

# **The Erosion of *Caveat Emptor*: The Impact of Protectionist Legislative and Judicial Developments in Favour of Legal Certainty and the Subsequent Effects on Freedom of Contract**

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## **Abstract**

The historically endorsed principle of *caveat emptor* is argued to have been substantially eroded by the implied terms of the Sale of Goods Act 1979 and judicial attitudes toward freedom of contract and party autonomy. This paper explores the approach of modern law in respect of legal certainty and the extent to which the codification of the law of sale fulfils the expectations of buyers and sellers. Furthermore, the deviation from a *laissez faire* attitude in favour of one of judicial and legislative intervention is examined in light of the requirements imposed by the key implied conditions of satisfactory quality and fitness for purpose. The article also considers the impact of the determination of the status of terms, concluding that the law in this area is unduly complex and technical. This extraneous intricacy supports a much needed and welcomed consolidation of this area of law recently introduced by the enactment of the Consumer Rights Act 2015 in the context of consumer sales.

## **Keywords**

*Contracts of Sale of Goods, Implied Terms, Caveat Emptor, Freedom of Contract, Legal Certainty, Party Autonomy*

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## I. Introduction

Despite commercial law's preponderant objective of effectuating 'the reasonable expectations of honest people'<sup>1</sup> in contractual relationships, there is a requirement to balance this freedom of contract<sup>2</sup> with legal certainty<sup>3</sup> and an acknowledgement of the potential injustices attributed to an imbalance of bargaining power.<sup>4</sup> The evolution of the law<sup>5</sup> pertaining to and regulating contracts of the sale of goods<sup>6</sup> reinforces a modern foundation for the equalisation of bargaining power and subsequently erodes, if not eradicates, the historically endorsed principles of *caveat emptor*<sup>7</sup> and freedom of contract. Freedom of contract, sanctity of contract,<sup>8</sup> and *caveat emptor*'s roots in the classical contract law theory prevalent in the 18th and 19th centuries reflected a *laissez faire*<sup>9</sup> economic model facilitated by a non-interventionist judicial and legislative policy stance designed to serve a free market. However, commercial law's shift from this *laissez faire* approach to one of judicial and legislative intervention has been necessitated, and welcomed, by a post-war consumerist socio-economy. This transition could be said to have culminated in the recent enactment of the Consumer Rights Act 2015 (CRA 2015),<sup>10</sup> arguably one of the most significant pieces of legislation 'consolidating an

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<sup>1</sup> Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 Law Quarterly Review 433

<sup>2</sup> Freedom of contract is 'the doctrine that people have the right to bind themselves legally; [it is] a judicial concept that contracts are based on mutual agreement and free choice and thus should not be hampered by external control such as governmental interference'. See Bryan A Garner (ed.), *Black's Law Dictionary* (7th edn, West Group 1999) 674

<sup>3</sup> Legal certainty 'is a principle of law, which demands for law to be clear and precise'. See Robert Bradgate, *Commercial Law* (3rd edn, OUP 2003) 5. *Vallejo v Wheeler* (1779) 1 Cowp 143, 153 stated that 'in all mercantile transactions the great objective should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon' (Mansfield LJ)

<sup>4</sup> Bargaining power is defined as 'the ability to secure another's agreement on one's own terms'. See James W Kuhn et al., 'W. Chamberlain: A Retrospective Analysis of His Scholarly Work and Influence' (1983) *International Journal of Education and Research* 143

<sup>5</sup> The process of codification of an extensive body of common law rules concerned with the rights and duties of buyers and sellers began in the late nineteenth century with the enactment of the Sale of Goods Act 1893 (56 & 57 vict c 71), followed by the Supply of Goods (Implied Terms) Act 1973 (1973 c 13), Sale of Goods Act (1979 c 54) (SGA 1997), Sale and Supply of Goods Act 1994 (1994 c 35), Sale of Goods (Amendment) Act 1994 (1994 c 32) and Sale of Goods (Amendment Act) 1995 (1995 c 28)

<sup>6</sup> SGA 1979 s 2(1) defines contracts of the sale of goods as 'a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for the money consideration, called the price'.

<sup>7</sup> From the Latin '*caveat emptor, quia ignorare non debuit quod jus alienum emit*', 'let the buyer beware, for he ought not to be ignorant that he is purchasing the right of another' as defined in Bryan Garner, *Black's Law Dictionary* (7th edn, Thomson Reuters 2000)

<sup>8</sup> Sanctity of contract is 'the principle that the parties to a contract, having duly entered into it, must honour their obligations under it'. See Garner (n 7) 1342

<sup>9</sup> *Laissez-Faire* (French 'let people do as they choose') is a doctrine favouring 'governmental abstention from interfering in economic or commercial affairs'. See Garner (n 7) 880; See also Tahany Naggat 'Adam Smith's *Laissez Faire*' (1977) 21 *The American Economist* 35

<sup>10</sup> Consumer Rights Act 2015 (2015 c 15)

unnecessarily complex consumer law'.<sup>11</sup> The CRA 2015 aims to amalgamate, in one statute, the key consumer rights relating to contracts for goods, digital content, services and unfair terms.<sup>12</sup> The Act applies to trader and consumer sales only. The legal regime under the Sale of Goods Act 1979 (SGA 1979),<sup>13</sup> which is the focus of this article, continues to govern business to business and private transactions.

The ensuing discussion addresses the radical change of attitudes from the non-interventionist market-driven approach of the 18th and 19th centuries, underpinned by the central tenets of *caveat emptor* and freedom of contract, to one dictated by the protectionist role of the State. This change of outlook gave rise to a State seeking to redress the imbalance of bargaining power between the seller and the buyer through *inter alia* implication of terms<sup>14</sup> into contracts of the sale of goods.<sup>15</sup> Further analysis focuses on the historical foundations of these principles, in particular discussing the meanings and origins of the concepts of *caveat emptor* and freedom of contract. An illustration of the aforementioned shift in attitude is then contextualised in light of section 14(2)<sup>16</sup> and section 14(3)<sup>17</sup> of the Sale of Goods Act 1979.<sup>18</sup>

## II. *Caveat Emptor* and Freedom of Contract

*Caveat emptor* predates the English common law as a standard principle implied into commercial contracts.<sup>19</sup> The historically incumbent *lex mercatoria*<sup>20</sup> facilitated the judicial view that a buyer ought to exercise an appropriate degree of caution when entering into legally binding contracts, whilst inattention or naivety would not give rise to an actionable claim.<sup>21</sup> Where an inequality of bargaining power resulted in unfair trade, this archaic view dictated

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<sup>11</sup> The National Archive, 'Consumer Rights Act 2015. Explanatory Notes. Background' <<http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2/1>> accessed 19 June 2018

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

<sup>14</sup> Implied terms are defined as '... provision[s] not expressly agreed to by the parties, but instead read in to the contract by a court as being implicit.' See Garner (n 2) 1481

<sup>15</sup> See above n 6

<sup>16</sup> SGA 1979 s 14(2): '[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'. See above n 5

<sup>17</sup> SGA 1979 s 14(3): '[w]here the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known [...] any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose'. See above n 5

<sup>18</sup> See above n 5

<sup>19</sup> Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin Books 2016)

<sup>20</sup> '... the medieval law merchant, ... for hundreds of years subsisted as a distinct source of rights, administered by the courts in which the merchants themselves were judges, before ultimately becoming redundant because of the adaptation of the common law itself to commercial needs and usages.' See McKendrick (n 19) 3

<sup>21</sup> *ibid*

that the buyer ought simply to have known better. Prevailing at a time where most claims concerned false measures or the adulteration of products,<sup>22</sup> this approach was encapsulated by Gerard de Malynes<sup>23</sup> in the 17th century, proclaiming: '[h]e that dealeth in barter must be very circumspect, and the money given in barter cannot be overset.'<sup>24</sup>

Surviving the development from localised, customary policies to the modern common law system, *caveat emptor* was consistently invoked to resist the implication of warranties assuring the quality of goods.<sup>25</sup> An early expression of such resistance is exemplified in *Chandelor v Lopus*,<sup>26</sup> representing a long-standing impediment to the development of consumer protection until the 19th century by way of its reaffirmation of *caveat emptor* as a substantiated and endorsed legal principle. The case demonstrated the magnitude of *caveat emptor*'s significance within the common law, holding that 'if there is no warranty ... an action on the case does not lie, even though [the buyer] is deceived.'<sup>27</sup> The common law subserviently followed this approach,<sup>28</sup> and *caveat emptor* continued to be employed seemingly arbitrarily<sup>29</sup> throughout a period where buyers naturally examined goods prior to purchase. The shift from such marketplace commercial interactions toward the mass production of goods and impersonal commercial relations during the industrial revolution was a noted contributor to the alteration of the judicial approach – sellers and buyers no longer contracted at fairs or markets, and recognition was given to the importance of product quality.<sup>30</sup> However, judicial resistance to

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<sup>22</sup> See above n 9

<sup>23</sup> An influential writer and government advisor advocating Aristotelian theories akin to mercantilism, the impact of Malynes' works on economic theory, commercial law, and contract law are substantial. See Lars Magnusson, *The Political Economy of Mercantilism* (1st edn, Routledge 2015) 167-171

<sup>24</sup> Gerard de Malynes, *Consuetudo; Vel, Lex Mercatoria; or, the Ancient Law-Merchant* (3rd edn, T Baffett 1686) 66

<sup>25</sup> An implied warranty is 'a warranty arising by operation of law because of the circumstances of a sale, rather than by the seller's express promise', whilst an 'implied warranty of merchantability' is 'a warranty that the property is fit for the ordinary purpose for which it is used, sometimes shortened to warranty of merchantability'. See Garner (n 2) 1582

<sup>26</sup> *Chandelor v Lopus* [1603] 79 ER 3

<sup>27</sup> *ibid*

<sup>28</sup> Seemingly justified by the argument that a failure to distinguish between mere puffery and genuine warranty would be detrimental to the judicial economy of the 17<sup>th</sup> century. In the interest of legal certainty, the application of *caveat emptor* was favourable over the risk of such a failure. See Eben Moglen 'English Legal History and Its Materials. *Chadelor v Lopus*'

<<http://moglen.law.columbia.edu/twiki/bin/view/EngLegalHist/LopusChandler>> accessed 19 June 2018

<sup>29</sup> Amid the uncertainties of litigation and lack of regulatory legislation. See Walton H. Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 40 Yale Law Journal 1133, 1156

<sup>30</sup> Karl L Llewellyn, *Cases and Materials on the Law of Sales* (1st edn, Callaghan & Co 1930) 204

implied warranties of merchantable quality continued to prevail through the turn of the 18th century.<sup>31</sup>

Freedom of contract reflects *caveat emptor* as a theoretical parallel. The predominant attitude at that time was the view that contracts ‘entered into freely and voluntarily shall be held sacred and [...] enforced by courts of justice’.<sup>32</sup> Often accompanying the principle of sanctity of contract, freedom of contract has traditionally justified a limited judicial intervention in favour of party autonomy.<sup>33</sup> Lord Goff described a prevalent judicial recognition of party autonomy,<sup>34</sup> and noted the potential adverse effects of judicial interference with commercial transactions:

[o]ur only desire is to give sensible commercial effect to the transaction. We are there to help businessmen, not to hinder them: we are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put the spanner in the works, or even grit in the oil.<sup>35</sup>

Empowered by Adam Smith’s principal economic self-regulating market theory of the 18th century,<sup>36</sup> freedom of contract discouraged legislative and judicial interference<sup>37</sup> in a society of contracting parties presumed to possess equal bargaining power. This presumption justified the lack of judicial intervention and reinforced a general, inalienable right to enter into legally binding agreements. The law lent itself to the expression, ‘[e]very man is the master of the contract he may choose to make.’<sup>38</sup> However, a gradual divergence from an approach that many viewed as a retaliation to the over-generous interference of the emerging equitable courts<sup>39</sup> began with the draft of the Sale of Goods Act 1893.<sup>40</sup>

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<sup>31</sup> The King’s Bench denied the implication of such warranties in *Parkinson v Lee* [1802] 2 East 314, assuming the application of *caveat emptor* in the absence of fraud or express warranty. See Michael Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (16th edn, OUP 2012) 17

<sup>32</sup> *Printing and Numerical Registering Co v Sampson* [1875] 19 Eq 462, 465 (Sir George Jessel MR)

<sup>33</sup> Dori Kimel, ‘Neutrality, Autonomy, and Freedom of Contract’ (2001) 21 Oxford Journal of Legal Studies 473

<sup>34</sup> Robert Goff, ‘Commercial Contracts and the Commercial Court’ (1984) Lloyd’s Maritime and Commercial Law Quarterly 382, 391

<sup>35</sup> *ibid*

<sup>36</sup> Adam Smith, *The Wealth of Nations* (1st edn, W. Strahan & T. Cadell 1776)

<sup>37</sup> See above n 19

<sup>38</sup> Clarence D. Ashley, ‘Should There be Freedom to Contract’ (1904) 4 The CLR James Journal 423

<sup>39</sup> Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1st edn, OUP 1979) 148. Equity’s influence on English Law was initially resisted in all areas including commercial and contract law; see Alistair Hudson, *Equity and Trusts* (9th edn, Routledge 2017)

<sup>40</sup> See above n 5

### III. Merchantable Quality

The Sale of Goods Act 1893 (SGA 1893) aimed to consolidate the pre-existing common law and provide a clear statute to serve as a reliable foundation for subsequent interpretations of merchantable quality to be undertaken with certainty.<sup>41</sup> The Act contributed to the process of undermining *caveat emptor* by way of its introduction of obligations on the part of the seller aimed at protecting the buyer.<sup>42</sup> One such obligation was the implied term of merchantable quality.<sup>43</sup> Courts wrestled with merchantable quality despite the condition's explicit endorsement by the SGA 1893.<sup>44</sup> As statutory definitions aid in the clarity of the law, a legal principle cannot be interpreted with certainty until its very essence is authoritatively defined. Thus, the absence of any peremptory definition of merchantable quality produced a convoluted, unfollowable common law.<sup>45</sup> No such definition was delivered until the SGA 1973,<sup>46</sup> and the codified introduction of an implied common standard of quality was a further contribution toward the erosion of *caveat emptor*. Consequently, it was observed that implied terms ensuring quality in every sale may arguably abolish any notion of *caveat emptor* within commercial law.<sup>47</sup>

#### 1. Exclusion of Liability

The effect of the statutory imposition of the standard of merchantable quality in every contract of the sale of goods was mitigated by section 55 of the SGA 1893, according to which terms could be 'negatived or varied by express agreement, or by the course of dealing between

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<sup>41</sup> Michael G. Bridge, 'The Evolution of Modern Sales Law' (1991) Lloyd's Maritime and Commercial Law Quarterly 53

<sup>42</sup> Drafted by Sir Mackenzie Chalmers, the SGA 1893 adopted a distinction between conditions and warranties and introduced implied conditions in contracts of sale by description (s 13) as to quality and fitness, (s 14) and quality in contracts of sales by sample (s 15). See above n 5

<sup>43</sup> SGA 1893, s 14(2). Contrary to popular belief, merchantable quality was not created for the Sale of Goods Act *ex nihilo*. The term was perhaps first considered in *Jones v Bright* [1829] 130 ER 1167. The lack of definition of 'merchantable quality' in the 1893 SGA, beyond stating that quality included 'state or condition', led to the development of two tests of 'merchantability' in the subsequent case law. The first was the 'acceptability test' (see *Grant v Australian Knitting Mills Ltd* [1933] 50 CLR 387). The second put emphasis on the usability of the goods (see *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402)

<sup>44</sup> The judiciary offered definitions during the years leading to codification in *Mash & Murrell v Joseph I Emanuel* [1961] 1 All ER 485, *Cordova Land Co. Ltd v Victor Brothers Inc.* [1966] 1 WLR 793, and *Henry Kendall Ltd v William Lillico Ltd* [1969] 2 AC 31. Chronologically evidencing the difficulties in conclusively defining merchantable quality, these cases led to the replacement of merchantable quality with satisfactory quality, defined in s 14(2A) of the Sale of Goods Act 1979. See above n 5

<sup>45</sup> See above n 34

<sup>46</sup> Supply of Goods (Implied Terms) Act 1973, s 7(2). See above n 5

<sup>47</sup> Patrick Atiyah, *The Sale of Goods* (10th edn, Longman 2001) 137

parties'.<sup>48</sup> Curtailing the potential scope of the SGA 1893,<sup>49</sup> this provision enabled an allocation of risk allowing for unbridled individualism at the cost of contractual obligations and sanctity of contract.<sup>50</sup> The Act's assistance to party autonomy facilitated the exploitation of inequality in bargaining power, allowing parties with a substantially greater bargaining power to abuse this individualism and escape contractual liability.<sup>51</sup> Reflecting the classical contract law theories prevailing in the 19th century, section 55 SGA 1893 permitted a potentially unrestricted exclusion of liability, reflecting the ultimate goal of the maximisation of wealth free from external interference. By contrast, the section 55(1) 'Exclusion of Implied Terms' under the SGA 1979 expressly refers to exclusions subject to the Unfair Contract Terms Act 1977 (UCTA 1977).<sup>52</sup> This express reference has provided courts with a statutory justification for intervention with certain categories of contract including, until the enactment of the Consumer Rights Act 2015, business to consumer contracts.<sup>53</sup>

## 2. Satisfactory Quality

The development of the SGA 1979 heralded a further shift toward consumer protection, sacrificing freedom of contract in favour of legal certainty and the facilitation of consumer rights.<sup>54</sup> Rebranding merchantable quality as 'satisfactory' quality,<sup>55</sup> the SGA 1979 restated the application of *caveat emptor* in the absence of any prescribed exception,<sup>56</sup> reaffirming the principle's existence despite severe limitations.<sup>57</sup> The reference to sales 'in the course of a business' under s 14(2)<sup>58</sup> initially restricted the utilisation of this implied term, but has since

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<sup>48</sup> SGA 1893 s 55: '[w]here any right, duty, or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract'. See above n 5

<sup>49</sup> In particular, its prospective destruction of *caveat emptor*

<sup>50</sup> Reshma Korde, 'Good Faith and Freedom of Contract' (2000) UCL Jurisprudence Review 142

<sup>51</sup> *ibid*

<sup>52</sup> Unfair Contract Terms Act 1977 (1977 c 50)

<sup>53</sup> Exclusion of liability with respect to non-consumer sales continues to be governed by s 55(1) SGA 1979. However, in relation to business to consumer transactions, s 31 CRA 2015 now applies, setting out the seller's liability that cannot be excluded or restricted. See above n 10

<sup>54</sup> Stefan Grundmann, 'The Future of Contract Law' (2011) European Review of Contract Law 490, 506

<sup>55</sup> The SGA 1979 rebranding of merchantable quality in s 14(2), See above n 16, as amended by the Sale and Supply of Goods Act 1994. The amendment was the result of recommendations suggested in the Law Commission's, *Sale and Supply of Goods* (Law Com No 160, 1987). The merchantable quality standard introduced in the Supply of Goods (Implied Terms) Act 1973 was viewed as placing too much emphasis on usability

<sup>56</sup> SGA 1979 s 14(1). Exceptions are expressed throughout ss 14 and 15

<sup>57</sup> SGA 1979 s 14(1) expresses that *caveat emptor* applies to private sales, one of the few remaining remnants of the principle

<sup>58</sup> See above n 16

been broadened by *Stevenson v Rogers*,<sup>59</sup> collaterally widening the scope of satisfactory quality's application. The case arguably further curtailed the scope of application of *caveat emptor*. Nevertheless, the requirement that 'goods must be supplied under a contract'<sup>60</sup> subsists, and the implied term is ineluctably restricted by exceptions in section 14(2C).<sup>61</sup> Judicial interpretation of satisfactory quality arises infrequently,<sup>62</sup> perhaps due to its statutory definition, but the assessment of the standard of quality is not limited to intrinsic consideration.<sup>63</sup> Despite this, there has been judicial resistance against a comprehensive or exhaustive list of circumstances to be considered.<sup>64</sup> Although a statutory definition of satisfactory quality exists, which no doubt introduced much needed clarification of the law, the lack of consistent judicial interpretation and subsequent application has resulted in crippling legal uncertainty.<sup>65</sup>

The gradual codification of satisfactory quality introduced sufficient clarification which, with the combination of the exclusions permitted by section 55(1) of the SGA 1979,<sup>66</sup> section 31(1) the Consumer Rights Act,<sup>67</sup> and the implied term of fitness for purpose, corrects an imbalance that would otherwise incapacitate commercial law in its over-protection of the buyer.

#### IV. Fitness for Purpose

Somewhat contrasting satisfactory quality, the implied term of fitness for purpose<sup>68</sup> places a degree of responsibility on the buyer. Whilst fitness for purpose is *prima facie* the responsibility of the seller, the buyer is burdened by obligations of communication of abnormal purpose<sup>69</sup> and the requirement to demonstrate reasonable reliance on seller's expertise.<sup>70</sup> Where

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<sup>59</sup> *Stevenson v Rogers* [1999] 1 All ER 613 CA. The defendant was held to be selling in the course of a business when selling a fishing boat, despite such a sale not being typical of his business. A sale is in the course of *any* business, not the seller's specific business

<sup>60</sup> See *Wilson v Rickett Cockerell & Co Ltd* [1954] 1 QB 589

<sup>61</sup> Namely notification, buyer's examination, and reasonable examination in a sale by sample. See SGA 1979, s 14(2C). See above n 5

<sup>62</sup> See *Thain v Anniesland Centre* [1997] SLT 102. At the time of writing, this is the sole reported decision considering the meaning of 'satisfactory quality'

<sup>63</sup> See the non-exhaustive list of five aspects of quality set out in s 14(2B) SGA 1979 that are to be taken into consideration when determining the quality of the goods. See above n 62

<sup>64</sup> See *Webster Thompson Ltd v J G Pears (Newark) Ltd and Others* [2009] 2 Lloyd's Rep 339 (Mackie J)

<sup>65</sup> William Ervine, 'Satisfactory Quality: What Does It Mean?' (2004) 684 Journal of Business Law 1

<sup>66</sup> Subject to s 6 of the Unfair Contract Terms Act 1977. See above n 52

<sup>67</sup> CRA 2015, supra note 10. For example, s 31(1A) restricts the exclusion of satisfactory quality standards

<sup>68</sup> SGA 1979, s 14(3). See above n 67

<sup>69</sup> *Griffiths v Peter Conway Ltd* [1939] 1 ALL ER 685

<sup>70</sup> *Cammell Laird and Co Ltd v Manganese Bronze and Brass Co Ltd* (n 43)



the buyer's own expertise is relied upon, *caveat emptor* still applies. Goods need only be reasonably fit for purpose<sup>71</sup> which, in similar vein to satisfactory quality is a flexible standard also encompassing many of the factors relevant to quality, such as durability, minor defects, and warnings.<sup>72</sup> Despite the standard's undeniable flexibility, any relevant claim under section 14(3) will be subject to two concurrent provisions: the buyer's reliance on the seller's skill and judgement, and the reasonability of that reliance.<sup>73</sup>

## V. Status of Terms

Lord Denning's departing dissent in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*<sup>74</sup> acknowledged the contribution of the SGA 1979 to the abandonment of *caveat emptor* and the undermining of freedom of contract. However, the statute also has a collateral impact on legal certainty by way of the determination of the status of terms. Defined under the SGA 1979 as either a condition<sup>75</sup> or a warranty,<sup>76</sup> the status of a contractual term determines the rights and obligations that the parties have under a contract.<sup>77</sup> However, in *Hong Kong Fir v Kawasaki Kisen Kaisha*,<sup>78</sup> the Court of Appeal introduced the innominate term approach, whereby the status of contractual terms are to be determined by the effect of their breach. The judicial creation of innominate terms attempts to consider the gravity of non-performance under the contract *ex post facto*, thus arguably ensuring a more just result. However, it is possible that this approach sacrifices certainty to do so. Although some implied terms<sup>79</sup> of the SGA 1979 are identified as conditions within the statute,<sup>80</sup> the legal inconsistencies are

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<sup>71</sup> *Bristol Tramways and Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 KB 831

<sup>72</sup> Bradgate (n 3) 299

<sup>73</sup> *ibid* 302

<sup>74</sup> [1982] 2 AC 803. Whilst the result of the appeal was unanimous, Lord Denning's dissent was partial, articulating his own interpretation of a limitation clause which was held to be both unreasonable and unreliable.

<sup>75</sup> *Poussard v Spiers* [1876] 1 QBD 410

<sup>76</sup> *Bettini v Gye* [1876] QBD 183

<sup>77</sup> S 11(3) SGA 1979 states that the breach of a condition may give rise to repudiation, whereas the breach of a warranty may give rise to damages only. See above n 5

<sup>78</sup> *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 QB 26. See also Hale LJ's rationale in *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* (2000) (Unreported, 30<sup>th</sup> June) at 35, Lord Wilberforce in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc. (The Nanfri)* [1979] AC 757, and Lewison LJ's citation of *The Nanfri* in *Telford Homes (Creeside) Ltd v Ampurius Nu Home Holdings* [2013] EWCA Civ 577, 50

<sup>79</sup> The notable relevant terms are contained within ss 13-15 SGA 1979

<sup>80</sup> As amended by Sale of Goods (Amendment) Act 1995, s 15(A). See above n 5

compounded by s 15(A), which states that, '[i]f a seller's breach of a condition under sections 13-15 is so slight ... it is to be treated as a breach of warranty.'<sup>81</sup>

Despite the statutory identification of the aforementioned implied terms as conditions, they may be classified as innominate terms and, as a consequence, would be subject to considerable uncertainty.<sup>82</sup> An example of such an inconsistency in the context of the interpretation of express contractual terms is evidenced when comparing *Schuler AG v Wickman Machine Tool Sales Ltd*<sup>83</sup> and *Butterworth v Lombard North Central*,<sup>84</sup> evincing the ability of the courts to override the parties' express classification of a term as a condition.<sup>85</sup> Despite repeated acknowledgements of the requirement for certainty in commercial transactions,<sup>86</sup> it seems that recent case law has further surrendered the need for certainty in favour of fair and just outcomes in commercial transactions.<sup>87</sup> Freedom of contract is regarded as a principle holding sway in business to business transactions. However, in business to consumer sales, commercial law's *caveat emptor* heritage is all but surrendered to a protectionist system which elects to accommodate the rights of the buyer.

## VI. Conclusion

The overriding objective of the law is that it should be accessible, clear and comprehensive.<sup>88</sup> The original codification of sales law in the SGA 1893 and its subsequent re-enactment in the SGA 1979 was to serve that purpose, together with the equally important collateral protectionism toward buyers. The implied terms of the SGA 1979 are irrefutably of fundamental importance to contracting parties, but are also a source of legal uncertainty. The modern law contained in the 1979 statute has not entirely fulfilled the expectation of legal certainty, as the measures which aimed to protect the weaker contracting party are unnecessarily technical and complex. Furthermore, these measures must be read subject not

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<sup>81</sup> *ibid*

<sup>82</sup> *The Hansa Nord* [1976] QB 44, *Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko SS & Co Ltd* [1976] 1 WLR 989 and *Harlington & Leinster v Christopher Hull Fine Art* [1991] 1 QB 564

<sup>83</sup> [1974] AC 235

<sup>84</sup> [1987] QB 527

<sup>85</sup> Further inconsistencies of this kind are evident in *The Hansa Nord*. See above n 82

<sup>86</sup> See *The Mihalis Angelos* [1970] 3 WLR 601 and *Bunge Corporation v Tradax* [1981] 1 WLR 711

<sup>87</sup> *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38

<sup>88</sup> Bradgate (n 3) 223

only to the satellite amending legislation of 1994<sup>89</sup> and 1995,<sup>90</sup> but also other provisions contained in the UCTA 1977. In addition, the undermining of legal certainty by the 1979 statute is undoubtedly exacerbated by issues regarding the status of terms. Consequently, the reform and consolidation of consumer law by the Consumer Rights Act 2015 is a welcome development. However, this reform emphasises the undeniable fact that the commercial and consumer law of the United Kingdom is subject to further divergence, with *caveat emptor* substantially eroded within the commercial context but still holding sway in relation to purely private sales.

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<sup>89</sup> See above n 5

<sup>90</sup> *ibid*

## **Bibliography**

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