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RISK AND FRUSTRATION AS APPLIED IN SALE OF GOODS: WHO BEARS THE BRUNT OF UNFORESEEN CONTINGENCIES?

*Osuntogun Abiodun Jacob**

1. INTRODUCTION

There is no guarantee or certainty in life. Everything in life, including commercial transaction, has an element of risk. Goods which are the subject-matter of contract of sale can deteriorate. In fact, they can be partially damaged or completely destroyed. Even if the goods are immune from the vicissitudes of life and are not subject to accidents or vagaries that can alter or affect their quality, it is still possible for the contracts under which they are sold to be frustrated by some supervening events. However, since goods have no such immunity, it is important to examine who bears the risk if they are damaged, lost or totally destroyed. The essence of this inquiry is to throw more light on the relationship between the parties and eventually contribute significantly in determining their obligations.[1]

In the meantime, it is important to note that risk and frustration[2] are not the same; they are, however, related.[3] When goods are destroyed or damaged, "the two sets of principles" may be relevant in order to determine the rights of the parties.[4] But the difference between them lies in the quantum of their protection. If frustration is proved, it absolves all parties completely because it brings the contract to an end. The same cannot be said of risk, whose protection, in most circumstances, is partial in nature, because it releases one

*LLB (University of Lagos, Nigeria), BL, LLM (Obafemi Awolowo University, Nigeria), MA (University of Ibadan, Nigeria), LL.M (University of Pretoria, South Africa), CILS (American University Washington DC, USA), PhD (University of Witwatersrand, South Africa). Osuntogun, Abiodun Jacob is Senior Lecturer in the Department of Commercial and Industrial Law, University of Ibadan, Nigeria. E-mail: osunfolak@yahoo.com

[1]Note however that there are other related issues that must be examined first which are: whether the buyer is liable to pay the price in spite of the fact that the goods are lost or damaged; whether under the contract, the seller has a duty to replace the lost or damaged goods; and whether the seller is liable to the buyer for damages for non-delivery or wrongful delivery.

[2] Note also that when a contract cannot be performed, because of one thing or another which rendered performance impossible without the fault of any of the parties, such contract is said to be frustrated.

[3] The doctrine of frustration is said in the past to be 'an aspect of the general rules as to risk' but the view is not entirely correct; see, John Adams and Hector MacQueen, *Atiyah's Sale of Goods* (2010), Longman, England. 342.

[4] *Ibid.*

party only from his obligations and the second party may still be liable. Atiyah explains how this can occur when he notes that;

> *If an executory contract is frustrated, neither party is under any liability to the other. On the other hand, if the goods are at the seller's risk and they perish or deteriorate, although the buyer is not liable to the seller for the price, it is possible that the seller can be liable for non-delivery if the buyer can prove that "he has suffered loss there from.*[5]

On the other hand, if goods are damaged, at the time the risk has passed to the buyer, the buyer will be liable to pay the price, even if he never received possession of the goods.[6]

In spite of that, risk is an important subject in sale of goods. It is one of the three incidents of sale of goods. Other incidents are transfer of property and delivery of possession. At the commencement of the contract of sale, all three are residing with the seller who has a duty to transfer them to the buyer.[7] Risk is not defined in the Act but is mentioned in four sections of the Act.[8] Surprisingly, it is not even explicitly mentioned in terms of right or obligation of the parties. Concomitantly, Igweike argues that "there is no right of action accruing to the buyer for failure of the seller to transfer it."[9] However, it is submitted that this comment is not completely correct. According to Sealey, risk is "a derivative and essentially a negative concept"; the legal consequences attached to it can be gleaned "in terms of the parties' other duties and the corresponding rights and remedies."[10] Given that logic, it is safe to conclude

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[5] *Ibid.*

[6] Ewan Macintyre, *Blackstone's Commercial Law* (1998) Blackstone Press Ltd. Great Britain. 72; infra, note 12.

[7] See S3 (1) of Sale of Goods, Oyo State Law CAP. 149 2000 (Oyo), which is in pari material with s1 (1) of the 1893, Sale of Goods Act (SOGA) and S3 (1) of Sale of Goods Law, the Laws of Lagos State of Nigeria 2003, Volume 7 provides that "the seller agrees to transfer the property in goods to the buyer"; S28 of Oyo, S27 of SOGA and S28 of Lagos, also provides that "it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them."

[8] See, Kingsley Ikem Igweike, *Nigerian Commercial Law: Sale of Goods,* Third Edition, Malthouse Ltd., Lagos, Nigeria. 125; S6 of SOGA, S7 of Oyo and Lagos, supra note 7, on goods that were perished before sale; S20 of SOGA, S21 of Oyo and Lagos, supra note 7, on risk prima facie passes with property; S32(3) of SOGA, S33(3) of Oyo and Lagos, supra note 7, on goods sent by a route involving sea transit; S33 of SOGA, S34 of Oyo and Lagos, supra note 7 on where goods are delivered at a distant place.

[9] Ibid.

[10] L.S. Sealy 'Risk in the Law of Sale' [1972]31 CLJ 225 at 226 noting that "risk is a derivative and essentially a negative concept - an elliptical way of saying that either or both of the binding obligations of one party."

that if the right dealing with risk can be gleaned from other terms in the contract of sale dealing with duties and the corresponding rights and remedies, then, the right can also be enforced through the same process. Consequently, there can be a right of action on risk but that right of action is embedded in 'other duties and the corresponding rights and remedies' of the parties.[11] An example of this can be found in *Orji v. Anyaso*[12] where the Court of Appeal held that the right of the respondent to compensation and special damage for breach of contract will depend on the determination of where the risk resided between the parties. Olagunju J.C.A. opined that:

> *if by operation of the law governing the transaction between the parties, the equipment was at the respondent's risk since 10/9/92", the judgment of the trial court awarding special damages and compensation for repairs to the equipment and replacement of some of its parts lacked "factual basis because of failure to determine the particular point in time when the damage occurred.*[13]

The court, therefore, set aside the judgment of the trial court for the same reason. However, taking a cue from how the term used in those sections where it was mentioned, it is reasonable to infer that risk is the negative outcome of accident on good which can affect its existence, quality or appearance. This accident can result in the loss of the goods, partial or total destruction, and deterioration in quality or simply damage. It follows therefore, that risk dealing with honesty or insolvency of the other party, as well as that of the adverse change in the market situation was not covered.[14]

2. THE COMMON LAW RULE

The common law places the transfer of risk to where the property resides. If the property resides with the seller, the risk revolves on him and vice versa; if property is transferred to the buyer, risk shifts to him. Thus, risk moves with

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[11] Another thing is that it is difficult for the buyer to enforce the right of action on risk directly without linking it to other remedies and duties which they have in the agreement because risk is a negative concept.

[12] [2000] 2NWLR (pt. 643)1

[13] *Ibid* at 33.

[14] Igweike, op. cit., 126; he noted that these risks of changes in circumstances are "failure of source of supply of the goods, outbreak of war or hostilities and even death or insanity of either party." However, it should be noted that those risks can still be covered; it is not possible for the Act to exhaust the list of risks covered.

the property. This rule is explained by Blackburn J. in *Martineau & others v. Kitching,*[15] when he notes:

> *As a general rule, res perit domino, the old civil law maxim, is a maxim of our law; and when you can show that the property passed, the risk of the loss prima facie is in person in whom the property is. If, on the other hand, you go beyond that and show that the risk attached to one person or the other, it is a very strong argument for showing that property was meant to be in him. But the two are not inseparable. It may very well be that the property shall be in the one and the risk in the other.*

This common law rule *res perit domino*, which means risk passes with property, has been codified in to the statutory provisions.[16] The implication of the principle is that risk resides with who owns the property regardless of who is in possession or control of the goods. In *Tarling v. Baxter*,[17] a contract to sell haystack was made on the 6th of January. The price was to be paid on 4th of February and the haystack was not to be moved before 1st May. On 20th January, the haystack was destroyed by fire, court held that property had passed to the buyer on the 6th of January and should therefore be responsible for loss occasioned.

Of course, the issue of risk is contemporaneous with that of transfer of property and the question of where the property resides will determine who bears the risk. This was compatible with the reasoning of the court in *Orji v. Anyaso* (supra) where the court noted that "the passing of the property in the equipment and correspondingly the risk to the respondent is also a matter that ought to be examined before assessment of damages."[18] Thus, the court set aside the judgment of the trial court for awarding damages without considering the issues of transfer of property and risk. No doubt, the judgment of the court in that case was correct. Since risk passes with the property, it is important to "determine the particular point in time when the damage occurred" before the rights of the parties can be rightly and reasonably decided. Consequently, if the damage occurs when property has not passed to the buyer, the seller bears the

[15] [1872] L.R. Q.B. 436 at pp. 453-454.

[16] See, S20 of SOGA, S21 of Oyo and Lagos, supra note 7, which provides "unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not."

[17] (1827)6 B & C 360.

[18] *Orji,* supra note 12 at 33.

risk but if it has passed, it is obvious the buyer bears the risk. In the same case of *Orji v. Anyaso*,[19] the appellant who was the plaintiff at the trial court had delivered the equipment to the respondent who was the defendant at the trial court on the strength of which the delivery and payment of balance were acknowledged in a document signed by both parties. The Court of Appeal held that since after he had received delivery, the respondent dismantled the machine, carried out repairs and replaced some parts of the equipment, without consulting the appellant, he is deemed to have accepted the goods in line with the provision of the Act.[20] According to the court, the consequence of acceptance is that the property has passed to the respondent before the damage occurred. The respondent must then bear the risk of damage thereafter.

Similarly, in *Wardar's Import & Export Co. Ltd. v. W. Norzvood & Sons Ltd.*,[21] the defendant who had 1500 cartons of kidneys in a cold store sold 600 cartons of them to the plaintiffs and issued a delivery order to that effect. When the plaintiffs' carrier arrived at the store, he presented the delivery noted and loading commenced. Two hours after the commencement of loading, it was noticed that water was dripping from the cartons. In spite of that discovery, loading continued for two more hours until all the goods were loaded. On arrival at their destination, it was later found that the goods were not fit for human consumption. The counsel to the plaintiff argued that the risk did not pass until all the goods were completely loaded on to the lorry. The Court rejected this argument and applied the common law rule of *res perit domino*. It held that property passed[22] to the buyer when the warehouseman/porters accepted the delivery note and since the damage to the goods occurred after the risk had passed to the buyer, the risk fell on him.

3. EXCEPTIONS TO THE RULE

There are some statutory and judicial exceptions to the general rule that risk passes with the property because the two are not inseparable. The first of the exceptions is directly provided for in the provision incorporating the general rule by using the phrase "unless otherwise agreed" to make room for a situation in which parties can agree to vary or dispense with the general rule. [23]

[19] *Ibid.*
[20] *Ibid.*
[21] [1872]L.R. Q.B. 436
[22] The Court notes that property will not pass just because delivery order was issued since the goods were not yet appropriated but property passed to the buyer when the warehouse man accepted the delivery order.
[23] This is known as contrary agreement to the general rule.

Importantly, due to literal interpretation of the phrase, the Courts in England have rightly accorded priority to the intention of the parties rather than to the general rule. As Lord Normand said:[24]

> *...In the law of England ...it has been found necessary to provide for the passing of the risk to the buyer before the property passes to him if the parties so agree. It may be conceded that the parties can agree to some purely artificial allocation of the risk and if they express that agreement in suitable language in the contract it must somehow be given effect.*

Thus in *Martineau & others v. Kitching*,[25] where the parties agreed that the goods were to be 'at seller's risk for two months,' the court held that the general rule will not be applicable for those two months as the court could not ignore the intention of the parties. However, since the loss occurred in that case after two months, the court held that the risk in the instance fell on the buyer.

The same situation applies in Nigeria where the courts have adopted the same approach not to meddle with the intention of the parties. In *Afrotec v. MIA & Sons*,[26]Kutigi, a former chief Justice (then J.S.C.) who delivered the leading judgment of the court throws light on the Nigerian approach when he insisted that they must give effect to the intention of the parties and should not "be seen as rewriting the agreement between" them. In certain cases, the intention of the parties may be in compatibility and not in exception to the general rule. Whatever it may be, the court's duty is to enforce it. Thus, in *Emaphil Ltd. v. Odili*[27] where one of the issues for determination was to determine whether the risk in goods passes separately without the property passing with it, the Court of Appeal held that it was the intention of the parties that property and risk should pass to the respondent on the delivery of the goods.

In any event, unlike parties to contract of sale who can agree to allocate risk on some purely artificial indices, the common law and statute allocates risk only where there is a genuine reason to do so. Thus, if as a buyer, property has been transferred to you, it is appropriate that you should bear the risk of loss.

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[24] See *Comptoir D'Achat et de Vente du Boererbond Belge S/A v Luis de Ridder Lamitada* (hereinafter the *Julia*) (1949) AC 293.
[25] *Martineau*, supra note 15.
[26] [2001]1S.C.M.1 at 21.
[27] [1987] 4 N.W.L.R(61)915.

However, the courts have established the second exception to the general rule that flow from the same principle. *Sterns Ltd. v. Vickers*[28] is a good example of where risk passed before property. In that case, the court opined that if you do not have the property or possession but you have an "intermediate and practical interest" in the goods, the risk shifts to you. In that case, the defendants sold to the plaintiffs 120,000 gallons of spirit which was part of a total quantity of 200,000 gallons in a storage tank belonging to a storage company and handed to them a delivery warrant, whereby the storage company undertook to deliver that quantity of spirit to the plaintiffs' order. The spirit deteriorated in quality between the time of sale and the time when the plaintiffs eventually took delivery of the 120,000 gallons. Even though, the property had not passed because there had been no appropriation, the court of Appeal held that upon the acceptance of the delivery warrant, the risk passed to the buyer and they must bear the loss.

A critical look at the exception shows that it operates to shift the risk to the buyer if the effect of an "intermediate and practical interest" (which the buyer has acquired) is to show that the goods have become his goods and they no longer belong to the seller even though property has not really passed. Thus, Scrutton, LJ said:

> *...The vendor had done all that they undertook to do. The purchasers had the right to go to the storage company and demand delivery, and if they had done so at the time they would have got all that the defendants had undertaken to sell them. What the purchasers here are trying to do is to put the risk after acceptance of the warrant upon persons who then had no control over the goods, for it seems plain that after the acceptance of that warrant the vendor would have had no right to go to the storage company and request them to refuse delivery to the purchaser.*[29]

In such a situation, it is axiomatic that the buyer should bear the risk of loss. However, if the so-called interest of the buyer is a mere interest without any proprietary value which can occur if the interest is in the form of a mere promise without a contractual flavor, then, the buyer will not bear the loss. In the *Julia* case,[30] the court endorsed the decision in *Sterns* but distinguished it to enable it reached a different decision. It is noteworthy that the main point of

[28] [1923]1KB 78.
[29] *Ibid* at 84-85.
[30] See, *Julia*, supra note, 24.

distinction between the two cases was the extent of the interest of the buyers in both cases. In *Julia*, unlike *Sterns,* the sellers and not the buyers had practical and real interest in the goods. Of course, the real and practical interest of the sellers in Julia was also supported by the undertaking made by the sellers in the contract to assume liability for condition of goods on arrival and for deficiency at discharge on bill of lading and weight.[31] With such evidence, the court could not but apply the general rule. Thus, Lord Normand opined that the general rule of *res perit domino* was applicable in the *Julia* case since "the buyers had no more than a promise to deliver a part of the bulk cargo" to them.[32]

Furthermore, Lord Normand also reviewed some of the cases on this exception and came to the right conclusion that in all the cases where this exception had been held to apply, "the buyer rather than the seller was seen to have an intermediate and practical interest in the goods."[33] Considering the cases of *Sterns*, *Inglish v. Stock*,[34] and even *Julia*, there is no doubt that Lord Normand's view is correct. In *Inglish v. Stock*,[35] the buyer of an undivided bulk obtained an insurable interest in the goods. The court held that because he had acquired the right to insure; he had an intermediate and practical interest in the goods. Similarly, in *Sterns*, acceptance of delivery warrant gave the buyer an intermediate and practical interest in the goods. On the contrary, in *Julia*, the practical and real interest in the goods still remained with the sellers. Therefore, the court held that there was no need to apply the exception to displace the general rule.

The third exception also emanates from a proviso to the same statutory provision which provides that where there is delay in delivery of goods through the fault of either buyer or seller, the goods are at the risk of any of the party at fault as regards any loss occasioned by the delay.[36] In *Demby Hamilton & Co. Ltd. v. Barden*,[37] the defendant agreed to buy 30 tons of crushed apple juice to be delivered in weekly loads. The seller crushed the apples and put the juice in casks pending delivery. The defendant was late in giving delivery instruction and some of the juice went bad. The court held that the buyer was liable. Quoting the dicta of Blackburn J., in *Martineau & others*

[31] Note that a clause in the agreement also provides that "all average should be for seller's account."
[32] *Julia*, supra note, 24 at 320.
[33] *Ibid.*
[34] (1885) 10 App Cas 263.
[35] *Ibid.*
[36] See, S20 of SOGA, s21 of Oyo and Lagos, supra note 7.
[37] (1949) 1 All ER 435.

v. Kitching supra,[38] the court clarified the extent of the liability of the party at fault. It opined that the party at fault is not to bear all the risks arisen from the damage or deterioration to the goods but he is expected to bear only the risks "which might not have occurred but for such delay." In that sense, it is crucial to note that if the party at fault is to bear the loss occasioned by his delay, then the issue of causation is likely to come in. In considering that issue, there is the tendency to shift the burden of proof to the party at fault. However, the effect of the burden of proof on this exception had been considered by Sellers J., who opined that the exception does not place the onus on the party in default to show that the loss could not have occurred but for his delay. [39]

Interestingly, the fourth exception arises when one of the parties changes his status to become a bailee of the other party in respect of goods which are the subject-matter of the contract of sale. By virtue of that new status, the party assumes responsibility for the risk of loss, damages or depreciation contrary to the general rule. This is so because the general rule preserves the common law duties and liabilities of bailees to the extent that a party who turns out later to be a bailee cannot rely on the statutory or general rule to evade his duties under that position.[40] On the issue of liability, there is no uniformity in allocating burden of proof to bailees. Richard argued that "Bailees who fail to live up to their contractual obligation become *prima facie* liable for breach of contract."[41] That breach of contract is usually in negligence. While this exception is simple to apply, the question of the quantum of standard of care that should be required from a bailee has been a problem in the past. It has been argued that if the time for delivery has not expired, "a seller in possession of the buyer's goods" can only be liable for ordinary negligence only since as a bailee for reward, "the price of the goods should include their custody by the seller till the time fixed for delivery or for a reasonable time."[42] The implication of that argument is that if the time of delivery has not passed, the seller can escape liability for ordinary negligence. The court in *Sharp v. Batt*[43] relied on this argument to hold that the seller was not liable for his failure to

[38] Blackburn J noted that if "...non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property has passed."

[39] Ibid at 437. He noted that it is the duty of the "jury [to] look at them in order to see whether the loss can properly be attributed to the failure of the (party) to take delivery of the goods at the proper time."

[40] See, second proviso to s 20 of SOGA, s21 of Oyo and Lagos, supra note 7.

[41] On this, see, Richard. H. Helmholz, 'Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care,' (1992) (41) *University of Kansas Law Review* 97-135 at 109 to 118.

[42] Benjamin on Sales, 7th edn p.427, citing 3 Salk 61 & US case of Koon v. Brinkerbaff [1886] 39 Hunt 130.

[43] [1930]25 Tas L.R. 33.

wrap the standard grape pies which he had purchased for shipment on April 22, although the goods developed fungal diseases due to that failure. Ordinarily, the court reasoned that the seller should had been liable for his failure to wrap the standard grape pies which he had purchased for shipment on April 22, but since he had prepared the goods ready for shipment on that day until he received further instruction to postpone delivery till May 20, his conduct could not amount to gross negligence. The reason for the court's decision was that since the date of delivery had been postponed and damage to the goods occurred within the time of delivery, the seller could be absolved of liability. While Sharp's decision is commendable, its reasoning is no longer tenable in the modern day.[44]

Indeed, the duty of the bailee to take reasonable care of the goods in his custody is a fundamental principle of law both under the common law and the statutory provision that it could not be defeated by a fine-tuned legal distinction between gross and ordinary negligence aimed to shift liability to the buyer instead of the seller who has become a bailee of the goods. In *Ogugua v. Armels Transport Ltd.*,[45] the major issue for determination was whether it was necessary to distinguish between negligence and gross negligence in bailment cases. In that case, the plaintiff/respondent sued the defendants at the high court claiming £4,821.8 as special and general damages for the loss of his Mercedes Benz car entrusted to the defendants for repairs but which was abandoned by the defendants in their workshop when Aba was over-ran by federal troops in 1968. The defendants claimed but failed to proof that the plaintiff at any time agreed to evacuate his car from their workshop. The trial court held that the defendants were liable because as bailees for reward, they failed to exercise the duty of care imposed upon them by law. On appeal, the learned counsel for the appellants argued that from the moment the plaintiff accepted to be responsible for the evacuation of his car, the contract for repair had ceased to exist, that the defendants had assumed the role of a gratuitous bailee and that, in that case, for the defendants to be liable, they must had been guilty of gross negligence. In contrast, the Supreme Court was not persuaded by that argument. It affirmed the judgment of the trial court and held that in bailment, it is no longer the law to classify negligence into degrees of epithets like gross or ordinary for the purpose of determining the liability of the bailees. Ibekwe J.S.C. who read the leading judgment of the court said:

[44] Atiyah comments on this case briefly in the footnote, see, John Adam, supra note 3, footnote 35 at 34 noting that the decision has "no currency in modern law."
[45] [1974]NSCC 169.

> *We do not share the view that, in approaching the issue as to whether the defendants in this case failed to exercise the measure of care which in all the circumstances were demanded on them, regard should be had as to as to whether their conduct amounted to what is generally referred to as 'gross negligence'...Viewed in the sense of a breach of the duty to take care, which is really what concerns us in this case, it seems to us that there are no degrees of negligence. Any breach of duty of care, whether grave or venial which cause a loss constitutes, in our view negligence.*[46]

With that case as precedent, it is obvious that the issue of categorization of negligence is limited to criminal matters in Nigeria. Therefore, such discussion in civil matters is nothing but a mere academic exercise.[47]

4. RISKS WHERE GOODS ARE TO BE DELIVERED TO A CARRIER

The Sale of Goods Act[48] enacts rules to govern the passing of risk where the goods are to be delivered to the carrier for the purpose of transmitting them to the buyer. It provides that "where goods are delivered to a carrier for transmission to the buyer, this is *prima facie* deemed to be a delivery of the goods to the buyer provided the carrier is independent of the seller."[49] The implication of this provision if the carrier is not a surrogate of the seller is that the risk will pass to the buyer as soon as the seller delivers the goods to him.[50] The word independence here means the carrier is not subject to the control of the seller. Thus, the carrier must not be his agent, employee or surrogate under any circumstances. If he is, the rule will definitely not apply.

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[46] At 173, it should be noted that the court cited many foreign cases to show that the English law has also departed from indulging in such dichotomy to determine liability of bailees.

[47] See, Igweike, op. cit., note 8. He is correct to express the view that such distinction has become a mere academic exercise and no longer significant because "the tendency of the courts today is to regard the duties of all bailees within one general, though variables, standard of care dependent upon all the circumstances of each case."

[48] See, s 32(1) of SOGA, S33 (1) of Oyo and Lagos, supra note 7.

[49] *Ibid.*

[50] See Lord Cottenham in *Dunlop v. Lambert* [1839] Cl & Fin. 600 at p. 620-1 where he opined that "the delivery by the consignor to the carrier is a delivery to the consignee and the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance. The delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risks of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent." In *Nads Imperial Pharmacy v. Messers Siemsqluese & Sons & Anor.*, [1959] LLR 21, where a Lagos High Court held that unless the parties express contrary intention, delivery by the seller to the carrier is deemed to be a delivery to the buyer.

Of course, delivery of goods to the carrier, according to Lord Cottenham, is not incompatible with the general rule that risk passes with the property. However, the problem that often arises in the application of the rule is that the goods might be eventually destroyed or damaged in transit to the extent that the buyer may not be opportune to physically possess them. If that occurs, the buyer is still under an obligation to pay the price of the goods to the seller since the risk has passed to him the moment the goods are delivered to the carrier. In *Frebold & 1 other (Trading as Panda O.H.D.) v. Circle Products Ltd*,[51] the Court of Appeal held that the seller of toys (Panda) was entitled to the payment of £ 845 the moment it had completed its own part of the bargain by putting the toys on board and that the risk of 'mishaps' that occurred thereafter had passed to the buyer (Circle).[52]

In contrast, risk and property may not pass at the same time but separately. Two examples of such exceptions[53] to the general rule are statutorily provided. The first one arises if the seller fails to make a reasonable contract with the carrier.[54] In such a situation, the reverse will be the case as the seller and not the buyer will bear the risk if the goods are lost or damaged in the course of transit. [55] The second exception deals with the failure of the seller to carry out the duty imposed on him to give notice that may enable the buyer to insure the goods where goods are to be sent to the buyer by a route involving sea transit.[56] Like the first exception, failure to do that will trigger the second exception to the general rule and the goods shall be at the buyer's risk during that sea transit, irrespective of whether property has passed or not. A Warri

[51] [1970] 1 Lloyd's Rep. 499.

[52] Note that it was an f.o.b. contract; thus the court held that the sellers were not in breach as they had delivered the goods in accordance with the requirements of the contract by shipping them in such a way as would normally have resulted in their arrival in time for the Christmas trade.

[53] Another exception can also occur due to reservation of title clause in S19 of the 1893 Sale of Goods Act. If the seller exercises this option to keep the goods at his disposal till the fulfillment of a certain condition, property will not pass to the buyer until the condition is fulfilled although risk should have passed.

[54] S32(2) provides that "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case." *Young v. Hobson* (1949) 65 TLR 365 the Court held that the buyer was entitled to reject the goods because the goods sent by rail could have been sent at carrier's risk instead of the owner's risk considering the nature of the goods.

[55] Ibid, since according to the Act, "the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."

[56] S32 (3) provides "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."

high court applied the provisions of this Act in *Ogbe v Kofi*.[57] In that case, the seller dispatched 104 bags of cement to the buyer at Warri by an Akiriboat through the carriers who carelessly dumped the bags of cement at the open wharf, without any covering documents and without informing the buyer of the arrival of the goods. As a result, the goods were lost. The court held that since the goods were dumped at the open wharf without any covering documents and the seller did not give advance notice of the imminent arrival of the consignment to the buyer (plaintiff) in breach of S32 (2) and (3) of the Act, the seller (defendant)will bear the risk of loss.

Of course, it is submitted that the seller can comply with this requirement (notice to insure) by just informing the buyer of the notice of shipment. Thus, in *Wimble, Sons & Co. v. Rosenberg & Sons*,[58] the ship sailed on 25 August and was lost the next day. Although the seller gave notice of shipment to the buyer on the 29, yet, the court held that the buyer should have insured the goods because he had sufficient information to do so. Consequently, the seller was not liable.

5. RISKS WHERE GOODS ARE DELIVERED AT A DISTANT PLACE

Where goods are to be delivered at distant places, the risk of deterioration is split or shared between the seller and the buyer, irrespective of who owns the goods. However, the parties can displace the provisions of the Act,[59] if they express contrary intention to do so. In essence, for the provisions of the Act to apply, the seller must agree to bear the risk. This risk is for extraordinary and unusual deterioration.[60] At the same time, the Act imposes another aspect of risk on the buyer. This statutory risk (unlike the one induced by the agreement of the seller) covers necessary deterioration which is subject to the course of transiting the goods from one place to another.[61] Indeed, this shared-risk

[57] (Unreported), Warri H/C suit No.W/BA/76, see also *Wimble v. Rosenberg* [1913] 3 K.G. 743; *Northern Steal & Hardware Co. Ltd. v. John Batt & Co. Ltd.* [1917] 33 T.L.R. 516.

[58] [1913] 3 KB 743.

[59] S33 of the 1893 provides "Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

[60] Risk due to accident or casualty.

[61] The drafters of the Act were influenced by a passage in the judgment of Anderson, B in *Bull v. Robinson* (1854)10 Ex 342,346:102 RR620. that 'A manufacturer who contracts to deliver a manufactured article at a distant place, must indeed stand the risk of any extraordinary and unusual deterioration, but the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to its course of transit from one place to another." On its adoption by the drafters of

scenario creates an exception to the general rule that risk passes with the property.[62] In spite of that admission, the effect of decision in *Beer v. Walker*[63] on the general rule has been controversial. Some scholars contend that the judgment of the court in that case is not compatible with the general rule,[64] while others insist it does.[65] In that state of uncertainty, it is crucial to note, that the House of Lords affirmed the principle of law enunciated in Beer v. Walker. It held in *Marsh & Murrell Ltd. v. Joseph I. Emmanuel Ltd* [66] that the condition which provides that the goods must be merchantable is a continuous obligation, not only at the time the goods are put on the rail but at the time of delivery or a reasonable time thereafter.[67]

6. RISK WHERE THERE IS MISTAKE

Mistake is one of the vitiating elements of contracts.[68] Under the common law, there are different categories of mistake[69] that can vitiate a contract but the one that is similar to the statutory rule[70] in Sale of goods is the common mistake. Common mistake occurs in contract where both parties make the same mistake. That mistake is fundamental in the sense that it goes to the root of the contract. Example of such mistake is where the subject matter of the contract was no longer in existence at the time both parties entered in to the agreement. The position of the common law is that such a contract is void and of no effect. Perhaps, it is important to illustrate this common law principle

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the 1893 Act, see, Seighart, Chalmer's Sale of Goods, 116 (13th Edn). He notes "there appeared to be no reason for confining the rule to the case of a manufacturer."

[62]See, Igweike, op. cit., note 8 at 158 he argues that "It is possible in some cases for the property in the goods to pass to the buyer, while the risk of deterioration rendering them un-merchantable or unsuitable for the purpose for which they were bought remains on the seller"; see, John Adam, supra note 3, at 345, Atiyah notes that "a fairly common instance of express agreement, under which the property passes before the risk occurs where the seller agrees to dispatch specific goods at his own risk to the buyer."

[63] [1877], 46 L.J. Q.B. 677. In that case, the buyer was held entitled to reject rabbits which arrived in Brighton by rail from the place of shipment in London due to the fact that the rabbits arrived at Brighton unfit for human consumption, although they were sound and saleable when sent off from London.

[64] See, Igweike, op. cit., note 8 at 159.

[65] See, Seghart, Chalmer op. cit. note 61 at 116.

[66] [1961] I, All ER 485.

[67] See *Lambert v. Lewis* [1982] AC 225,276.

[68] Some other elements are illegality, misrepresentation and duress.

[69] There are common mistakes, unilateral mistakes where one person is making a mistake and mutual mistake where parties are not in agreement at all though they concluded the contract thinking they are.

[70] Section 6 of the 1893Act provides "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

with at least one of the *res extincta* cases. In *Couturier v. Hastie*,[71] a cargo of corn was shipped from a Mediterranean port to England. Unknown to the parties, due to deterioration of the goods, the master of the ship had to dispose the goods to save the owner of the goods from irreparable loss. Believing that the goods were still on transit, Hastie, the owner of the goods sold them to a buyer in London. The learned counsel to the owner/seller argued that the buyer must pay the price of the goods because the risk had passed to him. In contrast, the court of Exchequer Chamber held that the contract was void. According to the court, since the parties entered into the contract on a wrong assumption, thinking that the goods sold were in existence, the buyer was entitled to repudiate the contract. The House of Lords affirmed the decision.

Since, the case was decided before 1893, it is important to discuss how the court reached its decision, particularly in regard to the requirement or issue considered before reaching the decision. In this regard, the initial thought for many years was that the court reached its decision because the contract was void for mistake.[72] However, it has now been generally accepted that the major issue that facilitated the court's decision was the manner of interpreting the contract between the parties in the case.[73] On this, there was the possibility that the court interpreted the contract in any of three possible ways.[74] One, on the basis that there was an implied condition precedent that the goods were in existence at the time of the contract. Two, on the basis that the seller warranted the existence of the goods sold; and three, on the construction that the goods were lost and the buyer had undertaken to take the risk for such loss.[75]

Of course, it is essential to limit the inquiry to consider the propriety of resolving modern-day commercial disputes to the first and second construction only, since the House of Lords has rejected the third means of construction as the ground for reaching its decision.[76]

The first deals with an implied condition in a contract of sale, while the second deals with the fact that the seller warrants the existence of the goods sold. If the court applies the first construction, there is likelihood that the

[71] [1843-60] All ER 280.
[72] See John Adam, op. cit., note 3, at 100.
[73] See Slade, 70 LQR (1954) 396 to 397.
[74] See Atiyah, 73 LQR (1957) 349.
[75] Igweike and Atiyah. See John Adam, op. cit., note 3, at 100; Igweike, op. cit., note 8 at 135 to 136.
[76] (1856) 5HLC 673.

contract may be declared void.[77] If it applies the second, the seller may be liable. Which type of construction should be preferred? In *Couturier v. Hastie*[78] in spite of the fact that some judges in the House of Lords and the Court of Exchanger noted that in a contract of sale, there should be an implied condition that the goods were in existence at the time the contract was made,[79] the House of Lords did not explicitly decide whether this particular means of construction was preferable to the second one.[80] According to Atiyah, a decision on which type of construction is appropriate "would only have been necessary if the buyer had sued for damages for non-delivery"[81] as in the case of *McRae v. Commonwealth Disposals Commission.*[82] In that case, the defendants agreed to sell a shipwrecked tanker on a definite reef to the plaintiffs. On the strength of the agreement, the plaintiff had incurred expenditure in preparing a salvage expedition but it was later discovered that there had not been any tanker and that the reef was non-existent. The High Court of Australia held that the defendants/sellers were liable for breach of contract unless, they could prove that there was an implied condition precedent that the ship was in existence.

In *Associated Japanese Bank v. Credit du Nord SA*,[83] one JB entered into a sale and leaseback transaction with the plaintiffs, under which he sold four large machines to them for over one million pound and they leased the machines back to him.[84] It was later discovered that the machines did not exist at all and the whole scheme was a fraud by the JP. The validity of the contract between JP and the plaintiffs was not the issue for determination because the plaintiffs could not sue JP who was not credit-worthy. The claim brought against the defendants to enforce a guarantee of the transaction was not

[77] Lord Atkin explained the effect of this condition in *Bell v. Lever Bros Ltd.* [1932] AC161, at 224-225, where he noted that "If the contract expressly or impliedly contains a term that a particular assumption is a condition, the contract is avoided if the assumption is not true."

[78] *Couturier*, supra note 71.

[79] In the House of Lord, Lord Cranworth, L.C. said: "...It appears to me clearly that what the parties contemplated those who bought and those who sold was that there was existing something to be sold and bought...The contract plainly imports that there was something which was to be sold at the time of the contract and something to be purchased." Colridge, J., delivering the judgment of the Court of Exchequer Chamber also stated that "It appears to us that the contract in question was for the sale of a cargo supposed to exist, and to be capable of transfer."

[80] See John Adam, op. cit., note 3, at 100.

[81] *Ibid.*

[82] (1951) 84 CLR 377.

[83] [1988] 3 All ER 902.

[84] Such a leaseback was not strange as it is a way of raising money on the security of goods.

successful as Stern J held that the guarantee contract was void either for mistake or for failure of an implied condition that the good existed.

At this juncture, it is important to consider how this means of construction can be reconciled with the statutory provision? The Act regulates cases on mistakes. It provides that "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void." This provision envisages a situation where the goods that initially existed before the contract was made were no longer in existence at the time of the contract without the knowledge of the seller.[85] If that is the situation, the cases of *McRae* and the *Associated Japanese Bank* would not be applicable in the circumstances because the goods were not in existence at all. In fact, in the *Associated Japanese Bank*, the seller knew that the goods did not exist at all and was just fraudulent. Consequently, the common law position would not be affected by these cases.[86]

Now, on the second construction, which deals with a situation where the seller warrants the existence of the goods sold. This rule of construction will be examined together with the statutory rule that regulates this transaction. As noted earlier, for the statutory rule to apply, the goods must initially exist, although, at the time of the contract, they were no longer in existence without the knowledge of the seller.[87] On this, the consequence is clear as the Act provides that such contract is void. However, Atiyah argues that such conclusion should not be final.[88] Of course, his view is plausible if the second construction is adopted in order to give effect to the intention of the parties in the case. Thus, a liberal interpretation of S55 (1) of the Act[89] will prevent "extraordinary result" of vitiating the contract at all cost.[90] If this approach is adopted, S55 will displace the effect of S6 and the seller will be liable for non-

[85] John Adam, op. cit., note 3, at 101.

[86] *Ibid.*

[87] If the seller has the knowledge that the goods no longer exists, he is bound by the contract. In *Bell v. Lever Bros Ltd* supra note 76, Lord Atkin noted that 'I apprehend that if the seller with the knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, but I know of no case where a seller has so committed himself.'

[88] *Ibid* at 102, he noted that 'It appears at first sight that the contract must be held void under s. 6, but it is difficult to believe that this can be right. If a seller, in effect, contracts that the goods are in existence, is he entitled to avoid all liability on the ground that s. 6 applies and the contract is void?

[89] It provides that 'where any right, duty or liability would arise under a contract of sale of sale of goods by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by such usage as binds both parties to the contract'.

[90] John Adam, op. cit., note 3, at 102.

delivery if the buyer sues him for damages for non-delivery. How S55 can attain this feat is not apparent on its face value. Both sections appear to be compatible without showing any slightest form of conflict. If the essence of S55 is to prevent the emergence of any right, duty or liability, and, S6 also prevents contract of sale of goods from coming in to existence, then, it may not be necessary to apply S55 again since there is no need to consider rights, duties and liabilities from those contracts that are vitiated. However, "in preventing the principal obligation from arising S6 may give rise to other rights and duties" which include the right of the buyer to recover his price.[91] In addition, if a liberal approach of S55 is adopted, a reference to "a contract of sale of goods" may also include a consideration of a contract that is void under S6.[92] In that case, since the main purpose of S55 is to allow the parties to waive or vary by agreement all the statutory rules "which do not affect third parties,"[93] the section can displace the provision of S6 which vitiates the contract if the parties intended so. Consequently, if the seller warrants the existence of the goods, S6 will not apply and the seller will be liable for non-delivery.[94]

Specifically, the Act has made clear provisions on what should be considered in cases of mistakes.[95] According to the Act,[96] three requirements must be proved if the goods will be considered void for mistake. First, the goods must be specific. This means future or generic goods are not covered by this requirement. For them to be covered, they must be in existence or appropriated. On the contrary view expressed in *Howells v. Coupland*,[97] it is important to note that the case can be explained under section 7 and not section 6 of the Act; therefore, its decision that future goods can be specific should be confined to cases dealing with frustration and not mistakes.[98] The second

[91] *Ibid at 102.*

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.* Atiyah noted that "If the seller has been negligent in not discovering that the goods have perished, it may be that the better solution would often be to hold that there is no such implied exclusion to S6 but that the seller should be held liable for misrepresentation. In that event, the buyer could obtain damages for some of his actual (reliance) losses but not for his expectation losses."

[95] Indeed, it has been argued that "the sorts of facts to which section 6 may be applied today may well differ considerably from *Couturier v. Hastie* situation." See John Adam, op. cit., note 3, at 103.

[96] See S6 of SOGA, S7 of Oyo and Lagos, supra note 7.

[97] (1876) 1 QBD 238.

[98] This is due to the fact that modern-day jurisprudence has confined the meaning of specific goods to existing goods. On this issue, see Osuntogun A. J, "Goods in Sale of Goods: An Examination of the Subject-Matter" (2011) *Business Law Review*, 85 at 99 to 103; Lord Atkin in *ReWait* (1927) 1 Ch 606; he noted that "an unascertained or unappropriated portion of a larger designated mass whether the latter is "existing goods" or "future goods" must be outside the statutory definition."; *H.R. & S. Sainsbury v. Street*, (1972) 1 W.L.R. 834.

requirement is that the goods must have perished before the contract was made. This requirement has been explained in this study, although not in detail. Therefore, this section seeks only to examine the meaning of the word 'perish' and what it may contribute to the understanding of this requirement. The word 'perish' is not defined in the Act but it appears that a clue to its meaning can be gleaned from decisions of the courts in relevant cases. In that regard, 'perish' can be defined in two perspectives. On one hand, it can be defined, not only as actual destruction of goods but diminution or loss in quantity of goods contracted for which makes the rest of the goods unattractive to the buyer. On the other hand, it can be defined as a loss in the character of good or alteration in its quality which negatively affects or impairs its commercial value. In *Barrow, Lane & Ballard v. Philip Philip & Co Ltd.*,[99] the sellers entered into contract to sell 700 bags of Chinese nuts to the buyers but unknown to either party, 109 bags had been stolen at the time the contract was made. The sellers delivered the remaining 591 bags but the buyers' refused. It was held that the contract was void under S6 by reason of the loss or theft of 109 bags since the contract was an indivisible contract for 700 bags.[100] This case has been subject of critical remarks from scholars. Benjamin,[101] citing an example of a stolen car by Atiyah,[102] wonders if theft alone could amount to 'perish' in all circumstances. The problem with such a scenario, according to him, lies with how to ascertain the actual time a stolen car should be regarded to have perished in the commercial sense.[103] He suggests that it should not be when it was actually stolen but when all hope of recovery is lost. Atiyah argues that to render the whole contract void is unsatisfactory "when the buyers obtained delivery of 150 bags and admitted liability to pay for them."[104] Igweike is of the view that the case could have been decided under S30 of the Act which deals with wrongful delivery by the seller instead of S6.[105] But that view may not be appropriate since it might be in conflict with the intention of the drafters of the Act. S30 deals with cases where the contract entered into by the parties is valid. That is not the same with S6, where non- existence of the subject-matter makes the contract void. S30 provides liability for sellers who failed for one reason or another to meet its obligations in an enforceable contract. S6

[99] [1929] 1 KB 574.

[100] *Ibid* at 583, the court reasoned "Does the case come within section 6 of the Sale of Goods Act, so that it would be the same as if the whole parcel has ceased to exist? In my judgment it does."

[101] See, Guest A. G. *et al*, Benjamin's Sale of Goods (7th ed.) (2006) London Sweet and Maxwell para. 1-126.

[102] John Adam, op. cit., note 3, at 107.

[103] *Ibid*; Guest, op. cit., note 101.

[104] John Adam, op. cit., note 3, at 103-104.

[105] Igweike, op. cit., note 8 at 136.

absolves the sellers of liability because there is no contract at all. Unless, it can be proved as it was done in *McRae v. Commonwealth Disposals Commission* that the seller warranted the existence of the goods, the sellers would not be liable. Therefore, it is absurd and unsuitable to apply section 30 where facts of the case demand the application of section 6.

Another case is that of *Asfar & Co v. Blundell,*[106] where the business' test to ascertain loss of commercial value of goods was propounded by Esher MR from the common law.[107] In that case, a cargo of dates was sold. The dates were contaminated with sewage so as to be un-saleable as dates, though they could be used for making spirits. The court held that the contract had become void as the goods no longer answered their description.[108] It has been accepted that the business' test by Esher MR in that case should be adopted in determining the meaning of the word perish in S6 of the Act.[109] To this extent, the decision of the court in *Horn v. Minister of Foods* that potatoes which had rotted had not perished within the meaning of S7[110] of the Act as they were still potatoes [111] could not be relied upon.[112] Indeed, what can solve the confusion and the injustice that might result from the wide application of S6 is legislative intervention and perhaps a flexible approach to judicial interpretation of S6 *vis-à-vis* with S55 as earlier discussed. If the principle of indivisibility of contract is the major reason for the wholesome application of S6 in that case, it could have been appropriate to agree with Benjamin that if a contract is severable or divisible, the destruction of part of the goods will not void the total contract[113] but the decision of the court in *H.R. & S. Sainsbury v. Street*[114] makes that proposition difficult to accept.

Finally, the third requirement which provides is that the goods must have perished without the knowledge of the seller has already been explained in this study.

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[106] [1896] 1QB 123 (CA).

[107] Ibid. He noted in that case that "there is a perfectly well-known test which has for many years been applied to such cases as he present - that is whether, as a matter of business, the nature of the thing has been altered."

[108] Note that this case was decided before the Act and S6 does not contain loss of commercial value but the test of commercial value is still relevant to the section.

[109] John Adam, op. cit., note 3, at 106.

[110] Note that the word "perish" has the same meaning under S6 and 7.

[111] [1948] 2 All ER 1036.

[112] Note that it could not be relied upon because it is an *obiter* since the court could not apply section 7 because the risk in the goods had already passed to the buyer.

[113] Guest, op. cit., note 101.

[114] (1972) 1 W.L.R. 834.

7. RISK WHERE CONTRACT OF SALE OF GOODS IS FRUSTRATED

The relationship between risk and frustration has been explained at the beginning of this paper. This section seeks to explain how a contract of sale can be frustrated and the effect of that frustration on risk. For that purpose, contract of sale can be divided into two categories. The first are contracts of sale that are covered by section 7, and the second; those that are not covered by section 7 but are regulated by the Law Reform (Contracts) Act of 1961.[115] The first category applies to agreement to sell specific goods, where the goods which form the subject-matter perish before the risk passes to the buyer without any fault on the part of the seller.[116] Four requirements are important for its application. One, the rule applies only to agreement to sell and not a sale.[117] Two, the goods must be specific.[118] Three, the goods perish without any fault of the seller or the buyer;[119] four, the goods must have perished before the risk passes to the buyer. Thus, in *Shipton Anderson & Co. v. Harrison Bros & Co*[120] the Court of Appeal expressed the view that there could be no frustration if property and risk have passed. However, it is crucial to note that if the first, second and fourth requirements are considered together, it means this rule has a narrow compass[121] and can only apply under some sections [122] but definitely not under section 18 rule one where the common law rule of *res perit domino* hold sway.

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[115]See, Law Reform (Contracts) Act, 196, No. 64 Annual Volume of the Laws of Federation of Nigeria, [1961], Federal Ministry of Information, Nigeria.

[116] The Act provides that "where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

[117] It should apply under sections 19 and 18, rule two, three and four; *Shipton Anderson & Co. v. Harrison Bros & Co.* [1915] 1Q.B. 258; in that case, the court held that a contract for the sale of a specific parcel of wheat in a warehouse on the terms that payment should be made by cash "within seven days against transfer orders" was frustrated when the goods were requisitioned by the Government, making delivery impossible at a time that the property in the goods had not passed to the buyer.

[118] This means unascertained goods are excluded from this rule.

[119] See *Elphick v Barnes* (1880) 5 C.P.D 321; there was an agreement to sell a horse on approval for eight days. The horse was taken on trial for a week but died on the third day without the fault of any of the parties. Since the buyer had not given his approval, the court held that the buyer was not liable for the price because the property in the horse had not passed to him. In *Howells v Coupland* supra Blackburn, J., noted "Where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to it perishing without any default of the seller, that would be quite another thing."

[120] See, supra note 117.

[121] Igweike, op. cit., note 8., at 138, John Adam, op. cit., note 3, at 349 .

[122] It should apply under sections 18, rule two and three.

The effects of frustration under the common law apply in this category. One, the contract is avoided. Two, parties to the contract are discharged absolutely of their obligations that are yet to accrue in the contract.[123] Thus, none of the parties can enforce such obligations under the contract even if framed in the form of damages.[124] As a result, the seller is not liable for non-delivery and the buyer is not liable to pay the price. Nonetheless, the seller still bears the loss of the goods.

That being said, it is important to note that parties are still bound to perform their obligations that have already accrued before the frustrating event.[125] However, if there is total failure of consideration, the buyer can recover any amount he has paid in advance. In *UBA Plc v. BTL Ind. Ltd.*[126] the Supreme Court held that the money that was paid under a frustrated contract was recoverable due to a total failure of consideration. However, the common law does not allow the seller to retain any of the advance payment as compensation for the expenses that he might have incurred before the frustrating event.[127] In *Fibrosa Spolka Akcjina v. Fairbairn Lawson Combe Barbour Ltd. (Fibrosa case)* [128] the buyers paid the sum of £1000 in advance for some machinery to

[123] See *Chandler v. Webster* [1904] 1 K.B. 493, as per Collins M.R. pp. 498-499. He noted that "[W]here, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

[124] See, Tobi J.C.A. in *N.B.C.I. v. Standard (Nig.) Eng. Co. Ltd.* [2002]8NWLR (Pt.768)104 at 131; Where a contract is frustrated the issue of breach of a contract does not exist because "where a court of law comes into conclusion that a contract has been frustrated, for no fault of the defendant, he cannot be found liable in the contract. Accordingly the issue of breach flowing into damages no more arises."

[125] *Ibid.*

[126] See in particular the concurring judgment of Onu, J.S.C [2006]19N.W.L.R. (Pt. 1013)61 at 93; 118.

[127] In the Chandler case, the court held that the parties should be left where they were at the time of the frustrating event, no restitution for money paid and no compensation for expenses incurred but in *Fibrosa*, the court granted the restitution claim but refused reliance interests.

[128] [1943]A.C. 32.

be manufactured by the sellers. The contract was frustrated before the machinery was completed and before any part of it could be delivered to the buyers. In spite of the claim by the sellers that they had incurred some expenses in the course of performing the contract, the Court held overruling Chandler case,[129] that the claim of a party who has paid money to recover it on the ground that the consideration for which he paid it has wholly failed is not based on any provision in the contract, but arises because in the circumstances, the law gives a remedy in quasi-contract to the party who has not got what he bargained for.

The result is not the same if the failure was not total but partial consideration. In such a situation, payments made by the buyer under such a contract cannot be recovered. Similarly, the common law rule known as the "entire contracts rule" would not allow any party to compel another party to pay for the benefit he receives from a frustrated contract if the contract is inseparable in the sense that it is to perform one indivisible service and the benefiting party has not made any deposit.

The second category goes further than the *Fibrosa* case in reducing the hardship of the common law rule in that it provides compensation for reasonable reliance.[130] It applies to any other contracts which are not covered by the first category [131]and contracts for the sale of specific goods which are covered by the first category but are frustrated by other reason, apart from perishing of goods.[132] The Act makes three major changes to the effects of frustration under the common law. First, it provides for recovery of all payments made in advance, even if the failure is partial and not total consideration. It provides that any amount of money that has been paid or payable to any party in pursuance of the contract before the contract was

[129] Note that although, the rule in Chandler case was overruled in the *Fibrosa* case, that did not affect cases on sale of goods even in the UK because the rule was never applied to cases on sale of goods; see *Logan v. Le Mesurier* (1847) 6 Moo PC 116.

[130] Note that the Lord Chancellor Simon in the *Fibrosa* case noted that only legislative intervention can protect reasonable reliance supra note 128 at 49.

[131] Particularly, unascertained contracts.

[132] See Law Reform, supra note 115, Section 3 (5c) of the Act provides that 'it shall not apply, (c) to any contract which section 7 of the Sale of Goods Act, 1893, of the United Kingdom (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) in its application to the Federal territory applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished'; Note also that it does not apply to Contracts of carriage of goods by Sea or Contract of Insurance or Charter-party(s3(5a & b).

discharged shall, if paid, be recoverable and if payable cease to be so payable.[133]

The second change arises due to a key proviso in the same section 4 (2) which enables the seller to retain part or all of a sum which would otherwise be recoverable under a total or partial failure of consideration if he has incurred expenses in the course of performing the contract before the time of discharge.[134] In order to do this, the Act invests the court with power to examine all the circumstances of the case in determining if it is just for a party to retain the money paid or should recover the whole or any part of the sums so paid or payable not being an amount in excess of the expenses so incurred.[135]

Third, the Act replaces the common law rule known as the 'entire contracts rule' with a statutory provision that makes it possible for the seller to recover payment for part of the goods delivered to the buyer or any other party by reason of part performance of the contract before the time of discharge.[136]

8. CONCLUSION AND RECOMMENDATIONS

This paper has examined risk and frustration as applied in sale of goods in Nigeria. The crucial challenge is how to enforce the intention of the parties. Presently, S6 as it has been explained subverts the intention of the parties. This leads to the issue whether it (S6) should be given a wide application or should be mellowed down by other provisions of the Act which enjoin the court to enforce the intention of the parties. It is submitted that since the essence of S6 is to absolve all the parties from liability, it should be used sparingly in order that its purpose is not subverted. If that is not done, it can become an instrument which parties can use to renege on or abandon their obligations. In view of the uncertainty in the case law, it is suggested that there should be statutory intervention. Therefore, S6 should be amended to enable variation in

[133] *Ibid, section 4(2).*
[134] *Ibid.*
[135] *Ibid.*
[136] The seller may receive on pro rata basis the price for part of the goods so delivered; Section 4(3) of the Act "If any party has obtained a valuable benefit through anything done by any other party for the purpose of performing the contract (other than a payment to which sub-section (2) of this section applies) before the time of discharge, 'there shall be recoverable from him by the said other party such sum (if any) not exceeding the value of such benefit to the party obtaining it as the court consider just having regard to all the circumstances of the case." Note that this law applies to Federal Capital territory but similar laws have been passed in some states of Nigeria, see for example Contracts Law, Cap. 25. Laws of Western Nigeria (1959).

its application. For example, if buyers are not consumers, they should be excluded from the rule in S6.[137] In addition, legislators should also explain the meaning of the word 'perish' to avoid ambiguity relating to how goods can perish in a commercial and physical sense. Finally, there should also be an amendment to the definition of specific goods in the Act, to include undivided share in goods, "specified as a fraction or percentage of goods identified and agreed upon."[138]

[137] Note that the Law Reform committee has suggested an amendment in the form of a proviso that will exclude consumers from the section. It states "where the buyer does not deal as consumer, the parties are free to stipulate expressly on which of them any loss is to fall," see, Sales Law Review Group, Report on the Legislation Governing The Sale of Goods and Supply of Services November 2011at 105.

[138] See UK Sale of Goods (Amendment) Act 1995 for similar amendment; S61 (1) of U.K. Sale of Goods Act 1979.