

# Examining the Application of the Doctrine of *Caveat Emptor* to Online Contracts of Sale of Goods in Nigeria

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## Abstract

*Caveat Emptor* is one of the fundamental rules of the law of contract which stipulates that a buyer of product should exercise due diligence when making a purchase and the risk of his failure to do so, should be borne by him. To this extent, the doctrine limits, and in some cases totally excludes, the seller from liability from defective products sold or supplied by him. Over the years, rigidity of this doctrine has been relaxed by certain principles laid down in decided cases. With the internet's emergence, and increase in online sale transactions, the extent to which this doctrine is still relevant in modern times has been called to question. The aim of this research is to examine the application of this doctrine to online sale transactions in Nigeria, and the extent to which online consumers are afforded protection from exploitation by online sellers, against the back drop of the theories of *Laisser Faire*, Contractual Freedom and Cyberlibertarianism. To achieve this aim, or the doctrinal method of research was adopted which involved the retrieval of primary and secondary materials relevant to the subject matter in question. For comparative purpose, brief reference was made to the electronic commerce and laws of other jurisdictions. The research discovered that globally, there is a push for greater protection of online consumers against exploitation with governments, online businesses and even consumers, having specific roles to play in this regard. Based on the findings, the research recommends, *inter alia*, that consumers should be made aware of the extent of their rights before, during and after purchase of goods online.

**Keywords:** Consumer Protection, Freedom of Contract, *Caveat Emptor*, Online Contract.

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## 1. INTRODUCTION

Online sale transactions, particularly in regard to goods, have become quite ubiquitous with more and more people making use of the internet. The most glaring feature of the internet, which is often pin pointed as its major advantage, is the fact that one can operate it from anywhere and can easily reach people from virtually all parts of the world. In other words, with the internet, one can conveniently do business without being limited by time or geographical location. Thus, purchasers and sellers using the internet to sell or buy goods have a broad range of customers to choose from when doing business and in some cases, consumer buyers can transact with manufactures directly without the involvement of middle men. The recent outbreak of the Covid-19 pandemic, as well as the requirement of maintaining social distancing, as a means of stemming its spread, has made it imperative for more persons to explore the option of entering into contract on the internet.

The restriction of movement of persons, introduced as one of the measures to curtail the infection rate of Covid-19 pandemic has more or less normalised online sale transactions<sup>1</sup>. This has brought about a change in consumer behavior with more buyers opting to shop online and this increase in online shopping has led to a decrease in physical shopping<sup>2</sup>. From time immemorial, persons who buy goods at the physical markets have been faced with the risk of transacting with dubious sellers and getting something contrary to what they bargained for. The age long doctrine of *caveat emptor* played a major role in placing the burden of bearing the risks of contracts of sale on the buyer. This doctrine was well encapsulated in the statement of Fitzgibbon, L.J., in the case of *Wallis v. Russell*<sup>3</sup> as follows:

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<sup>1</sup> Nur Rabiatuladawiah Abdul Rahman, The Rule of *Caveat Emptor* for E-Commerce Transactions In Malaysia [2020] 3(1) *Journal of Law and Governance* 18.

<sup>2</sup> Sarah Ayreen Mir, From *Caveat Emptor* to *Caveat Venditor*: What does the New Consumer Protection Act Mean For Consumers Today? <From *Caveat Emptor* to *Caveat Venditor*; What does the new Consumer Protection Act mean for consumers today? – NICKLED AND DIMED (nickledanddimed.com)> accessed 3 October, 2022.

<sup>3</sup> (1902) 21.R.585.

*Caveat emptor' does not mean in law or Latin that the buyer must take a chance, it means that he must take care. It applies to the purchase of specific things, e.g. to a horse or a picture upon which the buyer can and usually does exercise his own judgement. It applies also whenever the buyer voluntarily chooses what he buys. It applies also whenever by usage or otherwise it is a term of the contract express or implied that the buyer shall not rely on the skill or judgement of the seller<sup>4</sup>.*

However, it is not only in the physical market that buyers face risks. Transacting online comes with its attendant risk, most notably, fraud (credit card) which involves the use of another person's credit card or credit card information, intentionally, for stealing and identity theft, which involves a person using another person's name, social security number or other personal identifying information, to open accounts and either pay for, or incur huge debts for goods and service<sup>5</sup>.

## 2. STATEMENT OF THE PROBLEM

After the entering into a valid agreement, it is not unheard of for either of the contracting parties to express dissatisfaction with the outcome of the contract. Sometimes the outcome may not be as favourable as expected, sometimes a party may get something completely different from what he intended to contract for. The problem flowing from this is whether such a party should be allowed to renege from a contract he willingly, or voluntarily, entered into. This would of course require finding a balance in the scale of justice as allowing a party to avoid their obligations under a contract, simply for being disappointed with the outcome, would in turn work hardship on the other party. The function of the law is to do justice, so whichever way the pendulum swings, someone is bound to be at a

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<sup>4</sup> *Wallis ibid.*

<sup>5</sup> James John Shield, *Apple Inc v Superior Court: Caveat Emptor: The Future of Online Credit Card Transactions* [2015] 13(4) *DePaul Business and Commercial Law Journal* 532.

disadvantage. Thus, as between the buyer and the seller, who should be put at a disadvantage, particularly where the buyer is the party expressing disaffection with the contract? *Caveat emptor* was an early rule formulated to apportion risk and it places a higher burden requiring vigilance from the purchaser. With the modern style of buying and selling, a significant number of which are done virtually, as opposed to physically, the debate has turned on whether this ancient doctrine is still applicable to such online sales contracts or whether the seller should be made to bear the risk?

This paper examines the concept of *caveat emptor*, its evolution and application to modern commerce to ascertain to what extent the concept can be applied to online sale transactions in Nigeria in respect of goods. A brief comparison is drawn between *caveat emptor* and *caveat venditor*.

## 2.1 *Research Questions*

The questions this study sought to find answers to are as follows:

1. Whether the doctrine of *caveat emptor* is anachronistic and inapplicable to modern commercial transaction, particularly online sale transactions?
2. Whether parties should be left completely to contract without legislative intervention or whether such intervention is necessary to spell out the duties of the parties, particularly where the purchaser is buying for consumption.

## 3. THEORETICAL FRAMEWORK

It is worth pointing out that several theories cut across the issue raised in the above highlighted questions. There are theories, such as the classical contract theory and the classical economic theory which advocate that by the doctrine of Contractual Freedom, parties are free to enter into and agree on whatever terms they choose which shall be enforceable against a defaulting party<sup>6</sup>. It should not be the duty of the law to unduly interfere with such agreements or re-

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<sup>6</sup> Ihuoma I. Ilobinso, Paving the Path to an Enhanced Consumer Protection for the Nigerian Online Market: Theories and Concepts [2017] 8(2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 87.

write the contract for the parties. By these theories, the duty of the law is to provide a free market to enable competition to thrive and help the economy grow<sup>7</sup>, rather than to stifle it with unnecessary legislation. The chief proponent of this Classical Economic Theory is John Stuart Mills<sup>8</sup>.

Closely related to these two theories is the theory of Cyberlibertarianism which postulates that persons, whether individuals, corporate bodies, citizens, consumers, e.t.c, should be free to explore own tastes and interests online<sup>9</sup>. The argument of the proponents of Cyberlibertarianism is that individuals who use the internet should have the liberty to pursue their desires, including the freedom to enter into contracts, without government interference<sup>10</sup>. One of the earliest proponent of this theory was John Parry Barlow<sup>11</sup>. There is also the Asymmetric Information Theory which recognize that a lot of times consumer buyers, unlike the sellers, do not have full information about the products they intend to purchase to such an extent that would help them to protect their rights thus rendering them vulnerable to exploitation, while the Exploitative Theory and Consumer Protection argument favour the protection of consumers who transact online from being exploited by sellers and further advocates for the regulation of online transaction through legislative intervention<sup>12</sup>.

This paper proceeds on the assumption that the above highlighted theories are valid, and takes a position on the most relevant theory on whether or not the *caveat emptor* rule is applicable to online sale transactions.

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<sup>7</sup> *Encyclopædia Britannica* Historical School of Economics <historical school of economics | Britannica> accessed 3 October 2022.

<sup>8</sup> *Encyclopædia Britannica* Classical Economics <classical economics | Britannica> accessed 3 October 2022

<sup>9</sup> Adam Thierer, and Berin Szoka, Cyber-Libertarianism: The Case for Real Internet Freedom. <Cyber-Libertarianism: The Case for Real Internet Freedom (techliberation.com)> accessed 3 October 2022.

<sup>10</sup> Judith E. Jessah, The Principles of Freedom of Contract and *Laissez Faire Vis-A-Vis* the Regulation of the Internet in Nigeria [2019] 5 *DELSU Law Review* 346.

<sup>11</sup> Jonathan W. Penney, Virtual Inequality: Challenges for the Net's Lost Founding Value [2012] 10(3) *Northwestern Journal of Technology and Intellectual Property* 211.

<sup>12</sup> Ilobinso (n 6) 87.

### 3.1 *Research Method*

Being a theoretical research, data were obtained from primary sources, particularly statutes, and secondary sources, particularly published work of other scholars relevant to the subject matter.

### 3.2 *Literature Review*

The opinions expressed by the authors of some of the literature consulted in the course of this research are highlighted in this segment. One of the earliest argument on the issue of who bears the risk as between the buyer and the seller was by Leviness<sup>13</sup> who stated that eternal vigilance is not only the price of freedom but also is the price of maintaining fair trade practices. He also described *caveat emptor*, as a principle of legal relationship between buyer and seller, as being a pretty sick horse in view of the fact that its potency appeared to have been reduced to the extent of almost transferring to the seller the burden to be vigilante.

In a study conducted by Ndubuisi, Anyanwu and Nwankwo<sup>14</sup>, it was found that most consumers do not take time to study the labels on products before purchase and as a result, they do not have full information about the products that would help them to protect their rights. The result of low awareness of consumers of their protection laws results in few litigations against sellers even in cases of obvious infringements.

According to McMullen<sup>15</sup>, in contractual relationships, there is a need to balance freedom of contract with legal certainty and to also acknowledge the potential injustices attributed to an lopsided bargaining power. Ilobinso<sup>16</sup> has observed that unfair terms are

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<sup>13</sup> Charles T. Leviness, *Caveat Emptor versus Caveat Venditor* 7(3) *Maryland Law Review* 177.

<sup>14</sup> Emmanuel C. Ndubisi, Aham Anyanwu V. Aham and Cosmas Anayochukwu Nwankwo, *Protecting The Nigerian Consumer: An Expository Examination of the Role of Consumer Protection Council* [2016] 4(3) *International Journal in Management and Social Sciences*.

<sup>15</sup> Joseph McMullen, *The Erosion of Caveat Emptor: The Impact of Protectionist Legislative and Judicial Developments in Favour of Legal Certainty and the Subsequent Effects on Freedom of Contract*. <The Erosion of Caveat Emptor: The Impact of Protectionist Legislative and Judicial Developments in Favour of Legal Certainty and the Subsequent Effects on Freedom of Contract (bournemouth.ac.uk)> accessed 3 October 2022.

<sup>16</sup> Ilobinso, (n 6) 90.

inserted into an electronic contract without the input of the consumer buyer who also could not inspect the goods before purchase. One of such unfair terms in Nigeria based on the *caveat emptor* principle, identified by the author is one which states that the buyer would not be entitled to a refund of money after payments have been made.

Manyam<sup>17</sup>, has opined that the law recognises the paramountcy of the freedom of choice of parties to a contract as to promises made in that, once parties have exercised their choice of reaching an agreement, the law may be used to enforce the agreement so reached. This view is in line with the theory of freedom of contract. On their part, Dunham<sup>18</sup>, Wamhoff<sup>19</sup>, Pistis<sup>20</sup>, Weinberger<sup>21</sup> and Mir<sup>22</sup> have analysed the evolution of the *caveat emptor* rule, while and Abdul Rahman<sup>23</sup> distinguish *caveat emptor* from *caveat venditor*.

#### **4. THE CONCEPT OF CAVEAT EMPTOR**

Contractual Freedom is ‘the doctrine that people have the right to bind themselves legally; a judicial concept that contracts are based on mutual agreement and free choice and thus should not be hampered by external control such as governmental interference’<sup>24</sup>. It draws from the principle of sanctity of contract, which states that ‘the parties to a contract, having duly entered into it, must honour

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<sup>17</sup> Joel Manyam, *Sale of Goods Contracts and The Requirement of Fitness for Purpose in the Sale of Goods Act 1908* Waikato Law Review 4(11) Manyam, Joel --- "Sale of Goods Contracts and the Requirement of Fitness for Purpose in the Sale of Goods Act 1908" [2003] WkoLawRw 4; (2003) 11 Waikato Law Review 59 (nzlii.org) accessed 3 October 2022.

<sup>18</sup> Allison Dunham, *Vendor's Obligations as to Fitness of Land for a Particular Purpose* [1953] *Minnesota Law Review* cited in Frederick C. Wamhoff, *Property - Caveat Emptor - Duty to Disclose Limited to Commercial Vendors* [1981] 64 (3) *Marquette Law Review* 552.

<sup>19</sup> Wamhoff (n 18) 547

<sup>20</sup> Marco Pistis, *From Caveat Emptor to Caveat Venditor: A Brief History of English Sale of Goods Law From Caveat Emptor to Caveat Venditor - a Brief History of English Sale of Goods Law - Arbitration & Dispute Resolution - Italy* (mondaq.com) accessed 3 October 2022.

<sup>21</sup> Alan M. Weinberger, *Let the Buyer be Well Informed?- Doubting the Demise of Caveat Emptor* [1996]55(2) *Maryland Law Review* 387.

<sup>22</sup> Mir (n 2).

<sup>23</sup> Nur Rabiatuladawiah Abdul Rahman, *The Rise and Fall of Caveat Emptor in Malaysian Sale of Goods Contract*. [2018] 1(1) *Journal of Law and Governance* 1.

<sup>24</sup> Garner, B. A. (2009) *Black's Law Dictionary* (9<sup>th</sup> edn, West Publishing) 735.

their obligations under it<sup>25</sup>. According to McMullen<sup>26</sup> the foundation of the concept of contractual freedom is the presumption that contracting parties possess equal bargaining power as well as Adam Smith's principal economic self-regulating market theory of the 18<sup>th</sup> century which discouraged legislative and judicial interference.

The doctrine of *caveat emptor* emphasizes that the buyer could not get a refund from the seller for defects in the property sold to them that rendered the property unfit for ordinary purpose<sup>27</sup>.

The *caveat emptor* principle flows mainly from the asymmetry of information between the seller and buyer<sup>28</sup>. The description of the availability of information being asymmetric is because the seller, generally has more information about the item he is selling than the buyer. It is for this reason the buyer is the one assuming the risk of likely defects in the product purchased, and where the seller does not expressly give a warranty with regard to the quality of the product, it is then the buyer's responsibility to find out all there is to know about the product he is buying and the seller would not be liable for any product which is damaged, defective or does not meet the buyer's expectation<sup>29</sup>. If the buyer was careless at the time of purchase, and end up with defective goods, he cannot put the blame on, or sue, the seller. However, the seller has a corresponding responsibility not to misrepresent or give the buyer false or misleading information about the product<sup>30</sup>.

The rationale behind the *caveat emptor* rule is the presumption that buyers were fully capable of making competent independent investigation to satisfy themselves about the quality of what they are buying and, as such, there was no need to rely upon the transfer of information by sellers regarding defective conditions. In the light of modern commerce, particularly with regard to the peculiar nature of online consumer sales where online shoppers do not physically

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<sup>25</sup> *ibid* *ibid*.

<sup>26</sup> McMullen (n 15).

<sup>27</sup> Eni Eja Aloba, *Commercial Law and Practice* (Princeton & Associate Publishing Co. Ltd. 2021) 188.

<sup>28</sup> Mir (n 2).

<sup>29</sup> *ibid*.

<sup>30</sup> *ibid*. Mir.

inspect or touch products before buying them, whether or not this argument can be justified is debatable

The distinction between *caveat emptor* and *caveat venditor* is that in the latter, the burden is on the seller to check whether the product meets all legal requirements related to the transaction. Failure to do so can hinder the enforceability of a contract.

## **5. THE EVOLUTION OF THE DOCTRINE OF CAVEAT EMPTOR**

Both Wamhoff<sup>31</sup> and Weinberger<sup>32</sup> and are in agreement that *caveat emptor* is an old principle derived from English and Roman customs and traditions which over time came to have the force of law due to its wide acceptance and it became firmly entrenched in the common law of England. While its source is often traced to sixteenth century English decisions involving the sale of chattels, it originated much earlier in primitive Roman law<sup>33</sup>. It has been followed for many years by English Courts, and has been described by Pistis<sup>34</sup> as the perfect principle for transactions which do not involve massive quantity of goods. According to Wamhoff<sup>35</sup>, the maxim of *caveat emptor* was fashioned at a time when sale transactions were done on a simple day-a day basis between neighbors who transact face to face. The rule developed in a time when goods and land were there to be seen and everybody knew everybody else's land and became a philosophy that placed a high value on individual skill and minimal public imposition on standards of fair play<sup>36</sup>.

The initial approach of the court towards a buyer who felt dissatisfied with, or misled into making, his purchase is exemplified in the seventeenth century case of *Chandelor v Lopus*<sup>37</sup> the earliest reported case on the principle. In that case, the plaintiff sued the Defendant who had sold to him a Bezoar stone which supposedly

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<sup>31</sup> Wamhoff (n 18) 547.

<sup>32</sup> Weinberger (n 21) 387.

<sup>33</sup> Wamhoff (18) 547.

<sup>34</sup> Pistis (20).

<sup>35</sup> Wamhoff (n 18) 547.

<sup>36</sup> Dunham (n 18) 547.

<sup>37</sup> Dunham, *ibid.* 547.

had medicinal properties. The majority opinion of the court was to the effect that, without a written warranty, the evidence was not enough to hold the Defendant liable<sup>38</sup> that if a seller does not give a warranty, an action on the case does not lie, even though the buyer is deceived.

Gradually, there was a relaxation of a strict application of the *caveat emptor* rule. According to Levin<sup>39</sup>, buying was still perceived as a game of chance and at the beginning of the 12<sup>th</sup> Century, a movement arose to take the gamble out of shopping. The judicial climate was more inclined to favouring the good faith purchaser, and made the mechanical application of the *caveat emptor* rule in sales transactions a left-over from an earlier era<sup>40</sup>. The change in the approach by the courts is traceable to the industrial revolution and the large scale production of massive quantities of goods, as well as the realization by sellers that the quality of the products they were selling was very important in order to be competitive in a large market where the same product was sold by different producers<sup>41</sup>.

The exceptions to the *caveat emptor* rule, which developed over time, could be summarized as follows;

1. Where the seller makes a mere presentation and the buyer relies on it, such a contract being voidable at the option of the innocent purchaser, the buyer has the right to rescind the contract;
2. Where the seller makes a false representation, amounting to fraud, and the buyer relies on it, or where the seller actively conceals a defect in the goods so that the same could not be discovered on a reasonable examination of the goods<sup>42</sup>;
3. Where the goods are purchased by description and they do not correspond with the description;

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<sup>38</sup> Pistis (n 20).

<sup>39</sup> Leviness (n 13) 177.

<sup>40</sup> J. Gilman, Rethinking The Role of *Caveat Emptor* in Execution Sales [1982] 32(3) *Case Western Reserve Law Review* 735.

<sup>41</sup> Pistis (n 20).

<sup>42</sup> Opportunities for such physical inspection of goods in online contracts of sale of goods, are usually absent, making it internet-facilitated sale transactions, susceptible to fraudulent misrepresentations.

4. Where the goods are purchased from a seller who deals in goods of such class of goods and they are not of a “merchantable quality”<sup>43</sup>;
5. Where the goods are bought by sample and if the bulk does not correspond with the sample, or if there is any hidden or latent defect in the goods;
6. Where the goods are bought by sample as well as by description and the bulk does not correspond with both the sample and the description;
7. Where the buyer makes known to the seller the purpose for which he requires the goods and relies on the seller's skill and judgement, but the goods supplied are unfit for the specified purpose;
8. Where trade usage attaches an implied condition or warranty as to quality and fitness and the seller deviates from it<sup>44</sup>.

Abdul Rahman<sup>45</sup>, has identified the consumer protection legislation in the United States, the United Kingdom and other common law countries, as being one of the factors responsible for the decline of the *caveat emptor* rule. Over time the doctrine has evolved to the modern rule of *caveat venditor* through judicial intervention upon the realisation that the *caveat emptor* was inconsistent with the law of equity. By this more recent *caveat venditor* rule, which simply means “let the seller beware”, a greater responsibility is imposed on the sellers for the products that they sell. By this rule, an implied warranty attaches to each product, thereby relieving the buyer of the burden of verifying the quality of such products. It is the seller that should bear the onus of making sure the buyer makes a reasonably informed choice and to compensate him for defective products<sup>46</sup>.

One of the obvious ways through which online consumer buyers are exposed to exploitation, is by the use of photographs as a

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<sup>43</sup> *Caveat emptor* would apply if the buyer has examined the goods, as regards defects which such examination ought to have revealed.

<sup>44</sup> Alobo (n 27) 188.

<sup>45</sup> Abdul Rahman (n 23) 4.

<sup>46</sup> Mir (n 2)

substitute for the actual goods on display as obtains in contracts involving brick and mortar businesses. This is because a lot of times, the images/photographs of goods may be a far cry from what the goods actually look like<sup>47</sup>. The use of standard forms and exemption clauses are also methods utilised by sellers to take advantage of the doctrine of *caveat emptor rule*. An exemption clause is a contractual provision stipulating that a party would not be liable for damages for which that party would otherwise have ordinarily been liable.<sup>48</sup> According to Okany, it is a commercial practice for a contract to contain express terms whereby the parties to the contract may limit or exclude liability for breach of contract or negligence arising while performing the contract<sup>49</sup>. Indeed the liberty of the parties to do so is statutorily recognised under section 55 of the Act<sup>50</sup> and it is for this reason that Atiyah, Adams and MacQueen<sup>51</sup> have expressed the view that at first there was nothing legally objectionable about such exemption clauses in contracts of sale of goods. Interestingly, while many contracts contain exemption clauses, it does appear to me more commonly found in standard-form contracts<sup>52</sup>.

It is worth pointing out that where the buyer is a non-consumer, that is, where the buyer is not buying for the purpose of consuming the goods but for the purpose of sale, where the goods being purchased were second hand goods, *caveat emptor* would still be applicable in modern times<sup>53</sup>.

A major exception to *caveat emptor* is when the seller actively conceals latent defects or otherwise that could make material misrepresentations amounting to fraud. The emergence of the Sale of Goods Act (SOGA)1893 was one of the most noticeable changes in the approach to the concept of *caveat emptor*. It has been argued that

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<sup>47</sup> Abdul Rahman (n 1) 19.

<sup>48</sup> Garner (n 24) 653.

<sup>49</sup> M. C. Okany, *Nigerian Commercial Law* (Africana First Publishers 1992) 367.

<sup>50</sup> The SOGA 1979 s 55(1) and the SGL s 65(1)

<sup>51</sup> Atiyah, P. S., Adams, John N. and MacQueen, Hector *The Sale of Goods* (11<sup>th</sup> edn, Pearson Longman London 2005) 224.

<sup>52</sup> A standard form contract is a usually pre-printed contract containing set clauses, used repeatedly by a business or within a particular industry with only slight additions or modifications to meet specific situations. See Garner (n. 24) 373.

<sup>53</sup> Abdul Rahman (n 23) 3.

the Act contributed to the process of undermining *caveat emptor* by way of its introduction of obligations on the part of the seller aimed at protecting the buyer. One such obligation was the implied term of merchantable quality<sup>54</sup>. Although the Act whittled down the effect of *caveat emptor* by introducing obligations to be borne by the seller for the protection of the buyer, it however had the shortcoming of introducing the concept of merchantable quality without giving it a preemptive definition until 1979 when a definition of merchantable quality was provided in the SOGA 1979<sup>55</sup> which was then replaced with the concept of “satisfactory quality”.

While the emergence of the notion of merchantable quality appear to allocate the risk in sale of goods transactions to the seller under the SOGA 1893, McMullen<sup>56</sup> has opined that the provisions of section 55 of the Act which permits variation or negation of the terms of their contract by express agreement, has a counter-productive effect of facilitating the exploitation of inequality in bargaining power, to the extent of allowing parties with a substantially greater bargaining power to take undue advantage of the other party’s weaker position and escape contractual liability. With the Act of 1979, the negative effect of section 55, permitting parties to contract out of their obligations by using implied terms, has been reduced as these implied terms were made subject to the Unfair Contract Terms Act 1977. The United Kingdom has gone further to enact the Consumer Protection Act of 2015. Thus, when read and applied together, Section 55(1) SOGA 1979, the Unfair Contract Terms Act 1977 and the Consumer Protection Act 2015, the laws of the United Kingdom, have imposed a higher obligation on sellers in ensuring the goods sold by them conform to the standard.

## **5.1 Caveat Emptor and Online Consumer Contracts in Nigeria**

The Nigerian legal system is premised on the received English law,<sup>57</sup> and by this process of reception, the *caveat emptor* rule

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<sup>54</sup> McMullen (n 15).

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.* McMullen.

<sup>57</sup> This comprises of the principles of common law, the doctrines of equity and statutes of general application. See Ayinla Lukman Alabi. *Jurisprudential Perspectives on the Fountain of Nigerian Legal System* [2019] 2 *AGORA International Journal of Juridical Sciences* 15.

became part of Nigerian law. In applying the principle to specific cases, the courts in Nigeria, particularly the Nigerian Supreme Court, have drawn a distinction in the application of the concept of *caveat emptor* in a sale of goods transactions and its application in a sale of land. Thus, in *J. O. O. Imana v. Madam Jarin Robinson*<sup>58</sup>, decided by the Supreme Court in 1979, the court stated that;

*A defect in title to land is not easily ascertainable as one would easily discover a defect in respect of specific goods. A person buying a pair of trousers will examine the trousers and easily discover if it has any defects, and if he fails to discover the defects and buys, he has only himself and not the vendor, to blame. This is not the case with a purchaser of a parcel of land. The purchaser cannot look at the bare ground of either a bare bush or a developed property and discover whether or not the vendor's title to it is defective. A recourse must be had to the title documents (excepting most grants by Native Law and custom) which the vendor possesses. A purchaser must of course always take care, but this does not mean that in taking care the law is requiring him to take a chance*<sup>59</sup>.

This it appears that by the fact that defects in quality of products can easily be more ascertained than defect in the title of the vendor of land, the courts tend to be stricter in applying *caveat emptor* against the buyer in a sales transaction. If the opportunity to inspect, touch, feel and smell products offered for sale, is a yardstick for determining when *caveat emptor* should be applied, it is argued here that with online contracts of sale involving a consumer buyer, since the buyer is denied this opportunity of inspection, then *caveat* attempt ought not to apply against him. The theory of asymmetry of information ought to come into play to protect the consumer, hence the appropriate principle to apply should be *caveat venditor* to make

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<sup>58</sup> [1979] 3-4 SC.

<sup>59</sup> *Imana* *ibid.*

the seller shoulder the burden of defect in the quality of products offered by him for sale.

The use of the internet experienced rapid growth, but the development of Electronic commerce (eCommerce), particularly buying and selling on the internet, has not been as rapid. Even when eCommerce or online transactions started booming, it provided an avenue for criminals to exploit consumer buyers and steal people's identity and commit credit card fraud<sup>60</sup>. The reason for the increased risk of identity theft and credit card theft in online contracts is the fact that sale transactions conducted online require consumer buyers to make available their personal information and credit card number and the recipient of these information may be unknown to the consumer while hoping that such information would not be copied, reproduced or stolen<sup>61</sup>. The extent of this risk is more glaring when juxtaposed with the fact that consumers who shop online do not have the opportunity of seeing, or meeting with, online merchants.

It is argued that laws should be put in place to give protection to consumers from the risk of shopping online, because a lot of times online vendors or merchants may turn out not to be who they claim to be or they may misrepresent facts about their products. The issue of identity theft or fraud cut across online merchants and purchasers, nevertheless the scale tilts in favour of giving a greater protection to consumer buyers since sellers who sell their wares online are the ones who have taken the decision to market their goods and make profit from the use of the internet. Therefore, they should be deemed to have taken upon themselves the risks inherent in using technology to do business, rather than the consumer buyer. It has been argued that the advantage sellers have over consumers on the issue of preventing fraud and identity theft is because online sellers possess the means to protect themselves from fraudulent transactions and have access to verification systems that proactively detect fraud, whereas consumers do not have access to these systems, hence must put their entire trust on online sellers with regard to their credit card and personal information<sup>62</sup>.

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<sup>60</sup> Shield (n 5) 531

<sup>61</sup> Ibid 532

<sup>62</sup> Shield (n 5) 535.

Advancement in consumer fraud coincides with more advancement in the use of technology in online sales. The increasing global market has also made internet fraud to be more high-tech and broader in scope. It is observed that modalities for addressing and checkmating fraud in online consumer contracts of sale, especially through the instrument of law, is retroactive, hence it seems that online criminals appear to be miles ahead of law enforcement agencies established to tackle their activities. It is in this regard that this paper subscribes to Sheild's<sup>63</sup> argument that consumer protection laws geared towards checkmating online fraud and other legal issues militating against online contracts of sale, should be proactive rather than retroactive.

The difference between traditional brick and mortar sale transactions and online sales on the issue of identity fraud, can best be appreciated by looking at the methods of verification of identity. In the former, the seller simply requests for a valid form of identification such as drivers licence, in Nigeria that would include requesting for permanent voters card or National Identification Number. In online contracts, online vendors are now utilizing the services of third party verifiers to ascertain or verify the credit card information and identity of an online purchaser. The process of verification which provide sellers with a reliable and discrete method to verify the purchaser's identity involves three stages. According to Shield<sup>64</sup>, with the first step, the purchase history of a credit card user is ascertained through an analyses of his previous credit card purchases, thereafter the present purchase will be checked for consistency or conformity with previous purchases of the consumer. The next stage involves feeding the purchase information into an automated verification system that determines whether or not the information supplied during the sale corresponds with the information on the card. The last stage involves the system verifying whether the credit card user's internet address matches the Internet Protocol (IP) address of the consumer's previous purchases.

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<sup>63</sup> Ibid. 550.

<sup>64</sup> Shield (n 5) 535

Under the Nigeria Data Protection Regulation (NDPR) 2019<sup>65</sup> modeled after the EU's General Data Protection Regulation (GDPR) 2018, the conditions under which Personal Data would be deemed to have been lawfully processed have been highlighted below<sup>66</sup>:

1. Where consent of the Data Subject has been procured;
2. Where processing is necessary for the performance of contract to which the Data Subject is a party;
3. Where it is required for compliance with a legal obligation which the Data Controller i.e. the person or body of persons who determine the purposes for which and manner in which Personal Data is being or to be processed, is required to discharge;
4. Where it is required to protect the vital interests of the Data Subject;
5. Where it is required for carrying out a task in the public interest or in the exercise of an official public mandate imposed on the Data Controller<sup>67</sup>.

From the above, it is apparent that, merchants in Nigeria who offer their products for sale online, can have access to, or take advantage of sophisticated system of verification of the information of their customers. This, of course, lays bare the possibility of misuse of such customer information and granting access to such information to third parties. This underscores the need for adequate enforcement of data protection provisions in the NDPR.

If no adequate protection is given to Nigerian online consumer buyers, irrespective of whether they are resident in Nigeria or not<sup>68</sup> in Nigeria, through appropriate enforcement, and they are left to bear the risk of fraud, identity theft and breach of confidential information when transacting online, then buyers would be reluctant to purchase

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<sup>65</sup> Made pursuant to the National Information Technology Agency (NITDA) Act.

<sup>66</sup> Uche Val Obi SAN, 'An Extensive Article on Data Privacy and Data Protection Law in Nigeria' <https://inlp.com/latest-news-/article/an-extensive-article-on-data-privacy-and-data-protection-law-in-nigeria/> accessed 3 October 2020.

<sup>67</sup> *ibid.*

<sup>68</sup> The NDPR applies to all Nigerians, whether resident within the territory of Nigeria or not.

goods online. The result of consumers not purchasing the goods that are offered for sale, is that the sellers would not be able to sell products and make profit and this would affect production and ultimately the growth of the economy would be negatively affected<sup>69</sup>. The domino effect of this is that if the growth of the economy is stunted, it would affect the ability of the government to generate revenue and carry out infrastructural and human capital development. Thus, the government ultimately benefits where adequate protection is given to consumer buyers.

## **6. RECOMMENDATIONS**

1. Consumers should be afforded more protection while using the Internet and not subjected to the risk of loss when their credit card and/or identity is stolen and then used. For a market to be successful, it is essential that consumers should have confidence in the market. Therefore, the law should be focused on promoting, or interpreted to encourage, the confidence of consumers in online contracts of sale. The more consumers feel comfortable in making purchases the more buyers, sellers, the economy and the government ultimately benefits.
2. Instead of leaving sellers to be solely liable for the loss arising from fraudulent transactions involving the use of credit cards, mandatory security standards should be put in place for credit card companies to comply it and make them bear a greater share in the liability for fraudulent credit card transactions. This would compel such companies to put greater security measures in place to deter stealing or misuse of credit card information.

## **7. CONCLUSION**

An extreme adherence to the principle of *caveat emptor* rule, by making buyers, especially consumer buyers, to shoulder the risk of the quality of the product they purchase, had the effect of reducing purchase contracts to a gamble where the ultimate outcome is not known with certainty. Ironically, even if the *caveat venditor*

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<sup>69</sup> Shield (n 5) 552

principle is applied, and the burden is fine-tuned to transfer the burden of the risk from consumer buyers to sellers, the ultimate result is that a sales transaction contract is still a gamble but this time around, the person taking the chance, which is the seller, is better equipped to handle the negative outcome and even adopt measures to curb such outcome. Enacting appropriate consumer protection laws, or amending the existing ones, to make provisions requiring imposing a duty on sellers to disclose all information about the products they offer for sale and giving the buyers the right to refund such products where they fail to conform with the information supplied by the seller. This conforms with the theories of information asymmetry and consumer protection.