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Performance of Contracts by the Parties in Relation to Conditions and Warranties in Sale of Goods Transactions

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Abstract:

Performance of contract of sale of goods transactions involves primarily the delivery by or on behalf of the seller of the goods sold and their acceptance and payment of their price by or on behalf of the buyer¹. There must be an intention on the part of the parties to a contract of a sale of goods to create a valid and binding contract which affects the legal relationship. Thus, an agreement that is binding in honor only, will not be a contract of sale of goods². A contract for sale of goods like any other contracts 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 as to offer and acceptance, invitation to treat, correspondence of offer and acceptance are applicable to contract of sale of goods. Keeping in mind the premise of United States of America, this study focuses on the contract of sale of goods; price. Delivery issues along with installment also have been discussed in this article.

Keywords: Contract of sales of goods, rules of delivery, price

1. Subject Matters in a Contract of Sale of Goods

The subject matters in a sale of goods include goods, the concept of property, price, and monetary consideration. It is pertinent for our present purpose to briefly examine these subject matters for proper appraisal of the import of this paper, and the duties of seller and buyer in the performance of the contract of sale of goods.

1.1. Goods

All individual property other than things in action and money, emblements, industrial growing crops and things attached to the land and agreed to be detached before sale or under the contract of sale. (section 62(1) of Sale of Goods Act of 1893).

'Personal chattel' is a physical thing which can be touched and moved such as a boat, a car, a pen, a radio or a chair. Houses and land are not regarded as personal chattels. They are real property, not goods. However, crops and things attached to the land can be regarded as goods, as long as they are to be detached from the land either before the contract of sale or under its performance. Also, a thing in action is an intangible right which can be enforced only by taking legal action³.

The term 'emblements' which was borrowed from ancient real property law, comprises crops and vegetables⁴ produce by the labor of man and ordinarily yielding a present annual profit⁵. According to Robert⁶, in order to reap them even though his tenancy has expired before the crop matured.

However, the term 'emblements' covers crops which are planted and harvested annually, like yams, cassava, maize, potatoes, which are popularly known as 'emblements' are not part of land and are regarded as chattels even before they are severed from the land⁷.

³ Examples would include patents, shares in the company or cheques. See also Ewan Maclytre: Nutshells Commercial Law, Thomas, Sweet & Maxwell, 1st ed. p. 1

⁴ such as corn and potatoes

⁵ See Benjamin on Sale^{8th} ed. p. 171 cited in M.C. Okany; Nigerian Commercial Law, Africana, 1st publishers Plc, reviewed ed. p. 308

⁶ Robert Lowe; Commercial Law, 1970, cited in M.C. Okany, *ibid.* p. 311

⁷ See M.C. Okany; *ibid.* pp. 311-312

It is pertinent to ask here whether or not computer software can be classified as goods within the definition of goods under section 62(1) of the Sale of Goods Act⁸. It seems reasonably clear that, a personal chattel, such as a car which has built in software will be regarded as goods. In the same way, a computer sold with software already installed in it will also be goods. However, when the software is supplied on its own, it may be the case that this is a sale of goods if it is supplied on a floppy disk, as a floppy disk is a personal chattel, but not of if it was downloaded from the internet. The main reason it is pertinent to know whether or not software is goods under the definition of the Act is to establish the appropriate type of liability if it should turn out to be defective. Thus, if software are goods, then, when it is sold, the Act will govern the contract and section 15(2) will impose strict liability on the seller if the goods are defective. Also, if software is not goods, the sale of it will not be governed by the Act and the common law liability of the seller is likely to be based upon. It seems somewhat strange to have different liability regimes depending upon the way in which the software was supplied. It has therefore been suggested that the supply of software is a contract *sui generis*⁹. It remains to be seen whether or not the courts can stop this analysis. If the courts do, they could impose a liability regime which is specifically designed to be appropriate to the sale of software¹⁰.

1.2. The Price

- The amount of money used to transfer the ownership of any property or goods to a buyer is called Price. (Section 1(1)).
- Parties involved in the transaction decide the price. (Section 8(1)).
- On the basis of foregoing provisions, the price should not be fixed. Buyer should pay a reasonable price (Section 8(2)).

In the case of *Matco Ltd. v. Sante Fe Development Co. Ltd*¹², it was stated that, where the price is not fixed or determined by the parties, there is a presumption that the buyer will pay a reasonable price.

The provision of section of the Act manifestly assumes that, a binding contract has been concluded by the parties and consequently, all that indicate are the various modes by which the price can be ascertained. Where there is no definite price agreed upon by the parties, there is an indication that there is no contract between the parties¹³. Also, by section 8 of the Act, the price can be left to be fixed in a manner parties thereby agreed. Thus, where the price is not yet fixed, that there is no contract between the parties. This position invalidates the existence of an already concluded contract if the parties are to fix the price in the future.

This position of fixing price would become more complex where the price is to be fixed by a third party. In *Mary & Butcher v. King*¹⁴, the parties had agreed that the appellant should purchase tentage that should become available for disposal at a price to be agreed upon by the parties themselves. It was '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 that, the agreement by the parties did not constitute an effective contract; and that the fact that the parties resented to themselves the power to decide upon the price did not warrant or permit the court to infer any intention that a reasonable price should be payable nor was the provision that 'dispute should be referred to arbitration' of any assistance to the issue.

In *Forley v. Classic Coaches Lt*¹⁵, there, as part of the arrangement between the plaintiff and the defendants for sale of land, the defendants agreed to purchase the pump on the adjoining piece of land at a price 'to be agreed by the parties on writing and from time to time'. It was agreed that in the event of dispute, the matter should be submitted to arbitration. This arrangement operated between the parties for a period of three years until the plaintiff discovered that the defendants was higher in price than that being sold elsewhere. The question arose whether the plaintiff could disregard the arrangement for the purchased petrol from the defendants. It was held that, the defendants could not ignore the arrangement, for there as a binding contract between the parties. The later disagreement was a matter for arbitration as provided for in their agreement.

Also, 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, the agreement is voided. But, if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price for the goods delivered to him. But, if the buyer does not appropriate the goods, then there is no binding contract since the parties could still be restored to their *status quo ante*. And where the third party is prevented from making the valuation by the fault of the seller or the buyer, the party not in fault may maintain an action for damages against the other party in fault¹⁶.

It should be noted here that, a valuation made by a valuer is binding on the parties, unless the valuer acted fraudulently. In the case of *Tharsis Sulphur & Coper Co. Ltd. v. Loftus*¹⁷, the court stated that, on no account is the valuer liable to either party for negligence or for failure to act reasonably well. This is because, the rule appears to be that, when a third party is appointed to settle any matter between the two parties, they take him in such a case for better or for worst, and if he discharges his duty faithfully and honestly, they must be satisfied¹⁸.

⁸ hereinafter referred to as the Act

⁹ That is, a class of its own

¹⁰ See Maclyre op. cit. pp. 1-2

¹² (1971) 2 NCLR p. 1

¹³ See *Ingram v. Little* (1951) 1 QB p. 31

¹⁴ (1929) All ER p. 629

¹⁵ (1996) 9 Exch p. 238

¹⁶ See section 9 of the Act

¹⁷ (1872) LR 8 CP pp. 7-8

¹⁸ The same position was adopted in *Bayton v. Richardson* (1937) WLR p. 262

1.3. The Concept of Property

The contract of sale was more in the nature of an assignment. It is a contract whereby the seller agreed to transfer his interest in the goods. In most case, the seller who was in possession would transfer a possessory title; and the fact of the possession could be strong evidence of ownership. Under the Act, property means general property in the goods and not merely a special property. In other words, there is a transfer of ownership or dominion, and not just some possessory title. Thus, once a property has been transferred from the seller to the buyer; then, there will be a valid contract where the seller sold goods belonging to a third party¹⁹, this created some problems as the buyer in the absence of any warranty, might have no remedy against such a seller. It obviates such problems; the merchant began to develop the notion that a sale in a market overt would transfer good title to the bona fide buyer²⁰. Property generally denotes normal related to title or ownership, not any special one (section 61(1)). Possession is the physical control or custody of goods but the property in or ownership of such goods vest on another²¹.

2. Forms and Rules of Delivery

Delivery can take different forms depending on the circumstances of each transaction. The following are the forms delivery could take:

- Physical delivery: This consists of physical handling over the goods to the buyer or to his chosen representative or agent as the case may be.
- Handling over the means of control of the goods to the buyer or his agent. This will includes giving of the keys to the warehouse where the goods are kept to the buyer. In the case of *Wrighttson v. McAuther*²², it was held that, possession of the goods passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up, though the goods were at the defendant's residence because he had conferred to the plaintiff a special license to enter the premises and move the goods.
- Delivery also includes where the goods are in the hands of a third party and he acknowledges that he so holds them for the buyer. This is known as delivery by attornment as provided for in section 29(3) of the Act.
- Where goods are sent to the carrier at the request of the buyer for the purpose of transmission to the buyer; the delivery is said to have taken place²³.

Thus, title document on the score by section 1(4) of the Factors Act, 1889 defines it to mean:

Any bill of lading, dock warrant, warehouse keeper's certificate and warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the documents to transfer or receive goods thereby represented.

2.1. Rules of Delivery

Section 29 of the Act lays down the following rules as to delivery:

- Whether it is for the buyer to take possession of the goods or for the seller to send them to him depends on each case on the contract, express or implied. In the absence of such contract, the place of delivery is the place of business, if he has one, and if not, his residence. But if the contract is for the sale of specific goods which to the knowledge of both parties are in some other place, then that place is the place of delivery.
- It must be noted from onset under this rule as held in the case of *Galbraith & Grant Ltd. v. Block*,²⁴ that, acting reasonably, he delivered the goods to someone there who appears to have authority to receive them and they are lost. It should also be expressed here that, the place of delivery is the buyer's place of business, though; this can be waived by either party. The proviso to section 29(1) of the Act declares that, if the contract is for specific goods and to the knowledge of the parties, the goods are in some other place, that other place is the place of delivery. The case of *Associated Press of Nigeria Ltd. v. Phillips (W.A.) Records Ltd*²⁵, is very instructive on this score. There, the plaintiff agreed to sell to the defendant one of their secondhand line type machine. It was agreed between them that the plaintiff should keep the machine on their premises for the work of the defendants until such time, as the service of an operator to work the machine would be available to the defendants. It was held that, the buyer had already taken delivery of the machine; despite the fact that it was in the seller's place of business. Adefarati J. stated that:

In my view the machine in question had been delivered to the defendants in acceptance with the agreement of both the plaintiff and the defendants that the machine should be left at the premises of the plaintiff at which place it would be used in carrying out the work ordered by the defendants at no cost to the defendants, except for the labour charges for the staff provided by the plaintiff.

If by the contract, the seller is bound to send the goods to the buyer, but no time is fixed, he must send them within a reasonable time²⁶.

¹⁹ and not the seller

²⁰ See M.C. Okany; op. cit. 315

²¹ *ibid.* p. 316

²² 919210 2 KB p. 807

²³ See section 32(1) of the Act

²⁴ [1921] 2 KB p. 155; see also section 29(1) of the Act

²⁵ CCHC/08/72 p. 17, LagosState of Nigeria

²⁶ See section 29(2) of the Act

It should be noted here that, time is of the essence with respect to delivery. There is nothing to stop the buyer waiving the condition and if he does so, the waiver will be binding on him whether made with or without consideration. By virtue of section 11(1) of the Act which provides that, where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition.

Thus, where the buyer waived the delivery time or date, he is expected to give the seller reasonable notices that he will not accept delivery after a certain date. In *Charles Richards Ltd. v. Oppenheim*²⁷, the plaintiff agreed to supply a Roll Royce chassis to the defendant, to be ready at the latest on 20th of March, 1948. It was not ready on that day, but the defendant continued to press for delivery, thereby impliedly waiving the condition as to the delivery date. By 29th of June, 1948, the defendant had lost patience, and he wrote to the plaintiffs informing them that he would not accept delivery after 25th of July, 1948. In fact, the chassis was not ready until 18th of October, 1948 and the defendant refused to accept it. The Court of Appeal in England held that, the defendant was entitled to reject the chassis as he had given the plaintiffs reasonable notice that delivery must be made on a certain date.

If at the time of sale, the goods are in possession of a third party, there is no delivery by the seller to the buyer until such third party acknowledges to the buyer that he holds the goods on his behalf²⁸. This method of delivery is called an attornment. It is where the goods are sold in a warehouse; the seller gives the buyer a delivery order address to a warehouse man. Delivery here is complete when the warehouse man acknowledges that he holds the goods to the buyer order²⁹. If any deliverable can't be smoothly delivered then the seller should take all the responsibilities to deliver the goods³⁰. Defect of goods does not prevent property from passing to the buyer, until he rejects the goods. If the buyer rejects the goods, then the property reverts to the seller³¹.

3. Delivery of Wrong Quantity or Mixed Goods

This is where the seller delivers a quantity more or less than the quantity contracted for by the parties. It is the duty of the seller to deliver exactly the quantity agreed on by both parties; and where the quantity is wrong, it would entitle the buyer to reject it out rightly and repudiate the contract. But, where he accepts it, he is duty bound to pay for the wrong quantity. In *Behrand & Co. Ltd. v. Produce Brokers Co. Ltd*³², where the sellers agreed to sell a quantity of cotton seed export ingles in London. The ship discharged a small part of the cargo in London, and then left for Hull where she discharged other goods. Fourteen days later, it returned to London and discharged the remainder of the cotton seeds; which was the subject matter of the sale. It was held that, the buyers were entitled to reject the latter delivery while retaining the earlier ones. The decision in the above case is supported by the provision of the Act. It gives that 'unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installment³³. In *Payne & Routh v. Lillico & Sons*³⁴, the contract was for the sale of 4,000 tons of meal, 2 percent more or less. However, where the contract states the quantity followed by a given percentage or for the sale of 'about' so many tons, or 'more or less'. The seller is not obliged to deliver the exact quantity and he is allowed to reasonable margin but not excessive variation. Where the discrepancy is very little, the buyer will not be allowed to reject the goods, and the rule *de minimis non curat lex*³⁵ will apply with all force. A case on the score is *Shipton Anderson Co. v. Well Bros & Co. Ltd*³⁶. The sellers agreed to sell to the buyers a cargo of wheat described as '4,500 tons, two percent more or less', and where given an option to tender another eight percent if the sellers thought fit. This would in all have amounted to a maximum of 4,950 tons 55lb; though, they made no attempt to change the buyers with the cost of the 5lb. the court held that, the difference of 55lb, was so trivial as to be insignificant and accordingly the *de minimis* rule applied; and the buyers were not allowed to reject the goods under section 30(2) of the Act.

Similarly, where the seller delivers goods he contracted to seller and mixed the goods with other goods of different description not included in the contract, the buyer may accept the goods that accords with his contract and reject the one that is not included or reject the whole some³⁷. The case of *Ibrahim Dawood Ltd. v. Health (Est. 1927) Ltd*³⁸, is very instructive of the above proposition. In that case, the seller agreed to sell to the buyers fifty tons of galvanized steel sheets 'assorted over 6,7,8,9 and 10 feet long'. The buyers paid the whole of the purchase price in advance. When the sheets arrived, it was discovered that the whole of the fifty tons consisted of 6-foot length. The buyers claimed that, under section 30(3) of the Act, they were entitled to accept one-fifth of the consignment, and to recover four-fifth of the purchase price as money paid on a condition which had wholly failed. The court held that, they were entitled to do so, and that they were not restricted to claiming damages along.

²⁷ [1950] 1 KB p. 816

²⁸ See section 29(3) of the Act

²⁹ See section 29(4) *ibid*.

³⁰ See section 29(5) *ibid*. see also M.C. Okany, *op. cit.* pp. 371-372

³¹ See P.S. Atiyah, *Sale of Goods* 16th ed. Ibadan Pitman, 1987 p. 301

³² [1920] 3 KB p. 53

³³ See section 31(1) *op. cit.*

³⁴ [1920] 36 TLR p. 569

³⁵ This is a Latin maxim, meaning the law does not concern itself with trifled

³⁶ [1912] 108 LTT p. 372

³⁷ See section 30(3) *op. cit.*

³⁸ [1961] 2 Lloyd's Rep. p. 512; see also *Levy v. Green* (1859) LJT QB p. 319

3.1. Installment Delivery

No buyer is bound, unless he agrees to accept delivery of goods by installments. This may be expressed or inferred from the language used in the contract or from the circumstances of each case. For instance, in *Mustapha v. S.C.E.I.*³⁹, the contract provided that the goods should be delivered from factory in January, 1954; only parts of the goods actually left the factory at the date. It was held by the Nigerian Supreme Court that; the buyer was entitled to reject the whole since the contract was not severable. In *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd*⁴⁰, the sellers agreed to deliver 100 tons of flocks by installments. The first 15 installments were satisfactory. But the sixteenth was not up to the required standard. The buyers then took delivery of four more satisfactory loads before refusing further deliveries. The court held that, the buyers were not entitled to repudiate the contract, as the defective flocks constituted a small proportion of the total quantity delivered and there was slight possibility of the violation being repeated. The court laid down the tests to be considered in applying section 20 of the Act as follows:

- The ratio quantitatively which the breach bears to the contract as a whole.
- The degree or improbability that such breach will be repeated.

4. Performance of Contract of Sale of Goods in United States of America

Uniform Commercial Code of the United States of America⁴² if any delivery fails, buyer may show their reluctance to accept the order. It must however be stated that, the manner, time and place for tendering are determined by the agreement of the parties and the provisions of the UCC⁴³. Proper contract should be made if any chance of delay is present⁴⁴. Acceptance of goods occurs when the buyer fails to make an effective rejection but such acceptance does not occur until the buyer does any act inconsistent with the seller's ownership. But, if such act is wrongful as against the seller, it is an acceptance only if ratified by him⁴⁵. Also, by Article 2, section 2-606(2) of the UCC, the acceptance of a party by the buyer of any commercial unit is deemed to be acceptance of the entire units⁴⁶.

5. Recommendations

There is absolutely no doubt that, a breach of terms like conditions, warranty and the likes has become a daily occurrence in our economic system' in spite of the various statutes in that regard. This is because, instead of these principles balancing the interests of parties in the sale of goods transactions, especially in the performance of the contract of sale, they have been seriously abused by shylocks in series of ways.

Therefore, it is recommended that, the courts should do the needful by ensuring meticulous adherence to the provisions of our relevant statutes governing the sale of goods transactions. This is no doubt that, it will result in the promotion of our economic and social development.

Also, the Act which is a statute of general application in Nigeria⁴⁷ and some other West African countries should as a matter of urgency be amended to be in line with the UCC of the United States of America. This Act after the amendment should be incorporated in the Laws of the Federations as to serve as the most current reference point and the applicable throughout the continent for the sale of unison.

6. Conclusion

It is obvious that the performance of contract of sale of goods is governed by the Act and the Sale of Goods Law of some countries in West Africa which is strongly recommended here that there should be one applicable Act governing sale of goods transactions throughout the West African continent for uniformity.

It is humbly submitted here that section 32(1) of the Act tends to favour the seller more than the buyer in the sense that, whether the carrier deliver the goods to an authorized agent or not, the goods are deemed to be delivered to the buyer. This will certainly amount to an injustice on the part of the buyer. It is therefore suggested that, this particular section should be reviewed.

7. References

- i. See K.I. Igweke; Nigerian Commercial Law, Zaria Haman Press, 1991 p. 181
- ii. See *Raninseen v. Chessman* (1913) 30 TLR p. 68
- iii. Examples would include patients, shares in the company or cheques. See also Ewan Maclytre: *Nutshells Commercial Law*, Thomas, Sweet & Maxwell, 1 st ed. p. 1 such as corn and potatoes
- iv. See Benjamin on Sale 8 th ed. p. 171 cited in M.C. Okany; Nigerian Commercial Law,
- v. *Africana*, 1 st publishers Plc, reviewed ed. p. 308
- vi. Robert Lowe; *Commercial Law*, 1970, cited in M.C. Okany, *ibid.* p. 311
- vii. See M.C. Okany; *ibid.* pp. 311-312

³⁹ (2010) 45 NSCQLR p. 539; see also section 31(1) of the Act, which provides: unless otherwise agreed, the buyer is not bound to accept delivery thereof by installment

⁴² It is a statute regulating commercial transactions in the United States of America and shall furthermore be referred to as UCC

⁴³ See Article 2, section 31(1) of UCC

⁴⁴ See Article section 2, section 2-504, *ibid.*

⁴⁵ See Article 2, section 2-504 *ibid.*: <http://www.law.cornell.edu/ucc/12art2.htm>. Accessed on 1st of July, 2013

⁴⁶ That is, the buyer

⁴⁷ It must be noted that, this provision is different from section 35 of the Act, which does not deem acceptance of a unit as acceptance of the whole. This Act came into force in Nigeria on the 1st of January, 1900; except former Western Region of Nigeria who has its own Law tagged 'Sale of Goods Law of 1959

- viii. hereinafter referred to as the Act
- ix. That is, a class of its own
- x. See Maclyre op. cit. pp. 1-2
- xi. For example, by previous transactions between them or any relevant custom of the trade or profession
- xii. (1971) 2 NCLR p. 1 and not the seller See M.C. Okany; op. cit. 315
- xiii. ibid. p. 316
- xiv. 919210 2 KB p. 807
- xv. See section 32(1) of the Act
- xvi. (1921) 2 KB p. 155; see also section 29(1) of the Act
- xvii. CCHC/08/72 p. 17, Lagos State of Nigeria
- xviii. See section 29(2) of the Act
- xix. (1950) 1 KB p. 816
- xx. See section 29(3) of the Act
- xxi. See section 29(4) ibid.
- xxii. See section 29(5) ibid. see also M.C. Okany, op. cit. pp. 371-372
- xxiii. See P.S. Atiyah, Sale of Goods 16 th ed. Ibadan Pitman, 1987 p. 301
- xxiv. (1920) 3 KB p. 53
- xxv. See section 31(1) op. cit.
- xxvi. (1920) 36 TLR p. 569
- xxvii. This is a Latin maxim, meaning the law does not concern itself with trifled
- xxviii. (1912) 108 LTT p. 372
- xxix. See section 30(3) op. cit.
- xxx. (1961) 2 Lloyds Rep. p. 512; see also Levy v. Green (1859) LJT QB p. 319
- xxxi. (2010) 45 NSCQLR p. 539; see also section 31(1) of the Act, which provides: unless otherwise agreed, the buyer is not bound to accept delivery thereof by installment
- xxxii. (1933) All ER p. 15
- xxxiii. (1930) 2 KB 312 p. 331
- xxxiv. It is a statute regulating commercial transactions in the United States of America and shall furthermore be referred to as UCC
- xxxv. See Article 2, section 31(1) of UCC
- xxxvi. See Article section 2, section 2-504, ibid.
- xxxvii. See Article 2, section 2-504 ibid.: <http://www.law.cornell.edu/ucc> 12 art 2 hton. Accessed on 1 st of July, 2013
That is, the buyer
- xxxviii. It must be noted that, this provision is different from section 35 of the Act, which does not deem acceptance of a unit as acceptance of the whole. This Act came into force in Nigeria on the 1 st of January, 1900; except former Western Region of Nigeria who has its own Law tagged 'Sale of Goods Law of 1959