the other hand, warranty is defined in the Act[12] as *"an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated."*

The 1893 Act[13] does not deem it essential to define the meaning of

[7] See Felicia Monye, Commercial Law (Chenglo Ltd, Enugu 2006) p. 27.
[8] Ibid.
[9] n. 6
[10] Kaduna State sale of goods law (edict) 1990.
[11] *Wallis son & Wallis* V. *Pratt & Haynes* [1910] 2 K.B. 1003, 1012.
[12] Section 62 n6.
[13] n 6

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condition since what is important to the Act is not the definition of the term but the effect of the term. The Act therefore provided as follows:

> *"Whether a stipulation is a condition, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract."*[14]

It is essential to explain the meaning of stipulation. Stipulation is a term in a contract of sale of goods made by the parties themselves or implied by the law.[15]

It can be made in form of an oral statement or in written form. The fact that a statement is made orally does not reduce its probative value, particularly when the *"courts have been prepared to hold that an oral statement may override the written terms of a contract."*[16] However, inspite of that recognition, it is essential to distinguish mere statements or representations, which are not terms of contract from those which are.

Some statements are meant to induce parties, others are meant to be terms of contracts. In **Oscar Chess Limited v. Williams,**[17] a statement about the age of the car which though innocently made was false and was held to be a mere representation. But in **Couchman v. Hill,**[18] the defendant was offering his heifer for sale by auction. In reliance on an assurance given by the defendant and also by the auctioneer that the heifer was "unserved", the plaintiff bid for and bought the animal. This statement was held to be a term of the contract and not a mere representation. The determination of whether a statement is or is not a term of the contract can be arrived at by looking into the intention of the parties to be gathered from the facts of each case.[19]

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[14]Section 11(1) thereof
[15]n7 pg. 27
[16]P.S. Atiyah, The Sale of Goods (Pitman Publishing Ltd London ELBS edition 1976) pg. 37
[17](1957) 1 W.L.R. 37
[18] (1854), 15 C.B. 130
[19]n.17

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Stipulation (whether oral or written statement or implied terms in the Act) may be a condition or warranty depending on the effect and the nature of construction. A breach of condition gives the right to repudiate the whole contract, the consequence of which the buyer if he has paid might recover the price paid but a breach of warranty is not a repudiatory breach because the buyer is only entitled to damages and could not treat the contract as repudiated.

2.1 BREACH OF CONDITION AS BREACH OF WARRANT

There are circumstances in which a breach of condition can be treated as a breach of warranty. First, section 11(1)(a) of the Act[20] provides for one of those circumstances. It says:

> *"Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."*

This is a situation whereby the buyer uses his discretion of waiver to treat the contract as subsisting, rather than treating it as repudiated.

Secondly, a situation where a contract of sale is not severable but the buyer has accepted the whole goods or part of the goods or where the property has passed to the buyer in a contract for the sale of specific goods[21] will attract the same legal consequence which is, to treat the breach of condition by the seller as a breach of warranty.[22]

A contract of sale of goods is severable if it can be divided into separate contracts and each contract is to be separately paid for. In the absence of such division, the contract is inseverable. Once a buyer accepts goods in such a condition, he loses the right to repudiate the contract but to treat a breach of condition as a breach of warranty.

That takes us to the issue of what constitutes acceptance. Section

[20] n 6
[21] n 6section 11(1) (c)
[22] Ibid

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35[23] provides an answer as follows:

> *"The buyer is deemed to have accepted the goods when he intimates the seller that he has accepted them, or when the goods have been 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 to the seller that he has rejected them."*

The position of the law therefore is this: if the buyer has accepted the good in one of the ways mentioned in section 35[24] under a contract which is not severable, he loses the right to repudiate the contract in substitution for a right to damages as if it is a breach of warranty.

In **Hardy & Co. v. Hillerns & Fowler,**[25] a seller agreed to sell wheat to a buyer under a c.i.f contract. After the arrival of the wheat, he (the buyer) resold part of the cargo and delivered same to the sub-buyer. But it was not until two days later that he examined the wheat and found that it did not conform with the contract. It was held that it was too late to reject the goods for a breach of condition since he had "*accepted*" the goods under section 35, having done an aet, which was inconsistent with the seller's ownership of the wheat.

Delay to return goods not bought by the buyer for a long time may be regarded as acceptance. In **Danjuma v. Standard Company of Nigeria Ltd,**[26]

The defendants bought 200 tons of groundnuts, which the plaintiff as the seller delivered to the premises of the defendants according to the agreement between them. Defendants examined the groundnuts after several weeks only to discover that they "*were dirty and weevily and unfit*" for export. The defendants rejected the groundnuts but the plaintiff sued for the

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[23] n6 S.35
[24] Ibid
[25] [1923] 2 K.B 490
[26] [1922] 4 N.L.R. 52

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price. Court held that since the nuts had remained on the premises of the defendants for a long time without promptly intimating the plaintiff of their rejection, they were deemed to have accepted them and must pay the price.

Nevertheless, the buyer must have been given a *reasonable opportunity to examine the goods,* before he is deemed to have accepted the goods. **Section 34** of the Act[27] provides as follows:-

> *34(1) "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.*
>
> *(2) Unless otherwise agreed, when the seller 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 of ascertaining whether they are in conformity with the contract."*

A combined provision of sections 34(1) and 35 of the Act would suggest the fact that where a buyer who has not got an opportunity to examine the goods in accordance with section 34(1) sells the same goods to a sub-buyer, he is deemed to have accepted the goods under section 35.[28]

Where a buyer refuses to accept goods that are delivered to him, he is not bound to return same to the seller but must intimate him of his refusal and takes reasonable care of the goods as an unwilling bailee.[29]

The second aspect of the second situation where a breach of condition will be treated as a breach of warranty is where the contract *is for specific goods and the property has passed to the buyer.* For the property to pass to the buyer when the contract is made, the contract must be *unconditional* one and the specific goods must be in a *deliverable state*.[30]

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[27] n6

[28] n6 see also J. Olakunle Orojo, *Nigerian Commercial Law and Practice*, Volume 1 (Sweet & Maxwell London 1983) pg. 976 –977.

[29] n6 see section 36. See also Benjamin, Sale of Goods, 2nd ed, para 909.

[30] N6 section 18(1)

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In such situation, section 11(1)(c) will apply if there is a breach of condition, and the seller will be left with no option than to take it as a breach of warranty. The corollary however, is the same, that even if the good is a specific good, but it is not in a deliverable state, property will not pass to the buyer and section 11(1)(c) will not apply.[31]

The statutory division of implied terms into *conditions* and *warranties is inadequate to cater for emerging terms in the sale of good transactions.* As Lord Denning[32] correctly observed, that the statutory label of implied terms into warranties and conditions *"left out"* a category of vast majority of stipulations which could not be categorized as conditions nor warranties but were intermediate stipulations *"the effect of which depended on the breach."*

Therefore, the court in **Cehave N.Y. v. Bremer Handelgesella Chaft M.B.H**[33] recognized a third category of implied term as *innonimate term.*

The situation now *makes the remedy for a breach depends on the seriousness of the breach, rather than the status of the term.* If its effect is *"to frustrate the commercial purpose of the contract, the innocent party will be entitled to end the agreement."*[34]

3.O IMPLIED CONDITIONS AND WARRANTIES

Sections 12 to 15[35] enumerates a category of seven implied terms, out of which five are conditions and two are warranties. The conditions are, title, correspondence with descriptions, correspondence with sample, merchantable quality and fitness of purpose. Warranties are freedom from charges and encumbrances and quiet possession.

Under the following parts, we shall discuss them.

3.1 TITLE: THE RIGHT TO SELL

Section 12(1) of the Act[36] provides a condition in favour of the buyer as to the seller's right to sell as follows:

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[31] See Atiyah, Sale of Goods pp. 99-100 also n19 MLR p. 315
[32] Hongkong fir Shipping Co. Ltd V. Kawasaki Kisen Kaisah Ltd [1962] 2 Q.B. 26.
[33] [1975] 3 W.L.R. 447
[34] See R.M. Goode, Commercial Law (Penquin Books London 1985) 126.
[35] n6
[36] Ibid

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> *"An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of an agreement to sell he will have a right to sell the goods at the time when property is to pass.*

The right to sell has been thought of as being in some way analogous to power of the seller to transfer property in the goods sold.[37] **Lord Atkin in Niblett v. Confectioners' Materials Co.**[38] extended the meaning further when he said that it is the right of the seller to pass undisputed possession. It follows therefore, that a seller who could not pass a good title at the time of the passing of property, commits a breach of this provision and the buyer is entitled to repudiate the whole contract because the breach is beyond a mere breach of condition but also constitutes a total failure of consideration.

In **Rowland v. Divall**[39] the plaintiff bought a car from the defendant, which he used for some months before he discovered that it was a stolen vehicle, which was also bought in good faith by the defendant from someone without title. The court of appeal held that the buyer was entitled to recover the whole purchase price and that the seller was not entitled to set-off for the months the plaintiff had made use of the car. Atkin L.J, explained the position of the case thus:

> *"It seems to me that in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the de facto (actual) possession, but the seller had not got the right to possession and consequently could not give it to the buyer. Therefore the buyer, during the time that he had the car in his actual possession had no right to it, and was at all time liable to the true owner for its conversion."*

[37] Uviegbara, Sale of Goods (and Hire Purchase) Law in Nigeria pg. 31
[38] [1921] 3 K.B. 387
[39] [1923] 2K.B. 500

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Similarly in **Akoshile v. Ogidan**[40] the plaintiff bought a stolen car from the defendant for £340 and took possession of the car. The European who sold the car to the defendant was convicted of stealing the car and the police took the car from the plaintiff. Court held that it was a breach of section 12(1) of the Act and that the plaintiff was entitled to recover the purchase price he had paid.

Another curious interpretation of section 12(1)[41] is that it is possible to commit a breach of the section, even though the seller is an owner. In **Niblett v. Confectioners' Materials Co,**[42] the plaintiffs bought tins of milk from the defendants. Some of the tins of milk were delivered bearing labels, which violated the trademark of another company. That company persuaded Customs and Excise to impound the tins and the plaintiffs had to remove and destroy the labels, before they could get the tins back. They therefore sued the sellers for damages on the ground that the sellers had broken S12(1). Court held that section 12(1) had been broken and the buyers were entitled to damages.

3.2 CORRESPONDENCE WITH DESCRIPTION

Section 13 of the Act[43] provides that –

> *"Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."*

Since the first requirement for the application of this section is that the sale of goods must be by description. It is essential for us to know the meaning of description. Unfortunately, the Act contains no definition of one.

In **Varley v. Whipp**[44] per Channell, J. held that the meaning of the phrase "*sale by description*" applies to "*cases where the purchaser has*

[40] 10 19 NLR 87
[41] n6
[42] n38
[43] n6
[44] [1900] 1 KB 523 at p. 516

not seen the goods but is relying on the description alone." In that case, the defendant bought by description a second-hand reaping machine, which he had not seen. When it was delivered, the machine was a very old one, contrary to the description that it was new and hardly use. Court held that the defendant was entitled to reject it.

It seems therefore that a sale can be by description, if it is of future or unascertained goods and it is doubtful whether it could extend to specific goods.[45] That doubt was laid to rest in **Grant v. Australian Knitting Mills Ltd**[46] where the court held that a sale of an undergarment purchased by a buyer from a shop was a sale by description.

Lord Wright explained the reason thus:

> *" there is a sale by description even though the buyer is buying something displayed before him on the counter, a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g. wollen undergarments, a hot water bottle, a second-hand reaping machine..."*

Application of section 13 goes beyond the physical outlook of the goods to include the way and manner the goods are packed or marked. In **Re Moore & Co, Ltd & Landaver & Co**[47] the contract was for the supply of certain quantity of Australian canned fruits to be packed in cases of 30 tins.

The seller delivered the whole quantity ordered but about half of the cases contained only 24 tins while the other half had 30 tins. The court held that the buyers were entitled to reject the whole goods on the ground.

Even if goods are **examined** by the buyer, section 13 can still be of application. In **Beale v. Taylor,**[48] the defendant advertised his car for sale as a *"Herald, convertible, white, 1961"* and the plaintiff bought it after

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[45] In *Joseph Travers v. sons Ltd v. Longel Ltd (1967) 64 T.I.R* 150 the court held that the sale of goods by description could not apply to specific goods. Sellers J. quoted from Benjamin on sale (7th ed. P. 641) when he said " it is clear that there can be no contract for the sale of unascertained or future goods except by some description. It follows that the only sale not by description are sales of specific goods.

[46] [1936] A.C 85

[47] [1933] A.C 470

[48] [1967] I.W.L.R 1193

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examination. Court held that the plaintiff could reject the car because it did not correspond to the description when it was discovered that one part of the car was a 1961 model and the other part was a 1948 model.

The value of deciding whether a sale is by description or not is so important that it affects the issue of merchantability, P.S. Atiyah observed that:

> *"One of the consequences of the 1893 Act was that if the sale was held to be a sale by description there would often be an implied condition under section 14 that the goods were merchantable. This consequence of holding a sale to be by description was so important that it seems that the courts in practice tended to interpret section 13 with half an eye to section 14. in other words, if the court thought that on the true construction of the contract the seller should be held to warrant the merchantability of the goods, it would tend to hold the sale to be a sale by description ...."*[49]

On the whole, there is no doubt that the courts appear to take a flexible interpretation of the phrase "*sale by description*". Therefore, the phrase covers the sale of not only unascertained goods but specific goods whether seen or not seen by the buyer if they *"are described or expected to conform to a particular description, or to a description of goods of a particular generic name."*[50]

3.3 COMPLIANCE WITH DESCRIPTION

As to compliance with description, the attitude of the courts is that of exact compliance, therefore a strict interpretation of the phrase is adopted to achieve that objective.

In **Arcos Ltd v. Ranassen & Sons**[51] Lord Atkin formulated the yardstick for the **measurement** of the degree of compliance when he said:

> *"If a written contract specifies condition of weight, measurement and the like, those*

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[49] Atiyah, P.S. Op. cit, pg 136.
[50] n 7 pg 33
[51] [1933]AC 470

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> *conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does half an inch mean about an inch. If a seller wants in margin he must, and in my experience does stipulate for it."*

As a result of the application of that standard, in that case where the sellers contracted to supply a quantity of *wooden staves* which must be of *half an inch thick* but only five percent of the goods supplied complied with the specification while a great number of the *staves* were between half-an-inch and nine-sixteenths of an inch. The House of Lords held that the buyers were entitled to reject the goods.[52]

The same position was taken by the Court of Appeal,[53] who held that the buyer was entitled to reject the goods, because the sellers packed some of the Australian canned fruits in 24 tins, instead for them to pack all in 30 Remoore tins as specified in the term of the contract. Though there was evidence that the market value remained the same, whether they were packed in 24 tins or 30 tins.

Similarly in **Olajide Odumbo Stores and Sawmill Ltd. v. Omotayo Agencies (Nig) Ltd**.[54] the planks supplied did not correspond with the description of "*seasoned wood grooved and finished*" court held that the buyers could have been entitled to reject the goods if not because they have accepted to pay a lesser sum for the goods.

A flexible approach is suggested to the interpretation of this phrase when there is "microscopic" deviation from the description.[55] Lord Atkin mentioned the possibility of that being an exception to strict interpretation of the phrase when he stated:

> *"No doubt there may be microscopic deviations which business men and therefore lawyers will ignore. But apart from this consideration the right view is that the*

[52] ibid
[53] n47
[54] CCHCJ/4/78. 625 see also n7 pg 34
[55] See House of brands decision –read on Smith lines Ltd. v. Hunsen Tangen (1976) 1WLR 989.

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condition of the contract must be strictly performed."[56]

Thus, in **Peter Darlington Partners, Ltd v. Gosho Co. Ltd.**[57] court held that the buyers were liable to reject the goods even though the quality of pure canary seed supplied was of about 98 percent. Since by the custom of the trade, it is impossible to get pure canary seed of 100 percent quality.

However, if a sale is by description as well as by sample, the buyer has a double edged right to reject goods for non compliance to both.

In **Boshali v. Allied Commercial Exporters Ltd**,[58] a sample of textile materials was sent to the buyer after the conclusion of the contract. The Privy Council held that section 13 was applicable because the sample was an evidence of the description of the goods to be sold. This privy court's decision makes it clear that a sale may not be by sample even if a sample was shown or given to the buyer before the sale unless the contract contains a term "to that effect or the parties contracted on that basis.[59]

3.4 FITNESS OF PURPOSE

The essence of section 14(1)[60] is to ensure that goods serve the primary purpose for which they are bought, if by direct or indirect communication, buyers do not only inform the sellers of such purpose before sale, but rely on the skill and judgment of the sellers.

For implied condition of fitness of purpose to apply, the buyer must make known to the seller the particular purpose for which goods are bought, reliance must be placed by him on the skill and judgment of the seller and the good sought to be bought must be of description which it is in the course of the seller's business to supply. We will now consider these three requirements one by one.

The first one is a responsibility of the buyer to inform the seller of his particular reason for buying the good. The phrase, 'a particular purpose' is said to mean a specified or usual purpose[61] therefore if the purpose of good is

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[56] n. 51
[57] (1964) Llord's Rep. 149
[58] (1961) ALL WLR 917
[59] Iqweike Sale of Goods Mathouse Lagos 2nd edition. 52
[60] n6
[61] Igweike, K.I,

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obvious or it is for one purpose, it will be unnecessary for the buyer to inform the seller of such purpose again. In **Priest v. Last,**[62] the buyer did not inform the seller of the particular purpose for which the *hot water bottle* was bought yet the court held that this requirement was satisfied.

Collins M. R. explained:

> *"Where the description of the goods by which they are sold points to one particular purpose only. It seems to me that the first requirement of the sub-section is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller."*[63]

Applying the same principle in **Grant v. Australian Knitting Mills Ltd**[64] Lord Wright explained that:

> *"there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section, because it is the only purpose for which anyone would ordinarily want the goods."*[65]

If goods are useful for different purpose, the requirement will not be satisfied if the buyer does not inform the seller of his own peculiar purpose. In **D.I.C. Industries Ltd. v. Jimfat Nigeria Ltd**[66] the **wire coils** supplied by the plaintiffs were suitable for many purposes but not for the particular purpose for which the defendants needed them. Court held that since the defendants did not inform the plaintiffs of the particular purpose for which the goods were required, the plaintiffs were not liable.

Similarly, in **Adeola v. Henry Stephens & Sons Ltd**[67] the court

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[62] (1903) 2 K B 148
[63] ibid at p. 153
[64] (1939) AC 85
[65] ibid at p. 99
[66] (1975) 2 CCHCJ 175 see also Khalidibbou Mastronikolis (1949) 12 WACA 462 it was not started that the enigine oil was required for internal combustion engine, held the seller was not liable
[67] (1975) CCHCJ/10/23. see also Plastic Manufacturing Co. Ltd v. Toki of Nigeria Ltd(1976) 12 CCHCJ 12/01. The containers supplied were useful for other purposes but not for lotion and Shampoo. The sellers were held not liable.

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held that the sellers were not liable because they were informed, after the delivery that the *flour* was for *bread making* and not for the *making of biscuits* – to which the goods were found suitable.

In addition, a seller who sold a *fur coat* to a buyer was held not liable when the buyer *contacted dermatitis* due to the *peculiar nature* of his skin.[68] But in **Ashington Piggeries Ltd v. Christopher Hill Ltd**[69] the sellers knew that the herring meal were required for feeding animals but not for mink. Court found that the goods did comply with the contract description, so the sellers could not be liable under section 13 but since the meal was contaminated with some toxic element and the sellers failed to discharge the burden of proof that the toxic element was harmless to other animals except mink, they were therefore held liable.

The eagerness of the court to interprete this section in favour of the buyer should not be taken for granted where the cause of the problem is not in the good but in the failure of the buyer to perform his *responsibility.*[70]

3.5 RELIANCE ON SELLER'S SKILL AND JUDGEMENT

It is obvious from the literal interpretation of this section that the buyer ought to prove his reliance on the seller and that could be done if he makes his particular purpose known in such a way as to let him know that his skill and judgement are being relied upon. Thus, in **Ijomo v. Mid Motors Nigeria Co. Ltd.**[71] a Lagos High Court held that the sellers of an Nysa Zuk Truck were not liable because the buyer failed to inform them that the vehicle will be used for commercial transport.

It has been contended however that the case was wrongly decided since the purpose of such vehicle in Nigeria was usually for commercial transport and non communication to the seller should not be a bar.[72]

Without circumlocution on the past uncertainty, the position of the law is now clear that if the seller *"knew the purpose for which the buyer wanted the goods"* then he (the buyer) would be taken to have relied on the seller's skill and judgement.[73]

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[68] *Griffiths v. Peter Conway* ltd (1939) 1 ALL ER 685

[69] [1936] AC 85

[70] See *Hail v. Hedges*[1951] ITLR 512

[71] CCHCJ/9/74p. 1325.

[72] See EE Uvieghara Op. cit, p. 42 see also n 7 41

[73] Atiyah, Op. cit, p. 92

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How the seller comes to know of this purpose is not of big issue even if the buyer does not expressly communicate his purpose since it could be inferred from his expectation.

As Lord Wright observed:

> *"The reliance will seldom be expressed: it will usually arise by implication from the circumstances; thus to take a case like that in question, of a purchase from a retailer, the reliance will be generally inferred from the fact that* ***a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgement."***[74]

Reliance may not be total, it is sufficient even if it is partial. In *Ashington's* case supra[75], the plaintiffs supplied the formula used for the supply of minks food, yet the defendants were held liable. In ***Cammel Laird & Co Ltd v. Bronze and Brassco Ltd***[75] the buyer gave specifications for the propellers but the House of Lords held that there was and a substantial area outside the specification which was not covered by its directions and was, therefore, necessarily left to the skill and judgement of the seller".

3.6 GOODS IN THE ORDINARY COURSE OF BUSINESS

The House of Lords in *Ashington piggeries* case aborted the tendency to interprete this phrase strictly[76]? When the court reversed the decision of the Court of Appeal that the sellers *did not sell mink food in the course of business because they had never dealt in mink food before.* On the contrary, the House of Lords held that the goods were supplied in the course of business.

Therefore, the fact that a seller is dealing with that type of good for the first time will not be a defence. Lord Willbeforce's reasoning is apposite on this issue when he said that " it is in the course of the seller's business to supply goods if he *agrees, either generally or in a particular case, to supply the goods when ordered".*[77]

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[74] n 46
[75] [1934] AC 404
[86] See Griffiths case (supra), *Heil v. Hedses (supra)*
[87] [1938] 4 ALL ER 258

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Consequentially, in **Spencer Trading Co. Ltd v. Devon**[78] court held that the sellers sold in the course of business despite the fact that the sellers who used to sell *gums* were selling that type of *gums* for the first time.

Sales by private persons of their second hand properties are not covered by this section because such sales will not be in the course of business".[79]

In **Davis v. Summer**[80] the court considered a similar phrase (in the course of trade or business) though in another statute[81] where the appellant argued that a situation where a man sold his old car for a new one to be able to carry on his business should be taken to be a sale in the course of business. The House of Lords rejected such a wide interpretation of the phrase and held that the phrase would not cover "*the sporadic selling of pieces of equipment which were no longer required for the purpose of a business*"[82].

3.7 REASONABLE FITNESS

The Act insists, "that the good shall be reasonably fit for that purpose"[83]. That takes us into the issue of what is reasonable fitness. That is not defined by law. But it seems to mean that the good must fit the general purpose for which such good is used for and if the buyer has informed the seller of any special purpose, the good should fit such purpose not in a perfect state but in a reasonable man's test.

In **Onotu v. Adeleke**[84], a buyer wanted a *new car* but the car sold to him broke down *five days* after he bought it. Court held that the car was unfit for the purpose for which it was bought".

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[75] n46

[76] [1934] AC 404

[77] n46

[78] [1949] 1 ALL ER 285

Robert Lowe & Geoffrey Woodroffe, *Consumer Law and Private*, 4th edition (Sweet and Maxwell) London 1995 p. 133 see also n7 43

[79] Ibid.

[80] [1984] 3 ALLER 831

[81] Section 1(1) of the English Trade Description Act 1968

[82] (1984) 1 WLR 1301 Lord Keith's is judgement.

[83] n6

[84] [1975] NNLR 130

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Lord Pearce explained the factors to be taken in to consideration to determine reasonable fitness when he said:

> *"In deciding the question of fact, the rarity of the unsuitability would be weighed against the gravity of it consequences. Again, **if food was merely unpalatable or useless on rare occasions, it might well be reasonably suitable for food. But I should certainly not expect it to be held reasonably suitable. If, even on very rare occasions,** it kills the consumer. The question for the tribunal of fact is simply 'were these goods reasonably fit for the specified purpose"*[85]

We must however note that any fault or default on the part of the buyer, contributing to the negative results of the goods can exonerate the sellers, if proved that without such default or peculiarity of the buyer the goods are reasonably fit for the special purpose.[86]

Patented goods or articles sold by their trade names are exempted from this section, *if it is proved that the buyers does not rely on the seller's skill and jugement.*

In **Daniels v. White,**[87] the seller was held not liable for *a bottle of lemonade,* which he sold to the buyer and later found to be contaminated.

Lewis J said: *"If a man goes in and asks for a bottle of R, **White's lemonade,** or somebody's particular brand of beer, he is not relying upon the skill and judgement of the person who serves him."*[88]

3.8 CONDITION OF MERCHANTABILITY

S14(2)[89] enumerates requirements for application and non application of an implied condition of merchantable quality. The requirements for its

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[85] (1969) 2A.C 31 at 115
[86] See Griffiths case (supra), *Heil v. Hedses (supra,*
[87] [1938] 4 ALL ER 258
[88] Ibid pg. 263
[89] n6

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application are two, that the good must be bought by description and from a seller who deals in that description. Requirements for its exceptions are also two, that the buyer must have examined the goods and two, that defects, which such examination ought to reveal, shall be exempted.

Before we begin to discuss those four requirements, we need to understand the meaning of merchantability. That word is not defined by the Act and the attempt to define it by the courts has brought a lot of confusion to the already confusing word.

In the attempt to define it, jurists have devised some tests as the determining factor. The *usability test* is one of the tests, it states that goods are merchantable if a reasonable buyer could use the goods for any of the purposes for which goods of that contract description are commonly used.[90]

The court used this test in **Sumner Permain & Co. v. Webb & Co.**[91] In that case, the buyer who bought a large quantity *of tonic water* for export to Argentina, informed the seller of the destination of the goods. Argentina did not allow the tonic water to enter their country because it contained salicylic acid. Evidence revealed that other countries may not be concerned about this acid, *"which is an ingredient of aspirin but Argentina law did not allow it to be present in drinks."* The seller too was not aware of such prohibition in Argentina until the refusal by the Argentina authorities. The buyer sought to reject the goods. Court held that the goods were merchantable because it could have been used for just about any purpose other than the one for which the buyer wanted to use it.

Similarly, in **Plastic Manufacturing Co. Ltd. v. Toki of Nigeria Ltd.**[92] the *plastic containers* were not suitable for the purpose of the defendant's products but could be used for any other purpose for which plastic containers are normally used. Court held that the containers were merchantable.

Lord Wright explained this text when he said *"merchantable quality is that the goods in the form in which they were tendered were of no use for any purpose for which such good would normally be used and hence not saleable under the description."* [93]

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[90] Ewan Macintyre, *Commercial Law*, Blackstone London 1998 pg. 19
[91] [1922] 1 KB 55
[92] [1976] 12 CCHCJ 2701
[93] Supra [1934] AC 402 at 423

The second test is acceptability test which hinges its own definition on whether a reasonable man will be satisfied with the quality of the good and decide to buy it at the same price and without "any special terms" if he is aware of the actual condition of the goods at the time of sale.

This test was applied in **Shine v. General Guarantee Corporation Ltd.**[94] where a buyer bought a second-hand specialist sports car, which caused a lot of problems for him. He later discovered that the car had been involved in a ***crash*** and ***"totally submerged in water.*** *Court held that he could reject the car because it was not of merchantable quality. The court said that* ***"no member of the public who was aware of the car's history would touch (it) with a barge pole unless they could get it at a substantially reduced price to reflect the risk they were taking."***

Despite a massive influx of tests, there is no acceptable, adequate and sufficient definition of "merchantable quality". The conclusion of K.I. Iqweike on this issue is very accurate – *"the concept of merchantability is a flexible one or relative. It can neither be said to be objective or subjective. Indeed there is no one test for merchantability known to law. There is a considerable territory covered by each of the known texts so far advanced but non distinctively covers the whole area"*[95]

As a result of this confusion, the word has been replaced with the phrase "satisfactory quality."

3.9 APPLICATION AND NON APPLICATION OF MERCHANTABILITY

As to the requirement that the good must be bought by description our discussion of the meaning of a sale by description under section 13 shall be sufficient and applicable.

On the second requirement, a **Lagos High Court in British and Overseas Credit Ltd v. Animashaun**[96] held that for the requirement to be fulfilled, the seller must be frequently dealing in goods, which are subject of dispute. But the wider interpretation by the House of Lords in *Ashington* case[97] should be preferred.

[94] [1988] 1 All ER 911
[95] Igweike, K.I., op. cit, pp 72-73
[96] LS 14(2) of the Sale and Supply of Goods Act (U.K)
[97] [1961] 1 ALL NCR 343

If those two requirements are present, the condition shall apply but the presence of two exceptional requirements is fatal to the buyer's case.

Actual examination of goods or failure to examine goods when given the opportunity attracts the same legal consequence. In British and Overseas Credit Ltd (supra)[98].

De Lestang C.J observed:

> *"The defendant was present when the goods were examined by the Health Authorities – if after this he purchased the remainder without a through examination he was extremely careless –since he has full opportunity of examining them within the meaning of the proviso I am of the opinion that this case falls within the proviso and there was no implied condition."*

If however, such defect *could not be revealed* by a reasonable man examination, the condition will apply.[99] In addition, the goods must be merchantable not only at the time of sale but also at a reasonable time thereafter.[100] As a result, if goods have expiring dates, they should be merchantable till the dates of their expiration and other goods without expiring dates will fall to a reasonable time after sale.

3.10 IMPLIED CONDITION OF A SALE BY SAMPLE

Section 15(1)[101] seems to define the meaning of a sale by sample when it states *"a contract of a sale is a contract for sale by sample where there is a term in the contract, express or implied to that effect"*. It means, the mere fact that a sample is provided for the buyer to inspect will not make it a sale by sample unless there is evidence of *intention* by the parties that it should be such[102] and such intention can be inferred if the contract makes reference to the sample[103] or usage[104].

In **Boshali v. Allied Commercial Exporters Ltd**[105] where the

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[98] Ashington (supra)
[99] supra
[100] *Ibid*
[101] See *Godley v. Perry* [1960] 1 WLR 9 (defective Catapult), See also, Grant Australian *Kritting* milx (supra)
[102] n6
[103] n16 p. 102
[104] Mayer v. Everth [1814] 171 ER 8.
[105] *Syess v. Jonas* (1848) 2 Exch 111.

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goods sold were textile materials. A sample referred to as "Quality As 1000 was sent by the seller to the buyer along with one of the two letters containing the terms of the contract. Nothing else was said in the contract about the sample. Privy Council held that a sale could not be a sale by sample unless the terms of the contract (express or implied) say so.

Where the contract *is in writing* and it does not refer to the sample, Parol evidence will not be admissible to prove that it is a sale by sample.[106]

Furthermore, a sale will not be by sample because the parties expressed it so. Thus, in ***Ernest Friedrischdorf and Co. v. Fuja***[107] **Kazeem J.** declared:

> *"It is clear that the gramophone records were to be made in accordance with the tapes supplied by the defendant and the eight test records were merely sent in advance to enable the defendant to be satisfied that his order has been correctly effected. Although the parties have variously described the text records as samples, there is evidence that they are no more than a portion of the bulk order placed by the defendant. It is therefore incorrect to regard them as samples. In my view the whole transaction is a contract for sale of goods simpliciter and not a contract for sale of goods by sample"*

The consequence of a sale by sample as provided by S.15(2)[108] is an implied condition that the bulk of the goods shall correspond with the sample in quality; that the buyer shall have a reasonable opportunity of comparing the bulk with the sample and that the goods should be free of any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

On the first, correspondence of the goods with the sample must be total without any form of divergence. Even if an atom of thing is to be done to make it correspond, it should be done before delivery.

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[106] Supra
[107] *Ginner v. King* (1890) 7 TLR 140.
[108] (1967) LLR 110

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In **E & S Ruben Ltd v. Fair Bros and Co Ltd**[109] defects in the bulk could have been put right by warming the bulk which was an easy thing to do. Court held that the sellers were in breach of S. 15(2)(a) because the sale was a sale by sample.

This rule is similar to goods sold by description but in a sale by sample, small or insignificant differences are not allowed. On the contrary, if sample is supplied just for *visual examination*, the buyer loses his right to complain that the bulk does not correspond with the sample "so long as, on normal visual examination, it would appear to correspond even though there are differences"[110].

As for the second, which is the right of inspection, it is a right which is already given by **section 34**[111].

If the seller disregards this provision, property in the good will not pass because the buyer will not be deemed to have accepted the goods. Therefore, opportunity should be given to the buyer to inspect but failure to inspect inspite of the said opportunity will not be a breach.

The third imposes responsibility on the buyer to use diligence in discovering defects that a reasonable man would have detected as a result of examination.

Therefore only defects that such a reasonable man could not detect that could render the goods unmerchantable will suffice.

In **Godley v. Perry**[112] a retailer had tested the catapult, which he bought from a wholesaler. A young boy who bought one of the catapults from the retailer lost an eye because the defect which caused the injury could only be discovered by snapping. Court held that the wholesalers was liable"[113]

The importance of a sample in commercial transaction is well described by Lord MacNaghten[114] who said:

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[109] n6
[110] [1949] 1 ALL ER 215
[111] Atiyah, P.S. Op. cit, p. 102
[112] n6
[113] [1887] 12 App. Cas. 284 at p. 297.
[114] See *Grant v. Australian Knitting in mills Ltd (supra).*

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> ***"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language it may be difficult or impossible to express in words. The sample speaks for itself".***

3.11 WARRANTIES

Section 12(2)(a) of the Act[115] implies a warranty that the buyers shall have and enjoy quiet possession of the goods. It means nobody should lawfully hinder the buyer from enjoying possession of goods. The word, lawfully, is important, therefore in **Udekwu v. Abosi**[116] where customs officials unlawfully seized the car on the ground that the import duty was not paid. Court held that S.12(2) did not cover wrongful interference with goods by all wrongdoers.

It is interesting to note that warranty of quiet possession and the right to sell in section 12 work in the same unison but the objectives of the two subsections are different.[117]

In Microbead AC v. Vinhurst Road Markings Ltd[118] the defendants bought road marking machines and accessories from the plaintiffs. The defendants refused to pay because the machines proved unsuitable. The plaintiff sued for price but two years after the sale, a third party was granted a patent, which the good infringed.

Court held that section 12[119] was not breached because the plaintiffs had a right to sell the goods at the time of the sale but that S. 12(2) was breached because the defendants could not enjoy quiet possession.

Finally, second warranty in S.12[120] (3) protects the buyer against charge or encumbrance examples of such are mortgage and lien.

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[115] *Drummond and Sons v. Van Ingen* (1887) 12 App. Case
[116] n6
[117] [1974] ECSLR 298.
[118] [1975] 1 All ER 529
[119] n6
[120] Ibid

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4.0 CONCLUSION

In this paper, an attempt has been made to examine the application of conditions and warranties under the Sale of Goods Act 1893. We observed with delight an effort made by the drafters of the 1893 Act to displace Caveat Emptor and give due protection to the buyers.

Unfortunately, however, the gain of the Act in this respect may be swept away by the exclusion clause in section 55[121] which provide as follows:

"Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the cause of dealing between the parties or by usage. If the usage be such as to bind both parties to the contract."

We are of the view that to allow the parties to exclude implied terms of conditions and warranties is a surreptitious attempt to bring back the doctrine of Caveat Emptor which the incorporation of implied terms intended to abolish.

It is in this respect that we appreciate the position of plateau state Sale of Good Edict to dispense with any exclusion that may frustrate the conditions or warranties implied by its Edict.[122]

The 1893 Act has been amended in United Kingdom. First, it is no longer necessary under section 14(1) for the plaintiff to prove that "the goods are of a description which it is in the course of the seller's business to supply", once it is proved that the "seller sells goods in the course of the business".[123] Second, the exception given to "specified article" sold "under it patent or other trade name" has been dispensed with. The implied condition of fitness of purpose now applies to all goods without statutory exception.[124] The issue of reliance is also affected by the amendment, unlike the 1893 Act, the onus is on the seller to prove that the buyer did not rely on his skill and judgement and if he did the reliance was unreasonable or uncalled for.[125]

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[121] n6

[122] See section 65 of the Plateau State Sale of Goods Edict Section 65(1) "where a right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by such usage as binds both parties to the contract" 65(2) nothing in subsection (1) of this section shall be construed to permit the exclusion by express agreement as otherwise of any condition or warranty implied by this Edict.

[123] See S 14(3) of Sale of Goods Act 1979

[124] Ibid

[125] Ibid

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In addition, the buyer has liberty in this new law to deal with agents of business as if they are principals unless they (the buyers) know the true capacity in which they contracted.[126]

The new law makes some amendments as regards the implied condition of merchantability. The notable one is the replacement of the words "merchantable quality" with "satisfactory quality". The essence of that is to put a stop to the difficulty been encountered by the courts in the interpretation of the esoterical words which is known only to lawyers.[127]

Second, the phrase "where goods are bought by description from a seller who deals in goods of that description" has been replaced with "where the seller sells goods in the course of a business."[128]

It means that the sale may not be by description and the seller may be dealing with the type of goods for the first time, yet the condition of satisfactory quality will apply.

Commercial transactions take place in every country. Colour, language and civilization are no barriers to commerce.

The benefit of universal nature of commercial transactions is the opportunity to learn from one another. A situation in which almost all the states in Nigeria are using sale of goods laws that are carbon copies of sale of goods Act of 1893 without cognizance of its amendment is preposterous.

We therefore recommend that there should be a surgical review of our laws in this respect, not only along the path of amendments made in United Kingdom but in such a way to suit our own peculiar circumstances.

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[126] See Atiyah, P.S., Op. Cit, p. 95

[127] See M. Furmston, Sale & Supply of Goods, 3rd ed. (London: Cavendish Publishing Ltd. 2000) p. 119.

[128] n 123 S. 14(2).