

THE CONTRACT OF SALE AND THE CONSUMER OF PETROLEUM PRODUCTS IN NIGERIA: A RIGHT WITHOUT A REMEDY?*

Abstract

When a good is exchanged with money, it is in most cases under a business atmosphere. In most of such cases a commercial relationship is created which has or should have legal implications and consequences. The essence of this paper is to appraise the nature of the transaction that takes place between the buyer and the seller of a petroleum product at an outlet: whether it is a full-fledged contract with all the legal effects or just a transaction bereft of any legal relations. If there is a contract, what type is it and what is the effect of the breach of such a contract or will the consumer who has been injured by the consumption of the petroleum product go without a remedy?

Introduction

Any time a good is placed for sale in a market overt and there is a purchase, a contract has been created irrespective of the type of the contractual relationship formed. The generally accepted position is that where a contract is breached there should be a remedy attached thereto. This piece sets out to examine the meaning of a contract and the elements thereto, the nature of the contract formed when one buys a petroleum product, the rights of such a buyer and the seller and considers the consequence in the face of the breach of such a right if any.

The Character or Nature of the Contract

Meaning of a Contract

Before delving into the character or nature of the contract which a buyer goes into at the point of purchase of any form of the three petroleum products, it is pertinent to draw attention to what in a nutshell a contract entails and the constituting elements thereof. A contract is an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties.¹ Also a contract has been described as a promise or a set of promises the performance of which the law in some way recognizes as a duty the breach of which the law gives a remedy². The Sale of Goods Act defines a contract of sale of goods as a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a monetary consideration called the price³. The first arm of this definition by the Act is in tune with our intendment for at the time of payment for the petroleum product the property in the product is immediately transferred. Actually the pattern is for the product to be dispensed and the price for it is paid. The law empowers people to make and receive enforceable promises when they communicate decisions to act or refrain from acting in some definite way in the future subject to other principles. These enforceable promises are conveniently called contracts. These two descriptions, correct and legal as they are, do not fall within our perspective of the nature of the contract which a buyer goes into at the point he drives into a fuel station, positions his automobile for the purchase of any of the products, purchases and pays. They are futuristic in character although enforceable. The form of contract is that in which performance is actualized at the same moment of time. Even if there is no futuristic element to the promise, there need not be a verbal exchange of words at all for it to be entered into and concluded.

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¹ I.E. Sagay, **Nigerian Law of Contract**, Spectrum Law Publishing, Ibadan, 1993, 1,

² **Second Restatement of the Law, Contracts**, Students Ed, American Law Institute Publishers, D.C. Washington, May, 17, 1979, 5. I.E Sagay., **Nigeria Law of Contract**, *op. cit.*, 1.

³ Section 2(1) Sale of Goods Act 1893, Section 498(1) Contracts Law CAP 32 Laws of Anambra State, 1991.

The description of the nature of contractual relationship in contemplation here was judicially captured in **Omoyinmi v. Ogunsiji**⁴ where the Court of Appeal described a contract thus:

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The term has been used indifferently to refer to three different things;

- (1) the series of operative acts by the parties resulting in new legal relations,
- (2) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative act and also an operative act in itself,
- (3) the legal relation resulting from the operative acts, consisting of right or rights in persona and their corresponding duties accompanied by certain power, privilege and immunities.

The sum of these legal relations is often called obligation.

Sub paragraphs 1 and 3 in the above dictum tally with the legal scenario created when a motorist pulls up at a filling station in purchase of a petroleum product, say the PMS. When such operative acts are carried out, in most cases without much verbal interaction yet such acts create legal relations from which rights and duties with the corresponding obligations attach to the parties, the innocuous nature of the resulting contract notwithstanding.

The fact of documentation alone does not constitute a contract. A contract can exist by conduct of the parties. What is of utmost importance is the agreement of the minds, the *ad idem* on the terms of the agreement whether the terms are expressly written or exist by implication. The correlativity or reciprocity of acts is the underlying factor. Thus the Court of Appeal in **NICON Hotels Ltd v New Dental Clinics Limited**⁵ posited that for a valid contract to be formed, there must be mutuality of purpose and intention. The two or more minds must meet at the same point, event or incident. The meeting of the minds of the contracting parties is the most crucial and overriding factor in the law of contract. Hence the various acts that culminate in the dispensation of petroleum products at the outlet and the corresponding act of payment of money on the dispensed, all put together constitute the contract in this regard for which there are rights, duties and obligations created.

Elements of a Contract

The elements of a contract include an offer to sell which must be certain and definite. It is a definite undertaking or promise made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed⁶. This brings up the element of acceptance which is a final expression of assent to the terms of the offer.⁷ The assent implies that there must be an indication by the person accepting the offer either by words, in writing or by conduct⁸. So to constitute a contract, it must appear that the two minds were at one, at the same moment of time, that is, there was an offer continuing up to the time of acceptance⁹.

⁴ (2008) Vol 3 WRN 115 at 134 –135.

⁵ (2007), 3 NWLR Part 1056 p 237 at 266

⁶ I. E. Sagay, **Nigerian Law of Contract**, *Op. Cit* 6.

⁷ I. E. Sagey, *Ibid* 13

⁸ S 518 Contracts Law CAP 32 Laws of Anambra State 1991.

⁹ **Dickinson v. Dodds**, (1876) 2 Ch. D. 463 at 26, per James L.J.

For a contract to be enforceable by a party, that party must have furnished a consideration which is the third basic element in a contract of sale which the Sale of Goods Act called the price. The basic feature of the doctrine of consideration is reciprocity. It is something of value in the eyes of the law which must be given for a promise or actual transference of good for the transaction to be enforceable as a contract. In a simple contract of sale of goods, the seller's consideration is the promise of transfer or actual transfer of his title to the goods or possession of them to the buyer. The buyer's consideration is the money he pays or promises to pay for the goods. The transfer of title to the goods or possession of them to the buyer represents a benefit to him moving from the seller. Reciprocally, the promise to pay money or actual payment represents a benefit to the seller moving to the buyer.

Finally, the fourth element is the intention to create legal relations, which although is bedecked with a lot of controversy, still is an essential requirement under the common law, and common law principles form the bedrock on which most principles of the law of contract took their root. The law presumes in commercial transactions, the presence of this contractual intention and sees it as an essential to the formation of a contract. To buttress this, agreements have been distinguished and classified into social or domestic engagements and commercial agreements. Regarding the social and domestic engagements, the absence of legal relations is presumed,¹⁰ unlike the commercial agreements where it is assumed consciously or unconsciously to be accepted as part and parcel of the contractual relationship.

To shore up the very essence of this fourth element in a contract, the court had very recently asserted that "in commercial agreements, it will be presumed that the parties intended to create legal relations and make a contract"¹¹. Therefore, the intention to create legal relation has in the earlier and recent times been known and regarded as an integral part of a contract inclusive of the contract created when purchasing petroleum products.

Implied Terms of a Contract

In a contract of sale of goods, the express terms of the contract are those terms formulated and spelt out by the parties before or at the time of concluding the contract. Implied terms consist of those terms subsumed in a contract which are not expressly stated and declared by the parties to be part of the contract terms. They are established practices in the commercial and economic culture of a society. These practices are accepted and recognized as a relevant part of a contract. These implied terms are the ones associated with the kind of contract being dealt with here. They are of two types:

- (i) Terms borne out of trade or custom which developed over a long time of usage and applied in different contractual relations.
- (ii) Terms implied by statute. These are terms gradually accepted and enforced into contracts even though they were not expressly stipulated. This was done mainly to protect the weaker party (usually the buyers or consumers)¹² in contracts of sale of goods.

The Sale of Goods Act, a codification of the existing rules of common law on sale of goods provides for such terms. These are contained in sections 12 to 15 of the Act.

¹⁰ **Balfour v. Balfour**, (1919)2 K.B 57, **Spellman v. Spellman** (1961) 1 WLR 921.

¹¹ **Omoyinmi v. Ogunsiji** (2008) 3 WRN 115 at 135.

¹² I. E. Sagay, **Nigerian Law of Contract**, *op. cit* 110.

All these terms apply to the contract in question. Of these implied terms provided for, there are three that are of paramount importance to us with respect to the contract of sale of petroleum products. These are;

- (a) Implied term as to title¹³. In a contract of sale of good, there is an implied condition on the part of the seller that he has the right to sell the goods.
- (b) Fitness for the purpose¹⁴. This is where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer believes in the seller's skill. There is an implied condition that the goods shall be reasonably fit for such purpose.
Under the Sale of Goods part of the Contract Law of Anambra State 1991, fitness for purpose and quality imply one and the same thing which explains why it provided for fitness or quality under Section 538.
- (c) Merchantability. This implies that the goods sold are of merchantable quality¹⁵. That is, that they were of use for any purpose for which such goods would normally be put ¹⁶. Or where the good is meant only for one particular purpose in the ordinary course of its usage, it is fit for that particular use¹⁷.

Nature and Character of the Contract

The juridical or jurisprudential basis of the law of contract is the enforcement of obligations between parties so as not to allow any party take undue advantage of the other without redress. This obligation flows against contracting parties notwithstanding the means by which the contract was entered into. That is to say, whether consciously entered into by means of express offer and acceptance or impliedly entered into by the conduct of the parties, the position is the same.

In this wise, when a filling station operator or owner opens for business, he is expressly inviting the public to drive in and purchase fuel, gas or kerosene. There is the legal presumption that what he is offering for sale is good fuel, unadulterated, untinkered with and of good quality. That duty is cast upon him by law and he is bound to the purchasing public under an implied contract by which he is taken to warrant to the public that what he has in stock for sale meets the standard quality.

If therefore, it turns out to be otherwise, this immediately amounts to a breach of the contract to supply fuel of appropriate quality. When therefore a filling station with stock of the petroleum products throws its doors ajar to the driving public, it is an offer beckoning on the motorists and other consumers to drive in and purchase the needed product. Any consumer driving in is in fact declaring, 'I want to buy', and thereby accepting the offer of the seller or operator of the station. Much more than just opening the filling stations, some of them go the extra mile to write on boards – "yes fuel", "yes gas", "yes kerosene". The law implies that they are warranting by that declaration that what they are offering for sale is good.

¹³ Section 12(1), Sale of Goods Act 1893, S 538, Contracts Law, CAP 32 Laws of Anambra State, 1991.

¹⁴ Section 14(1), Sale of Goods Act 1893, S,538, Contracts Law CAP 32 Laws of Anambra State, 1991

¹⁵ Section 14 (2) and 15 ; Sales of Good Act 1893, Ibid, S 535 Contracts Law CAP 32 Laws of Anambra State, 1991.

¹⁶ **Cammel Laird and Co Ltd v. Manganese Bronze and Brass Co. Ltd** (1934) AC 402

¹⁷ **Grant v. Australian Knitting Mills** (1936) AC 85.

The nature of petroleum products pricing in Nigeria does not give room for counter-offer. It is a close-ended pricing policy. There is therefore no haggling for the price as the official pump price is usually fixed by the government. In the sale of petroleum products, the offer is certain, definite and direct and the motorist positioning his car for the product to be dispensed from the pump into his tank has by that action accepted by conduct the offer made by the seller. The price for the dispensed product which is read on the meter which the motorist is expected to pay to the seller is the consideration he is furnishing in reciprocation for the fuel dispensed into his tank. As is usual, that money or price paid should be commensurate with and of the value of the dispensed product.

Being an implied contract, it is natural that the issue of creating a legal relationship should be subsumed into it. It is a commercial relationship in which the features of a contract are involved and the procedure of contracting completed. So any breach of the contract in any way should have a legal consequential effect. Where for any reason a problem arises, for instance from the purchase of fuel (PMS) and a car engine knocks, flowing from the use of the fuel, it is a breach of the contract for which a redress will follow. This ought to be and is actually so as the operator holding himself out to sell petroleum products is assumed to be selling products that are of merchantable quality and fit for the purpose for which they are being sold. If fuel is sold to power a car, it should be good quality fuel and should enable the car to drive. Where it fails to so operate but rather slows down the speed of the car that it eventually grinds to a halt, what it entails is that the fuel is not of merchantable quality and hence not fit for the purpose of driving a car for which it is purchased. Also where fuel is bought for a generating set and it could not start the engine or where it ought to be used for any purpose for which it is normally or specifically used and it refuses to perform or performs below expectation, the product is of no use for any purpose for which in the ordinary course it ought to be useful, or for the particular purpose for which it is bought. The situation is akin to what happened in **Grant v. Australian Knitting Mills Ltd**¹⁸ where the underwear caused the plaintiff dermatitis and the court held the underwear not fit for the purpose for which it was made and thus not of the acceptable quality.

The sale and purchase of petroleum products is a normal business transaction giving rise to a normal contractual relationship with the resulting legal consequence of right of redress in the face of a breach. That this is so is incontrovertible even though parties may enter the contract without uttering even a word to each other. It is a simple and implied contractual agreement without any difference in legal effect. Its distinction lies in the mode of manifesting assent which mostly is by conduct and not words in most circumstances.

Duties of the Seller and the Buyer

In a contract of sale of goods, there are duties that parties to the contract owe each other. These duties are intrinsic and flow with the contract. The Sale of Goods Act provides for these duties either expressly or impliedly. The seller has six duties which he owes the buyer. They are duty to;

- (a) the existence of the goods¹⁹,
- (b) pass good title²⁰,

¹⁸ (1936) Ac 85.

¹⁹ Section 6, Sale of Goods Act, 1893, Section 501(1) Contracts Law CAP 32 Laws of Anambra State 1991

²⁰ Section 12(1) *Ibid*

- (c) deliver the goods²¹,
- (d) supply the goods at the right time²²,
- (e) supply the goods in the right quantity²³, and
- (f) supply the goods of the right quality²⁴.

Of all these, the duties to supply goods in the right quantity and of the right quality, that is, the last two are of prime importance to us. By the nature of the contract they are given to be applicable at the time of the entering into and execution of the contract. The fuel station which opens to the public for sale is presumed to have the goods in existence (but if products are unavailable some of them put the “No Fuel, No Gas and No Kerosene” sign or board) and the right to sell the product on demand and that it will in fact deliver the goods at the same time. This is so since a car owner or driver who pulls up to buy fuel, positions his car at the pump and the nozzle is inserted into his tank. Once the operator presses the nozzle and dispenses the fuel, the first four duties have been discharged as at that point in time, the good has been delivered.

The duty to supply the goods in the right quantity and of good quality is the ones to be examined substantially. Section 30 (1) of the Sale of Goods Act provides that where the seller delivers to the buyer a quality of goods less than he contracted to sell, the buyer may reject them, but if he accepts them as delivered he must pay for them at the contract rate, while sections 14(2 and 3) and 15 (2 c) make provisions with respect to the good being fit for the purpose and of merchantable quality.

The duty to deliver the right quantity contains a rider namely; the right to reject the good by the buyer due to supply of less than required quantity. This provision as it is can obtain in an ordinary contract of sale. In the contract of sale of petroleum product which is delivered straight into the tank of the vehicle in the case of PMS, it is difficult to ascertain the actual quantity of the product delivered. The operator of the dispensing pump punches the pump for the number of litres of fuel requested and supposedly delivers that quantity. Ascertaining whether the quantity is less than that agreed upon depends on the ability of the buyer to read his fuel gauge in the car, assuming such a gauge is working. Moreover, after the product has been dispensed, the buyer pays even before starting his car to check the quantity delivered where he could read the gauge. The possibility will be better and easily achieved where the product is delivered maybe in a gauged or calibrated container where the product is not delivered directly unto a vehicle tank, for instance purchasing the PMS for uses other than for driving cars which would be by direct delivery. The situation is worse in this country where tampering with meters of dispensing pumps is a usual system obtainable in our petrol stations. Fuel stations are known to adjust their metres to deliver lesser quantity²⁵. The tinkering affects all the three products, namely PMS, AGO and DPK. The delivery of the right quantity of the good and the right of rejection as provided by the law seem a far-fetched possibility, considering the mode of operation in the country.

²¹ *Ibidi.*, Section 27.; *Ibid.*, Section 540

²² Section 29(5)

²³ *Ibidi.*, Section 30 (1)

²⁴ *Ibidi.*, Section 14 (1and2)

²⁵ Dr. Seyi Roberts, The Great Petrol Scam, The Guardian, Tuesday, January 8, 2008, 9

The goods being fit for the purpose and of merchantable quality is an abandonment of the original common law rule of *caveat emptor*.²⁶ These provisions are implied conditions which offered the buyer some degree of protection, especially when read together, such that where the good is merchantable but still unsuitable for the buyer's purpose,²⁷ it would be regarded as lacking the right quality and thereby rejected. This view of Atiyah of a good being of merchantable quality and still not fit for the purpose, is with utmost respect, incomprehensible. Merchantability and fitness for purpose go hand in hand and constitute the prime quality of the good. In fact they are the two sides of a whole which is the quality. Differentiating one from the other symbolizes an attempt to differentiate between tweedledee and tweedledom, which is impossible because both mean one and the same thing. The merchantability of the good is because it is fit for the purpose and vice versa. It resembles the snail with its shell, inseparable. It is on this standing that we believe that the Anambra State Contracts Law provision for quality or fitness under S 538 as shown above without providing further for merchantable quality is a better provision.

In application, the petroleum product offered to the buyer is of quality where it is merchantable and fit for the purpose for which it is procured. The discharging of this duty at the point of purchase is only known to the seller. To determine the quality of the product the buyer must have put it in use. Where it is the purchase of PMS for a car, the car would have been started and driven out of the station to ascertain whether the PMS could power the engine or not. It is only on very rare and remote occasions that after procuring fuel the vehicle engine could not start due to the quality of the fuel.

Most users of petroleum products cannot ascertain the quality of these products due to lack of the requisite chemical knowledge to enable them know the qualities of the good products and also the opportunity for those few who possess the knowledge to find out the quality before dispensing. For instance, most Nigerians cannot categorically tell the colour of PMS – whether water-colour, red or pink. Also the products' suppliers do not help matters either, as a product like the PMS can possess different colours depending on the source. Time there was, when imported PMS was identified with the colour red and locally refined one was plain. Therefore, the customer depends on the producer/manufacturer/marketer and allied participants in the production and distribution for the quality of petroleum products. These products are purchased in the belief that they are merchantable and fit for their purposes.

As noted above, in each situation the chance of rejection is very remote as payment would already have taken place. The only remedy available to the buyer, due to the nature of the contract, is legal action for redress in damages and or compensation.

The duties of the buyer as expressed by Atiyah²⁸ are two namely; the duty to pay the price and the duty to take delivery. But to us, with reference to the nature of the contract involved, these duties are two sides of the same coin. They are like siamese twins. The Sale of Goods Act aligns itself with this position where it provides that delivery of goods and payment of the price are concurrent conditions, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price

²⁶ P. S. Atiyah, **The Sale of Goods**, 6th Ed, Pitman Publishing Ltd, London 1981, 85,

²⁷ *Ibid*, 86.

²⁸ *Ibid*, 171 - 176

in exchange for possession of the goods²⁹. This concurrent position as it is referred to by the Act rhymes with the practical situation with regard to the sale and purchase of petroleum products. These goods are delivered at the point of sale and payment made at once. Except in very extraordinary and peculiar situations will products be paid for without delivery or vice versa. Such situations are described as peculiar and extra-ordinary by reason of the fact that such situations obtain in very strange business climes like Nigeria when there is scarcity of such products and these goods are stored and kept away for certain agencies and or individuals. However, such extraordinary and peculiar situations had been ordinary and normal in this country where the availability of these products had for years been the aberration instead of the norm. But the situation has positively changed for the better since the mantle of leadership of this country fell on President Goodluck Jonathan.

But the question which naturally arises is where a petroleum product like the PMS is alleged to have caused the engine knock of a vehicle and the filling station operator denies liability insisting that the fuel he sold was of good quality and could not have caused the alleged problem, how will the law deal with the situation in the face of our adversarial jurisprudence of - he who asserts must prove? How will the consumer whose car engine knocked establish that it was that fuel he purchased which caused the engine knock for if he drove the car into the station where he purchased the fuel, there was obviously some quantity of fuel in his car before he purchased the alleged injurious fuel. If his car had no problem before he bought the fuel, it may be taken that it was the fuel he bought which caused the problem. But in the face of the denial of the filling station operator, is the fuel content of the car not supposed to be chemically analyzed to determine its nature and chemical composition to see if it could actually cause the engine knock? Where are laboratories with facilities to undertake such chemical analysis if not only at the depots? The legal strictures in the way of such an injured consumer of petroleum product occasioned by the requirement of proof and absence of independent laboratory outfits constitute a great hindrance to success in such litigations.

Will the law not in this kind of situation create a different legal obligation or burden or standard of proof casting the burden of establishing the fitness of the PMS on the filling station operator once the allegation is made that it caused the injury complained of? In the alternative, the law should reduce the burden of proof placed upon the plaintiff to something less than the usual preponderance of evidence so as to enable him establish his case upon minimal proof and not requiring him to go into the technical proof requiring laboratory analysis of the product complained of.

This legal approach will definitely make the filling station operators sit up more and indulge much less in adulterating the products in such a way as to adversely affect their quality.

Conclusion

The petroleum product is a product available in the market for any interested purchaser with the wherewithal to purchase. The market is the petrol station or outlet which is where such specialised products are meant to be sold in Nigeria, and as such, the outlet is their market overt. Likewise, the buyer or consumer of a petroleum product who purchased it from such an outlet is as much a buyer like any other buyer of any good or service offered in a market. Therefore, all the attendant rights and responsibilities attaching to any buyer or purchaser of

²⁹ Section 28, Sale of Goods Act 1893, Section 540 Contracts Law CAP 32 Laws of Anambra State, 1991.

any good or service attach to him. A contractual relationship is established at the point of sale and purchase of any of these products. Hence when such a consumer or purchaser is injured by the consumption of any petroleum product bought in the usual manner at the normal place, he is entitled to all the available remedies. The fact of the contract entered into by conduct does not and should not affect the right of the purchaser or consumer. When he is injured by the consumption of the product the legal remedial consequence should follow. This is the natural flow of events and it tallies with the age-old legal maxim- where there is a right there is a remedy.