

# Sale in the Ordinary Course of Business Under Ghana Law: Recent Developments and Lessons from the UK

Nuhu Yidana\*

## SUMMARY

*The Sale of Goods Act 1962 (Act 137) put a statutory footing on implied conditions for the quality and fitness of goods in every contract involving the sale of goods in Ghana. The functionality of the implied conditions of quality and fitness of goods hinges on the sale of goods taking place in the ordinary course of the seller's business. This article evaluates the concept of the sale in the ordinary course of business under which the implied conditions of quality and fitness of goods apply in Ghana. The paper argues that the current definition of sale in the ordinary course of business under the law in Ghana, is narrow to the disadvantage of buyers of goods. Consequently, this article advocates that the definition of the sale in the ordinary course of business needs to be broadened along the lines of the English law to help enhance the degree of protection of buyers of goods in Ghana. The paper further submits that the courts should consider distinguishing consumer matters in widening the scope as the current definition is mainly the product of non-consumer case law.*

## KEYWORDS:

*implied conditions, quality of goods, fitness of goods, sale in the course of business, buyers of goods, sellers of goods, distinguishing, consumers, and non-consumers*

## I INTRODUCTION

Following independence in 1957, the Parliament of Ghana enacted a Sale of Goods Act (SGA) 1962<sup>1</sup> to regulate the conduct of sale of goods transactions between traders and customers in Ghana. The SGA 1962 was hailed as a lucky heir as it was devised drawing from the long experience of the then celebrated English codified Sale of Goods Act 1893.<sup>2</sup> The statute was also extolled as a promising statute capable of dealing with the commercial challenges of Ghanaians.<sup>3</sup> Over the years, the SGA 1962 has been a subject of academic discussion with scientific legal scholars scrutinizing the

provisions of the Act.<sup>4</sup> One important provision which has benefited from the coveted scholarship is section 13 of the SGA 1962.<sup>5</sup> The provision laid down implied conditions for the quality and fitness of goods which are supplied to purchasers in contracts for the sale of goods.

Despite the scrutiny of the provision by far, key doctrinal frameworks within the provision remain unexplored. One of these doctrinal concepts which arguably may be classified as the central nervous system in the operation of the implied conditions for the quality and fitness of goods is the principle of sale in the ordinary course of a business. As will be demonstrated later, the application of the implied conditions of quality and fitness of goods is predicated on the transaction being in the ordinary course of the seller's business. Being the nucleus to the operation of the implied conditions, one would have expected that the question of what constitute sale in the ordinary course of the seller's business would come with a straight answer. However, this does not seem to be the case. The phrase has appeared to generate some controversy, relating to when a sale can be correctly diagnosed as being in the realm of sale in the ordinary course of the seller's business.

The present article, therefore, seeks to evaluate when a sale could be said to occur in the ordinary course of a seller's business for the implied conditions to have a force of law. This is important to help address any likely uncertainty that is associated with the doctrine of sale in the course of business.

This article is subdivided into five sections including this introduction. The second section reviews the implied conditions for the quality and fitness of goods. The third section considers the concept of sale in the ordinary course of business under the law in Ghana. Sale in the course of business under English law<sup>6</sup> is then examined for lessons in section four. The analysis is concluded in section five with a highlight of recommendations in this article. Below is the implied condition of quality and fitness of goods under the law in Ghana.

## 2 THE IMPLIED CONDITIONS FOR THE QUALITY AND FITNESS OF GOODS IN GHANA

The SGA 1962 broadly sets out the obligations and rights of parties to every sale of goods contract in Ghana. One of these obligations of vendors and rights of customers, which is central to the present discourse, is the implied conditions for the quality and fitness for purpose of goods which are supplied in contracts for the sale of goods. The express provision is

\* BA & CE-MBA Kwame Nkrumah University of Science and Technology (KNUST); LLM [Leeds Beckett]; PGD & PhD in Law [Hull]; Law Lecturer, Tamale Technical University, Ghana and former Sessional Lecturer in Law, University of Hull, UK. Email: chiefyidana@gmail.com.

<sup>1</sup> Act 137. The statute is herein referred to as SGA 1962.

<sup>2</sup> K. K. Dei-Anang, *Caveat Venditor Ghanianensis*, 4 U. Ghana L. J. 90 (1967). The English law experience then is referring to the 1893 Sale of Goods Act which had then received judicial pronouncement on the aspect of its provisions as well express views by commentators, which helped in the development of the Sale of Goods Act, 1962, Act 137 in Ghana. In particular, Roy Goode, who was the draftsman of the Ghana Sale of Goods Bill, had the opportunity of commenting on the aspect of the English eighteenth century statute.

<sup>3</sup> *Ibid.*

<sup>4</sup> Nuhu.Yidana, *Enacting a Consumer Protection Law in Ghana: Possible Lessons from the UK Consumer Rights Act 2015*, 6(4) L. Res. Rev. Q. (2020); Christine Dowuona-Hammond, *Consumer Law and Policy in Ghana*, 41(4) J. Consumer Pol'y 333–354 (2018).; Lydia A. Nkansah, *Consumer Protection in Ghana: An Appraisal of the Law*, 2(1) Joseph Ayo Babalola U. L. J. 185–200 (2015).; Christine Dowuona-Hammond, *Protecting the Purchaser of Goods Under Ghanaian Law*, 19 Rev. Ghana L. 105 (1993).; Dei-Anang, *supra*, n. 2.

<sup>5</sup> Nuhu Yidana, *The Consumer in the Midst of Two Distinct Terms for the Quality of Goods in Ghana: Can the Law Be Simplified*, 94 JL Pol'y & Global. 168 (2020); J. E. A. Mills, *Rockson Armah: A Case of Caveat Emptor, Caveat Venditor or Neither*, 15 U. Ghana LJ 168 (1978).; Dei-Anang, *supra*, n. 2.

<sup>6</sup> English law as referred to herein is the law in England and Wales.

documented under section 13 of the Sale of Goods Act 1962 as follows:

(1) Subject to this Act and to any other enactment, there is no implied warranty or condition as to the quality or fitness for a particular purpose of goods supplied under a contract of sale except

(a) that there is an implied condition that the goods are free from defects which are not declared or known to the buyer before or at the time when the contract is made

The provision of the statute sought to preserve the doctrine of *caveat emptor* which the common law has always adhered to but proceeded further to introduce the case of the implied condition for the quality of goods to be free from defects which are not disclosed to the buyer. It is against this backdrop that one commentator rightly observed that the provision ‘started with *caveat emptor* and have ended with *caveat venditor* in a novel and extreme form’.<sup>7</sup>

With the imposed restrictions on the *caveat emptor* maxim, sellers of goods are under the implied obligation to supply goods which are free from defects in every contract of sale unless the defects are disclosed before or at the time of the contract. The then Chief Justice, Her Ladyship Chief Justice Wood in *Continental Plastics Engineering Co. Ltd v. I.M.C. Industries Technik GMBH*,<sup>8</sup> lucidly stated that ‘[a] seller of either first or second-hand goods is, by an implied condition, liable for all defects in them. ... the seller is however not liable for defects which he fully discloses or declares to the buyer at the time of the contract of sale’.<sup>9</sup> It was further stressed that the implied condition for the goods to be free from defects under ‘section 13 (1) hinges on whether or not at the time of the Sale Contract, there were defects, latent or otherwise in the goods complained of’.<sup>10</sup> The courts have further submitted that the requirement for the goods to be free from defects extends to cover latent defects, and that latent defects are defects, which both the seller and the buyer may not discover at the time of the contract of sale.<sup>11</sup> Consequently, the Supreme Court held that the provision ‘can only be prayed in aid of buyers who succeed in establishing the existence of defects in goods bought at the time the contract is concluded’.<sup>12</sup>

By far, it is settled that the implied condition for the quality of goods is that the goods should be free from defects which are not disclosed at the time of the contract. It follows therefore that defects which are not disclosed before or at the time of the contract could give rise to a customer claim against the vendor of the goods for the existence of the defects in the goods.<sup>13</sup>

However, there are statutory recognized instances under which the implied condition for the goods to be free from defects will not apply. The various instances are equally laid down under section 13 (1) (a) of the SGA 1962. The subsection states that the provision that the goods should be free from defects is not an implied condition under the following circumstances:

1. where the buyer has examined the goods in respect of defects, which should have been revealed by the examination;
2. in the case of a sale by sample, in respect of defects which could have been discovered by a reasonable examination of the sample;
3. where the goods are not sold by the seller in the ordinary course of the seller’s business, in respect of defects of which the seller was not, and could not reasonably have been aware.<sup>14</sup>

The provision broadly presents two specific circumstances through which the implied requirement for traders to supply goods which are free from defects in respect of the quality of the goods will not apply. The first instance is where the goods were examined by the buyer before or at the time of the contract of sale. The doctrine of the buyer’s examination of the goods as basis for the exclusion of the seller’s liability regarding defects in the goods may arise where the buyer has either examined the goods, or a sample of the goods, in a sale by sample. It is instructive to note that the courts have affirmed in a profile of case law that the implied condition for the goods to be free from defects will cease to have effect where either the goods or sample of the goods, in a sale by sample, were examined by the customer without detection of the defects in question at the time of the contract.<sup>15</sup> It has therefore been submitted that where the buyer has examined the goods, the seller cannot be held liable for defects which the examination ought to have discovered.<sup>16</sup> Under such circumstances, the principle of *caveat emptor* operates with full force, requiring the buyer to beware in undertaking the examination of the goods as regards defects in the goods. It is against this backdrop that the court in *New Lucky Electrical Ltd. v. Startrack Int. Ghana Ltd & Isaac Acquah*<sup>17</sup> stated that where the buyer has examined the goods, ‘the doctrine of “caveat emptor” becomes the threshold’.<sup>18</sup>

Beyond examination, the second leg through which the implied condition for the quality of goods will equally have no consequence is where the transaction was not carried out by the seller in the ordinary course of the seller’s business and which the seller was not, and could not reasonably have been, aware of the defects in issue. The legal effect of the provision was stated by the Supreme Court in *G.A. Sarpong & Co. v. Silver Star Auto Ltd*<sup>19</sup> that ‘... where the seller is not a dealer in the kind of goods sold and it is established that he did not know or could not reasonably have been aware of the defects complained of, he escapes liability’. Also, the Court of Appeal, after evaluating the evidence before it in the case of *Andreas Bschor & Co. KG v. Birim Wood Complex Ltd and Birim Timbers Ltd*<sup>20</sup> stated that:

<sup>14</sup> Section 13 (1) (a) of the Sale of Goods Act 1962, Act 137.

<sup>15</sup> *G.A. Sarpong & Co. v. Silver Star Auto Ltd* (2014) Suit No. J4/43/2013, 9; *Andreas Bschor & Co. KG v. Birim Wood Complex Ltd and Birim Timbers Ltd* [2016] CA. No. J4/9/2015; *Continental Plastics Engineering Co. Ltd v. I.M.C. Industries Technik GMBH* [2009] SCGLR 298, at 299; *Pyne & Associates v. African Motors* [2017] CA. No. J4/38/2013, 15.

<sup>16</sup> *Ibid.*

<sup>17</sup> *New Lucky Electrical Ltd. v. Startrack Int. Ghana Ltd & Isaac Acquah* [2010], Suit No. OCC 49/08 5.

<sup>18</sup> *Ibid.*

<sup>19</sup> *G.A. Sarpong & Co. v. Silver Star Auto Ltd* [2014] Suit No. J4/43/2013 9; See also *Dowuona-Hammond, supra*, n. 4.

<sup>20</sup> [2008] 4 GMJ 214.

<sup>7</sup> Mills, *supra*, n. 5.

<sup>8</sup> [2009] SCGLR 298, at 304.

<sup>9</sup> *Continental Plastics Engineering Co. Ltd v. I.M.C. Industries Technik GMBH* [2009] SCGLR 298, at 304.

<sup>10</sup> *Ibid.*, at 304; See also *G.A. Sarpong & Co. v. Silver Star Auto Ltd* (2014) Suit No. J4/43/2013, 9.

<sup>11</sup> *Continental Plastics Engineering Co. Ltd v. I.M.C. Industries Technik GMBH* [2009] SCGLR 298, at 299.

<sup>12</sup> *Ibid.*, at 304.

<sup>13</sup> Yidana, *supra*, n. 5.

*the evidence does not disclose that the appellants' normal course of business includes the sale of 'Sawmilling machinery'. They could therefore not be in breach of a fundamental obligation – their normal course of business was the purchase of wood products. The appellants therefore could not be presumed to have known or been aware of any defects in the machines. They could also not have been in breach of any fundamental obligation as to quality and fitness of the machines.*<sup>21</sup>

While the above pronouncement was overruled on the merit of the evidence on record, following an appeal to the Supreme Court, it nevertheless contributes to enriching the discussion regarding the extent to which the principle could be applied to exonerate sellers of liability for defects in the goods sold outside the scope of the trader's mainstream business.

The liability of the seller for the existence of the defects in the goods traceable to the time of the contract of sale operates where the goods were sold in the ordinary course of the seller's business. Where the goods were sold in the ordinary course of the seller's business, the seller cannot escape from liability for defects which existed in the goods at the time of the contract of sale.

The application of the implied condition for the quality of the goods rests on the goods being sold by the seller in the ordinary course of the seller's business. It is instructive to note that a similar precondition exists under the implied condition for the goods to be fit for the purpose disclosed by the buyer before or at the time of the contract of sale. Section 13 (1) (b) of the SGA 1962, Act 137 states the implied condition for the fitness of the goods for the buyer's declared purpose as follows:

(b) that where the goods are of a description which are supplied by the seller in the course of the seller's business and the buyer expressly or by implication makes known the purpose for which the goods are required, there is an implied condition that the goods are reasonably fit for that purpose.

In *New Lucky Electrical Ltd. v. Startrack Int. Ghana Ltd and Isaac Acquah*,<sup>22</sup> the court stated that the rationale behind 'the fitness of purpose doctrine is to examine who should carry the liability for defects which are not immediately visible, but which make the product unfit for the use for which it was procured, especially where that use had been made known to the seller'. Central to the determination of where liability should fall is the question of both whether the contract of sale was in the course of business or otherwise and whether the buyer's purpose of procuring the goods was disclosed to the seller. In the case of *Andrea Bschor GMBH v. Birim Timbers Ltd*,<sup>23</sup> the Supreme Court held that: 'the grounds for the condition as to fitness for purpose to be applicable are that the seller should sell the goods in the normal course of his business and the buyer should have made the seller aware of the purpose for what he requires the goods'. It is discernible that the central nervous system of the provision is that where

a trader supplies goods to a buyer who discloses the primary purpose of acquiring the goods to the trader before or at the time of the contract, the implied condition is for the goods to be reasonably fit for that disclosed purpose. The application of the implied condition of fitness of the goods seems to have the effect of extricating the principle of *caveat emptor* which admonishes buyers to beware of the likely problems that may come with the goods in a sales contract.

This is an important provision similar to the implied condition for the goods to be free from defects which are not disclosed. At the nucleus of the provisions lies a strong legislative intent for the protection of buyers of goods when they rely on the skills and knowledge of sellers, as affirmed by the court in *Andrea Bschor GMBH v. Birim Timbers Ltd*.<sup>24</sup> It is, however, significant to state that the implied condition for the goods to be reasonably fit for the buyer's disclosed purpose is subject to the sale being one which was in the ordinary course of the seller's business. In the *Birim Timbers Ltd* case, the court accepted the view that the implied condition of fitness applies where the seller sold the goods in the ordinary course of his business description irrespective of whether the goods are sold as new or second hand.<sup>25</sup> In the recent case of *Pyne & Associates v. African Motors*,<sup>26</sup> the court was invited to determine, among others, whether the sellers were dealers in the class of goods in contention. The Court, upon a perusal of the issues, explicitly observed that '[t]he facts and circumstances of this case show clearly that the Defendants have been well known in the business of selling four-wheel drive vehicles of the type in contention'.<sup>27</sup>

The issue is that the seller should be one operating in the ordinary course of his trade to give effect to the implied obligation regarding the fitness of the goods. This presupposes that if the sale was not in the ordinary course of the seller's business, the implied condition that the goods should be reasonably fit for the buyer's disclosed purpose will not apply. It may therefore be argued that where the implied condition for the fitness of the goods disappplies on account of the sale not being in the ordinary course of the seller's business, the doctrine of *caveat emptor*, requiring the buyer to beware, would resurrect from its buried grave by the implied condition for the fitness of the goods. This is similarly identical with the case of the implied condition for the quality of goods.

From the discourse, it is apparent that the implied conditions for the quality and fitness of goods for the particular purpose of the buyer are both subject to where the goods were sold in the ordinary course of the seller's business. The central question that begs for answers underscored the issue of what constitutes sale in the ordinary course of the seller's business under which the implied conditions for the quality and fitness of the goods will not apply? Knowing what amounts to sale in the ordinary course of the seller's business is significant to help in distinguishing sale of goods which are caught by the provision and those which are not. In the next

<sup>21</sup> *Andrea Bschor & Co. KG v. Birim Wood Complex Ltd and Birim Timbers Ltd* [2008] 4 GMJ, 214.

<sup>22</sup> [2010] Suit No. OCC 49/08, unreported judgment of the High Court 4.

<sup>23</sup> *Andrea Bschor GMBH v. Birim Timbers Ltd* [2016] unreported CA. No. J4/9/2015 9; See also *Pyne & Associates v. African Motors* [2017] CA. No. J4/38/2013, unreported Supreme Court judgment 15; See also *Yirenkya v. Tomekpey* [1987–88] 1 GLR 533 CA 537.

<sup>24</sup> [2016] CA. No. J4/9/2015, unreported Supreme Court judgment 10.

<sup>25</sup> *Andrea Bschor GMBH v. Birim Timbers Ltd* [2016] CA. No. J4/9/2015, unreported Supreme Court ruling 8.

<sup>26</sup> [2017] CA. No. J4/38/2013, unreported Supreme Court judgment 16.

<sup>27</sup> *Pyne & Associates v. African Motors* [2017] CA. No. J4/38/2013, unreported Supreme Court judgment 16.

section, attempt will be made to address the question of what constitutes sale in the ordinary course of the seller's business.

### 3 SALE IN THE ORDINARY COURSE OF A BUSINESS UNDER GHANA LAW

As noted above, the sale of goods in the ordinary course of the seller's business forms a constituent basis for the application of the implied conditions of the quality and fitness of the goods, broadly for the benefit of the buyer. Curiously, however, there are uncertainties as to what exactly is meant by sale in the ordinary course of the seller's business. For instance, the question of whether a seller who sells his used business assets or goods mainly to acquire new ones for the continuation of his principal business will be selling in the ordinary course of his business remains unclear. Moreover, the question of whether a one-off sale of an article initially acquired for the running of the seller's own business will be a sale in the ordinary course of the trader's business is equally unresolved. Also, the question of whether a seller who is only disposing of his unwanted goods will be regarded as a sale in the course of the seller's business equally remained unanswered. Addressing the above questions is fundamentally crucial particularly taking into account instances where a purchaser or a buyer may be sold faulty goods through such sales outlet by the supplier or trader. This is essentially where the sale is a one-off sale, or a sale directed at getting rid of the trader's old business assets. Resolving the uncertainty will therefore help in promoting the interest and confidence of consumers, especially when they know approximately what is closely required under the law.

The question of what amounts to sale in the ordinary course of a seller's business as provided under section 13 of the SGA 1962 has curiously been a subject of judicial discussion, particularly in recent times.<sup>28</sup> For instance, in *Andrea Bschor GMBH v. Birim Timbers Ltd*, the fundamental question that was placed before the Supreme Court to be addressed was what is meant by 'where the goods are of a description which are supplied by the seller in the course of his business'. The Supreme Court, noting the absence of authority on the subject, resorted to some English judicial authorities for persuasive guidance. The Court, after a review of English authorities,<sup>29</sup> made the following submission in respect of how the phrase should be read in the context of Ghana as follows:

*we will therefore broadly construe Section 13 (1) (b) of the Act 137 and gave effect to the purpose of the provision by including any sale where there is an element of regularity showing the seller has been selling goods of that description as part of his business, whether it is his main business or not; or where the seller accepted an order from the buyer to supply goods of that description.*<sup>30</sup>

<sup>28</sup> *Andreas Bschor GMBH v. Birim Timbers Ltd* [2016] CA. No. J4/9/2015; See also *Pyne & Associates v. African Motors* [2017] CA. No. J4/38/2013 unreported Supreme Court judgment; *New Lucky Electrical Ltd. v. Startrack Int. Ghana Ltd and Isaac Acquah* [2010] Suit No. OCC 49/08 unreported judgment of the High Court; See also *Yirekyi v. Tormekpey* [1987–88] 1 GLR 533 CA.

<sup>29</sup> The various English cases that were cited for persuasion purposes included *Ashington Piggeries Ltd v. Christopher Hill Ltd* [1972] A.C. 441; *Davies v. Summer* [1984] 3 All ER 831 and *R & B Customs Brokers Co Ltd v. United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party)* [1988] WLR 321; and *Jones v. Bright* [1829] 130 ER 1167 at 1171.

This essentially sets out an expanded scope of what constitutes sales in the ordinary course of a seller's business description. It is instructive to note that in *Pyne & Associates v. African Motors*,<sup>31</sup> the Supreme Court reiterated the fact that the provision is predicated on where 'the seller has been selling goods of that description as part of his business, whether it is his main business or not'. In effect, the settled position of the law is that sale in the ordinary course of a business under which the implied condition of fitness of goods applies covers sales which the seller carries out in regularity and sale orders which the seller accepts in the course of his business adventures.

It is, however, important to point out that the court went further to state that the provision is not applicable 'where the goods were sold on "where is" basis or as a private sale'.<sup>32</sup> With this position, a private seller will not be liable for the unfitness of goods he delivers to the consumer in a contract for the sale of goods. In the case of the implied condition for the goods to be free from defects, a private seller may be liable for defects in the goods unless 'it is established that he did not know or could not reasonably have been aware of the defects complained of ...'.<sup>33</sup>

In *Andrea Bschor GMBH v. Birim Timbers Ltd*,<sup>34</sup> the obiter statement of the Court also appeared to discount a one-off sale from the confines of sale in the course of a business. The court made this clear by stating that:

*the provisions do not only relate to situations where the goods are sold as an integral part of the business of the seller but include cases where there is a certain degree of regularity by the seller in the supply of goods of the description, as distinct from a one-off sale.*<sup>35</sup>

This, in effect, seems to exclude sellers from liability arising from a one-off sale transaction they undertake in the ordinary course of a business. Broadly, the courts have provided a very helpful exposition of sale in the ordinary course of a business to include sales the seller habitually undertakes with regularity and sale of goods in response to an accepted order. The regime, nevertheless, excludes a one-off sale from the domain of sale in the course of a business. This implies that a purchaser who obtains his goods from a seller who sold the goods to him in a one-off instance cannot come under the implied conditions of quality and fitness regime.

The position of the law seems to be that a seller who is disposing of his used assets to enable him to replace them with new ones will not be caught under the ambit of sale in the

<sup>30</sup> *Andrea Bschor GMBH v. Birim Timbers Ltd* [2016] CA. No. J4/9/2015, unreported Supreme Court ruling 10–11; see also *Pyne & Associates v. African Motors* [2017] CA. No. J4/38/2013, unreported Supreme Court judgment 16.

<sup>31</sup> [2017] CA. No. J4/38/2013, unreported Supreme Court judgment 16.

<sup>32</sup> *Andrea Bschor GMBH v. Birim Timbers Ltd*. [2016] CA. No. J4/9/2015, unreported Supreme Court judgment 10–11; see also *Pyne & Associates v. African Motors* [2017] CA. No. J4/38/2013, unreported Supreme Court judgment 16.

<sup>33</sup> *G.A. Sarpong & Co. v. Silver Star Auto Ltd* [2014] Suit No. J4/43/2013, unreported Supreme Court judgment 9.

<sup>34</sup> [2016] CA. No. J4/9/2015, unreported Supreme Court judgment.

<sup>35</sup> *Andrea Bschor GMBH v. Birim Timbers Ltd* (2016) CA. No. J4/9/2015, unreported Supreme Court judgment 10. In arriving at this conclusion, the Court relied on the English judicial pronouncements in *Davies v. Summer* [1984] 3 All ER, 831; *R & B Customs Brokers Co Ltd v. United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party)* [1988] WLR 321; *Jones v. Bright* [1829] 130 ER 1167 at 1171.

ordinary course of the seller's business. It equally carries the impression that where the seller decides to resell goods he bought for the running of his business in a one-off instance, this will fall outside the remit of sale in the course of his business. The express omission of one-off sale by vendors from the generality of sale in the course of a business does not portend well for the protection of purchasers of goods in Ghana. From the illustrated instances under which one-off sales could arise, it seems evident that the seller may plough back the profit resulting from the sale into his business. Consequently, depriving the buyer of the benefit of the implied conditions for the quality and fitness of goods does not appear to be satisfactory to the object of protecting purchasers of goods. It is against this background that this article seeks to further interrogate the English law for possible inspiration in respect of the contextual scope of sale in the course of a business.

#### 4 LESSONS FROM THE CONSTRUCTION OF SALE IN THE COURSE OF A BUSINESS UNDER ENGLISH AND WELSH LAW

Before examining the substantive English law, it is imperative to note that the Consumer Rights Act (CRA) 2015<sup>36</sup> and the Sale of Goods Act 1979 (as amended)<sup>37</sup> are the statutes that respectively govern the sale and supply of goods to consumer and non-consumer buyers.<sup>38</sup> The extent to which the two pieces of legislation deal with the subject matter under review will therefore constitute the primary focus of the present comparative analysis. Evaluating the two pieces of legislation has become necessary because the current law under consideration in Ghana applies to both consumer and non-consumer buyers. The analysis of the two statutes will provide a more comprehensive picture from which possible lessons could be drawn to help in addressing the issue of concern under the law in Ghana.

Under English law, section 14 (2) and (3) of the Sale of Goods Act 1979 similarly provide for the implied conditions for the satisfactory quality and fitness of goods. The implied requirements for the satisfactory quality and fitness of goods do not operate unless the transaction was in the course of the seller's business. Section 14 (2) of the statute specifically states that: '[w]here the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality'. Section 14(3) went further to stipulate that:

[w]here the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known- (a)

to the seller, or (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit broker to the seller, to that credit broker, any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose ...

The preamble for the implied conditions of satisfactory quality and fitness is strongly anchored to 'where the seller sells goods in the course of a business'. This is similar to the requirement for the operation of the implied conditions for the quality and fitness of goods under the law in Ghana as discussed earlier. Before delving into what sale in the course of a business means under section 14 (2) and (3) of the English SGA 1979, it is imperative to address the question as to whether 'sale in the course of a business' exists under the Consumer Rights Act 2015.

Within this purview, it is worth noting that the Consumer Rights Act (CRA) 2015 provides for every contract for the supply of goods to include a term that the goods are of satisfactory quality and reasonably fit for purpose.<sup>39</sup> The CRA also stipulates that transactions to which the seller will be liable for the satisfactory quality and fitness of the goods is where the transaction is between a trader and a consumer.<sup>40</sup> The Explanatory Notes to the Act further re-affirmed that Part I of the Act, to which the present discussion relates, governs the relationship between traders and consumers under the English law.<sup>41</sup> Beyond clarifying the parties to which the regime applies, the Act went further to define a trader to mean 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'.<sup>42</sup> While the definition of a trader in this context relates to the EU Directives,<sup>43</sup> Benjamin's *Sale of Goods* has posited that the term 'traders' is a reflection of the pre-2015 requirement that the parties should be 'acting in the course of business' to give rise to the application of liability for the non-conformity of the goods.<sup>44</sup>

<sup>39</sup> Sections 9 and 10 of the Consumer Rights Act 2015, c 15.

<sup>40</sup> Section. 1, Consumer Rights Act 2015.

<sup>41</sup> The Consumer Rights Act 2015: Explanatory Notes, 2015, n. 1(1); See also Denis Barry et al., *Blackstone's Guide to The Consumer Rights Act 2015*, para. 2.01, 13 (Oxford University Press 2016); See also Michael Bridge, *Benjamin's Sale of Goods*, paras 14–023, 721 (10th ed., Sweet & Maxwell 2017).

<sup>42</sup> Section. 2 (2), Consumer Rights Act 2015; A consumer has also been defined in s. 2 (3) of the Consumer Rights Act 2015 to connote 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.

<sup>43</sup> See Art. 2(2), Directive 2011/83/EU of the European Parliament and of the Council of 25 Oct. 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance; See also Art. 2 (c), Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; See also Art. 2(c), Council Directive 93/13/EEC of 5 Apr. 1993 on unfair terms in consumer contracts; 1993; See also Regulations 2 (2012, No. 3110), UK Consumer Rights (Payment Surcharges) Regulation 2012; See also Michael Bridge, *Benjamin's Sale of Goods* (10th ed., 2017), paras 14–033, at 730; See also The CRA 2015 Explanatory Notes, para. 34.

<sup>44</sup> Bridge, *supra*, n. 41, paras 14–023.

<sup>36</sup> C 15.

<sup>37</sup> The Sale of Goods Act 1979 was amended by the Sale and Supply of Goods Act 1994, the Sale and Supply of Goods Regulations 2002 and the Consumer Rights Act 2015.

<sup>38</sup> It is worth highlighting that the Sale of Goods Act 1979 was the applicable law to both consumer and non-consumer buyers until the coming into being of the Consumer Rights Act 2015. Consequently, the SGA 1979 remains the statute that governs commercial transactions. It has been argued that the viability of the English SGA to dealing with commercial transactions contributes to the UK non-ratification of the CISG. For details, see Eghosa O. Ekhatior & Amede Alexandria Orieso, *The Evolution of International Transactions and the United Nations Convention for the International Sale of Goods (CISG): An Assessment of its Contradictions and Compromises*, Benson Idahosa L. J. 328–346 (2015).

While observing that the Act is silent on whether a one-off sale by a trader of his old items would be caught as relating to the trader's business, trade, craft, or profession, Barry et al. however noted that the fact that the goods belong to the trader and profit will be ploughed back into the trade imply that this might still be read as a part of the trader's business, trade, craft, or profession.<sup>45</sup> This observation appears to have been motivated by the courts pre-2015 determination of the question of whether a one-off sale by a seller was in the course of his business to which the term trader now relates as noted above. In particular, in the pre-2015 Act in *Stevenson v. Rogers*,<sup>46</sup> it was placed before the Court of Appeal to address the question of whether a fisherman's sale of his fishing boat was carried out in the course of his business as provided under section 14 (2) of the Sale of Goods Act 1979 to warrant his liability for the quality defects of the fishing boat. While setting aside the trial court ruling that the transaction was not in any form of regularity to be in the course of the fisherman's trade, the Court of Appeal held that regularity of habit was not what is required but rather a one-off sale in the course of the fisherman's business was sufficient to hold him liable. Similarly, in *MacDonald v. Pollock*<sup>47</sup> the pursuer bought the defendant's former fishing vessel after causing a marine engineer to carry out a general survey of the cruise vessel. Preceding a short sea trial and the contract formation, the cruise vessel was found to have a series of defects. One of the questions that arose on appeal before the Court of Session was whether the sale was conducted in the course of the defendants' business. While accepting the earlier verdict of the Court of Appeal in the *Stevenson v. Rogers* case, it was observed by the Court of Session that the notion of the need for some prior degree of regularity to exist to give rise to the sale being qualified as one in the course of the seller's business is unsatisfactory.<sup>48</sup> The Court further stressed that sale as an integral part of the seller's business 'will undoubtedly extend to cases where the seller sells goods of a kind in which he has not previously dealt and (*semble*) also to cases where he sells goods of a kind in which he does not ordinary deal, e.g., where a store sells off one of its delivery vans'.<sup>49</sup>

As seen above, the settled position of the English law in the pre-2015 regime is that a one-off transactional sale by the trader will give rise to the trader's liability arising from the quality defects of the goods. It therefore seems very likely that disputes regarding whether the trader's one-off sale of his old assets relates to his trade, business, craft, or profession will lead to a similar determination as the authors rightly argued above.

The example of the English law in which a one-off sale is classed as relating to the trader's business, trade, craft, or profession, or its comparable requirement of sale in the course of a business, will similarly help resolve the concern that excluding a one-off sale from being part of sales in the course of a seller's business in Ghana limits the protection available for purchasers of goods. The clear inclusion of a one-off sale as part of the seller's business will expand the scope of transactions under which purchasers of goods may be protected in Ghana. Including a one-off sale in the domain of sale in the course of a business will imply that if 'Melcom Ghana Ltd'

decides to sell off some of its office computers to upgrade to new ones, the Company will be caught under sale in the course of a business. Nevertheless, if a staff member of 'Melcom Ghana Ltd' decides to sell his personal computer, he will not be caught by selling in the course of a business.

It is significant to note that extending the frontiers of sale in the course of a business to cover a seller's one-off sale under Ghana law is not alien. Indeed, sale in the ordinary course of a seller's business had been interpreted by the High Court to include a seller's one-off sale in *New Lucky Electrical Ltd. v. Startrack Int. Ghana Ltd and Isaac Acquah*.<sup>50</sup> In the instant case, the seller, who was mainly in the business of renting out heavy duty equipment such as tipper trucks, excavators, personal carriers, and water tankers, allegedly acquired a particular excavator in anticipation of a contract but failed to secure the contract. The seller eventually sold the excavator to the plaintiff who alleged that the excavator was supplied to him in breach of the implied condition of fitness. The High Court was therefore invited to decide whether the sale was in the course of the seller's business for which there is a breach of the implied condition of fitness. Before arriving at a decision, the High Court heavily relied on the English Courts<sup>51</sup> and the sixth edition of Benjamin's *Sale of Goods* for persuasive guidance on what constitutes sale in the ordinary course of a seller's business. Upon its analysis, the High Court stated that sale in the ordinary course of a business covered sales which are an integral part of the trader's business and sales which incidentally are carried out by the trader with a degree of regularity, even if the sale was one that was happening for the first time in the course of the seller's business. The Court also submitted that a one-off sale with a view to profit in the context of the seller's business falls squarely within the reach of sale in the course of a business as contained under the provision. It was therefore held that the seller's sale of the excavator was in the ordinary course of his business.<sup>52</sup>

The point worth highlighting is that the High Court ruling in 2010 gave an emphatic recognition to a seller's one-off sale transaction as being part of sale in the ordinary course of a seller's business.

However, the Supreme Court, whose decisions are binding on all courts in Ghana on questions of law, has impliedly overruled the High Court determination.<sup>53</sup>

It is significant to reiterate that in rendering their decisions, both the Supreme Court and the High Court drew persuasive guidance from the authorities of the English law. What seems clear is that the case law the Supreme Court relied on in excluding a one-off sale transaction from the ambit of sale in the course of a business was the original position of the English law. However, the English courts have since departed from the position in which a one-off sale was excluded from the doctrine of sale in the course of a business as shown in the analysis earlier. The English courts' departure from their earlier position has been praised as an important breakthrough

<sup>45</sup> Barry et al., *supra*, n. 41, para. 2.12, at 15.

<sup>46</sup> (1999) QB 1028.

<sup>47</sup> (2012) CSIH 12, 2013 SC 22.

<sup>48</sup> Paragraph 21.

<sup>49</sup> Paragraph 23.

<sup>50</sup> [2010] Suit No. OCC 49/08, unreported judgment of the High Court 4.

<sup>51</sup> The Court relied on the English case of *Ashington Piggeries v. Christopher Hill Ltd* [1972] AC 44; *Stevenson v. Rogers* [1999] QB 1028.

<sup>52</sup> [2010] Suit No. OCC 49/08, unreported judgment of the High Court 5.

<sup>53</sup> Section 2 (3), Courts Act 1993, Act 459.

directed at safeguarding the larger interest of purchasers of goods.<sup>54</sup> Unfortunately, the abandoned English law position is what our Superior Court resorted to, and was persuaded to, exclude a one-off sale transaction from the realm of sale in the course of a business. Interestingly, the updated position of the English courts under which a one-off sale transaction forms part of sale in the course of a business was what guided our High Court's earlier decision, which has since been overridden by the Supreme Court's recent decisions. It is crucial to mention that the Supreme Court reference to the English law for persuasive reasoning was not comprehensive to the extent of covering the current position of the English law as documented in the English case of *Stevenson v. Rogers*,<sup>55</sup> which equally inspired the Scottish case of *MacDonald v. Pollock*<sup>56</sup> as discussed earlier. The key question then is whether the Supreme Court would have been persuaded to qualify a seller's one-off sale transaction as being part of sale in the course of a business if the current position of the English authorities were critically evaluated in its review? While this is unclear, the present author argues that this was very likely, taking into consideration the practical value of the inclusion of a one-off sale as part of sale in the course of a business to the overall agenda of protection of buyers of goods.

It is therefore submitted that the extension of sale in the course of a business to cover the sphere of a one-off sale is imperative to help in advancing the course of buyers in Ghana. However, until the Supreme Court has the opportunity of introducing this extension, the various courts of the land remain bound to follow the settled authority on questions of law. It is instructive to note that the Supreme Court's trite position came to bear mainly in non-consumer matters. In effect, the lower courts remained empowered to depart from the Supreme Court's position by distinguishing matters of a purely consumer nature from the non-consumer cases.<sup>57</sup>

It is therefore submitted that the courts in Ghana should endeavour to extend the scope of sale in the course of a business to cover one-off sale transactions when dealing with purely consumer matters. This is particularly critical as the trader who has been in use of the goods before the one-off sale should have a better appreciation of the degree of quality of the goods than the consumer who is only acquiring the goods for the first time. Another important justification for the seller to be made liable for defects in a one-off sale of goods is that his sale of the goods will add to his accrued transactional income, which he may as well reinvest in his business as similarly noted earlier under the English law. For this underlying reason, it is appropriate that a one-off sale is

rendered as part of the seller's business under the law in Ghana, especially in consumer matters. The case for the extension of the scope to a one-off sale in consumer matters in the meantime is important to ensure that consumers are provided with a wider degree of protection until such a time that the Supreme Court will get the opportunity to extend the scope for every purchaser of goods in Ghana. This will help to preserve the sanctity of the legislative intent of protecting purchasers of goods in Ghana. It will equally help to eliminate the potential impact of the current narrowed scope of protection for purchasers of goods in the case of consumer transactions in Ghana.

## 5 CONCLUSION

This article has demonstrated that the implied conditions for the quality and fitness of goods has a strong object of protecting buyers of goods under the law in Ghana, as affirmed by the Supreme Court in *Andreas Bschor GmbH v. Birim Timbers Ltd.*<sup>58</sup> However, this very legislative intent of securing a sufficient degree of protection for buyers of goods is being curtailed with the exclusion of one-off sale transactions from the ambit of sale in the ordinary course of a seller's business, which is the central nervous system for the operation of the implied conditions for the quality and fitness of goods in Ghana. This article therefore argued that the interests of purchasers of goods would better be served if the limited scope of interpretation is broadened to cover sellers' one-off sale of goods to customers along the lines of the English law construction which the High Court in Ghana had taken notice of. Consequently, this article submits that until the Supreme Court has the opportunity of widening the scope of sale in the ordinary course of a business to cover a seller's one-off sale of goods, the lower courts should take advantage of distinguishing the material variation of consumer matters from non-consumer cases in providing the extension in matters that are placed before them. The lower courts could perfectly undertake this task where matters of a purely consumer nature are placed before them in the light of the fact that the current narrow scope of construction is drawn mainly from matters of a non-consumer nature. Exercising the power of distinguishing consumer matters from the non-consumer cases as the basis of departing from the Supreme Court exclusion of a one-off sale from sale in the course of business is imperative to help in preserving the sanctity of the legislative intent of protecting purchasers of goods in Ghana.

<sup>54</sup> John De Lacy, 'Selling in the Course of a Business Under the Sale of Goods Act 1979', 62 Mod. L. Rev. 776 (1999); Len S. Sealy, 'When Is a Sale Made in the Course of a Business?', 58(2) Cambridge L. J. 276-278 (1999); Dora S. S. Neo, 'Sale in the Course of a Business Under the Sale of Goods Act', 60 Sing. J. Legal Stud (2000).

<sup>55</sup> (1999) QB 1028.

<sup>56</sup> (2012) CSIH 12, 2013 SC 22.

<sup>57</sup> The courts have accepted that a case can always be distinguished from an established authority where there are clear material variations. For example, see *Kama Health Services Ltd. v. Unilever Ghana Ltd.* [2013] GHSC, No. J4/24/2013; See also, *Col. Ayisi v. Nassiru Abdulai Banda* [2012] CA, No. H1/68/2011; see also *Barclays Bank (DCO) v. Dabo* [1964] GRL 637.

<sup>58</sup> [2016] CA. No. J4/9/2015, unreported Supreme Court judgment 10.