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I- Introduction

In the context of policy and business development, the circular economy (CE) is a significant approach in achieving environmentally sustainable economic development (Korhonen *et al*., 2018; Merli *et al*., 2017; see also Ellen MacArthur Foundation, 2013). This vision is supported and reinforced by dissatisfaction with the traditional linear 'take-make-dispose' model, which relies heavily on large quantities of easily accessible resources and energy. The take-make-dispose model encourages cost effectiveness over eco-efficiency. This model is predominantly set up for products to be manufactured more quickly and cheaply, but not necessarily resulting in products of high quality and with a lengthy lifespan. Conversely, CE offers a powerful business model whereby consumption is cyclical and regenerative.

This article analyses the contractual framework for the sale of goods in order to determine whether the English sales law regime can promote the guiding principles of the circular economy. It specifically examines whether – and, if so, to what extent – a manufacturer, who is a 'seller' in the context of private sales agreement,[2] is *liable* for failing to comply with the guiding principles of CE in the process of designing and producing goods. The English sales law, and in particular Sale of Goods Act 1979 (SGA), is a significant legal regime governing sales transactions between businesses. Although there is a limited, though growing, legal scholarship examining the connection between CE and general contract law (e.g. Feldman *et al*., 2016; Backes, 2017; Thomas, 2018, 2019; Mak and Lujinovic, 2019), no article has analysed the extent to which the English sales law regime, including the interpretation and jurisprudence thereof, has the capacity to accommodate the guiding principles of CE.

First, this article outlines the circular business model concerning sale of goods, which will show how the guiding principles of CE may extend the manufacturers' responsibility at the stage of design and production of goods. Second, the general function of sales law and in

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[2] The terms 'sellers' and 'manufacturers' are used interchangeably in this article.

particular the implied terms of quality enacted in SGA are analysed. The subsequent section then examines the implied terms in section 14 (establishing the seller's implied obligation of 'satisfactory quality or fitness for purpose' of the goods delivered), as these may have a particularly important role in the context of the eco-efficient design principle.

II- Circular business model and its legal ramifications

While 'circular business models' cannot be easily defined or conceptualised, it features a new socio-economic-environmental paradigm. In the conceptualisation of the model adopted for the purpose of this article, manufacturers have a responsibility to uphold the environmental values of society and must respond to a broad set of stakeholders rather than just their largest shareholders (Brennan *et al.*, 2015; Merli *et al.*, 2018). A business model based on these principles of CE seeks the efficient use of products in order to preserve them as long as possible in the economy through product-life extension, redistribution/reuse, remanufacturing and recycling (Urbinati and Chiaroni, 2017). Implementing such an approach will often require a fundamental shift in the purpose of business and almost every aspect of its operations (Dalhammar, 2015; Backes, 2017; Thomas, 2018, 2019; Mak and Lujinovic, 2019). The realisation of a fully functioning circular business model necessitates creativity and innovation at all stages of the product lifecycle such as design, production and reverse logistics (e.g. Geissdoerfer *et al.*, 2018). The incentive for businesses to implement CE principles is to generate profit through the reuse and recycling of resources rather than through the sale of new products (e.g. Ellen MacArthur Foundation, 2015; Webster, 2016; Ghisellini *et al., 2016*; Murray *et al.*, 2017).

A major principle of the circular business model to reduce resource consumption is 'product-life extension', that is products should be designed and produced to be durable (Stahel, 1982; see also Ellen MacArthur Foundation, 2013). Both the design phase and production processes are key aspects in sourcing and resource use throughout a product's life. As stated by the European Union (EU) Commission (2019a): "design stands at the beginning of products' lifecycle and is essential for ensuring circularity" (see also European Commission, 2015, 2019b). Products should ideally be designed with environmentally friendly raw components and with the aim of easy disassembly for reuse, recycling and recovery of materials and components (Mitra and Datta, 2014; Mutha and Pokharel, 2009). Product design should thus

be improved by ensuring that the repairing and reconditioning of goods becomes efficient and simple, ultimately leading to the extension of product life (Gregson *et al*,. 2015). A commercial buyer engaged in such a CE business model has therefore particular interests of obtaining goods with a better design leading to durable lifecycle ('goods compliant with CE'). Stahel (1982) states that "almost any product or component can be made to last longer than it was originally intended to". According to the EU Commission's 2019 report entitled 'The Implementation of the Circular Economy Action Plan', economic actors, including businesses, are instrumental in driving the process towards achieving a circular economy; businesses will need to alter their business models to improve product design, which may also require the offsetting of increased production costs as a result of redesigning products.

The EU have been keen to foster sustainable economic growth by devising and implementing measures that facilitate reparability and upgradability of products as well as encouraging simplification and standardisation of components to reduce costs. For example, the EU Parliament adopted the Ecodesign Directive 2009/125/EC as a significant policy instrument for addressing resource efficiency, which might have the greatest potential for promoting a CE. This Directive, with the purpose of harmonising ecodesign law across Member States, sets out mandatory ecological requirements such as reparability or durability for 'energy-related products' sold within the EU. Such products are defined as "any good that has an impact on energy consumption during use which is placed on the market and/or put into service" (Ecodesign Directive, Article 2(1)). Energy-related products cover a wide range of manufactured goods including air conditioners, electric motors, domestic cooking appliances and household dishwashers. In addition, The EU Commission announced the Ecodesign Working Plan, as part of the Commission's new initiative on CE, to promote a transition towards a fully-fledged CE in the EU through a series of measures covering the lifecycle of products and materials. In particular, the Commission adopted an action plan in 2015 (EU Action Plan) in order to drive the transition of Europe towards a CE, strengthen global competitiveness and generate new jobs (European Commission, 2015). The EU Action Plan also highlighted the significance of the Ecodesign Directive in addressing resource efficiency in the design stage of energy-related products. More recently, an EU Commission's Report concerning the transition towards a circular economy stressed that products should be designed for "durability, upgradeability, reparability and reusability, with a view to reusing the materials from which they are made after they reach the end of their life" (European Commission,

2019b). There are ongoing policy projects that will address systematically the reparability, durability, upgradability or recyclability of certain materials or substances (European Commission, 2019c).

The circular business model is a powerful conceptual and analytical tool that might stimulate a paradigm shift in contract law doctrines (Heshmati *et al.*, 2013; Gregson *et al.*, 2015). The governing legislative frameworks alongside underlying agreements set out the extent to which producers' responsibilities are recognised and reinforced. It is questionable whether the English sales law can provide a conduit through which the circular business model can be maintained and developed, as discussed in the remainder of this article.

III- The policy context of English Sales Law in developing the circular business model

The UK has incorporated the CE concept within some of its policies. Brexit is likely to bring about significant changes in areas such as UK environmental law where the EU has played a key role in transforming the law over the past four decades (Reid, 2016; Steenmans, 2019). At the time of writing this article, it is far from clear how far the existing laws and policy frameworks based on European measures will remain unchanged or will be revised substantially. Nevertheless, the UK policy documents show the government's continued commitment towards promoting a sustainable, circular economy (HM Government, 2018; Department for Transport & Office for Low Emission Vehicles, 2018).

The UK's initial response to the EU Action Plan was somewhat favourable to the circular economy, through the Department of Environment, Food and Rural Affairs (DEFRA, 2015a; DEFRA, 2015b). In 2018 the government published a policy paper entitled 'Our Waste, Our Resources: a Strategy for England' (Strategy), which sets out how material resources should be preserved by improving resource efficiency and moving towards a circular economy in England (DEFRA, 2018). The Strategy also promotes Extended Producer Responsibility (EPR) that extends producers' responsibility throughout its useful life. EPR is based on the idea that in order to minimise negative effects, producers should already consider environmental

concerns in the design process of a product (Forslind, 2005). Such strong environmental policy may incentivise producers to design their products to be easily reused, dismantled or recycled at the end of their lifecycle (Dawson, 2019; Bradshaw, 2020). This article does not analyse the EPR policy, not least because existing regulations reflecting and reinforcing the policy in the UK are mainly concerned with the allocation of cost burdens of recycling to producers in order to enhance recycling rates. These regulations, with various recycling targets, which arise from EU directives are presently in force: Waste Packaging,[3] End-of-Life Vehicles,[4] Waste Electrical and Electronic Equipment.[5] These regulations, while crucial in waste management, play a less crucial role in incentivising manufacturers at the production stage. The focus of this article is rather on the stage where manufacturers design and produce products.

The emergence of the national and European policy frameworks concerning the design of products raises the important question of their relationship with the legislative framework governing parties' rights and duties in the context of sale of goods transactions. The primary focus of the English sales law is to assign duties, risks, liability and remedies between private parties. Nonetheless, a business model built upon the principle of CE often concerns the *goods* and their various stages of design and production that, in the eyes of sales law, can give rise to the issue of 'conformity' or 'quality'. In particular, this article will examine the impact of the Ecodesign Directive, an effective instrument in prompting manufacturers to produce goods complaint with CE, which lays down requirements that manufactures should follow during the design phase of products. These requirements are thus significant in ascertaining the nature and extent of the manufacturer's liability in producing energy-related goods. The SGA incorporates section 14 that sets out the implied seller's obligation in relation to the quality or fitness of goods delivered. Breach of this section entitles a commercial buyer to reject the goods and ask for damages. It is questionable whether this section has the potential to take account of the policy frameworks concerning CE in determining the seller's scope of obligations.

[3] 1994/62/EC transposed in UK under the Packing Waste Regulations 2007.
[4] 2000/53/EC transposed in UK under the End-of-life Vehicles Regulations 2003.
[5] 2002/96/EC transposed in UK under the Waste Electric and Electronic Equipment (WEEE) Regulations 2013.

IV- Implied terms concerning the quality of goods

The central purpose of commercial contract law is to realise the parties' reasonable expectations, which are based on their promises (Llewelyn, 1936; Reiter and Swan, 1980; Zamir, 1991; Liu, 2009). A manufactured goods seller is thus regarded as responsible for the reasonable expectations created by his actions or inactions. A logical corollary may be that a commercial buyer may not be restricted to expectations explicitly expressed by the seller, but extend to any expectations that are characteristic and reasonable (*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co Ltd*). Discovering the typical expectations of buyers is a sophisticated process that leads to identification and recognition of the buyer's reasonable expectations. Such recognition then justifies the imposition of conformity obligations, even where not contemplated by the parties in their transactions. Therefore, principles concerning conformity obligations are justified whenever the circumstances give rise to the promisee's reasonable expectations concerning the quality of the goods for their ordinary use. The virtue of this premise lies in its flexibility, but therein also lies the difficulty that the reasonable expectations of a promisee are difficult to define. The implied terms of a sale contract seek to define the parties' contractual obligations and are not *prima facie* concerned with considerations of the public interest, which are external to the contract (Saidov, 2015). However, the implied terms concerning the quality of the goods function in such a way that ensures certain quality standards are maintained and promoted in a society. As such, these implied terms under the SGA should be examined to ascertain whether they can be viewed as suitable avenues for the development of the circular business model.

With the enactment of the SGA, the *caveat emptor* (i.e. let the buyer beware) principle, indicating that "the buyer had eyes; let him use them, or suffer the consequences" (McKendrick, 2016; Bridge, 2014), has been gradually eroded. Its impact, however, remains significant as it is the dominant and underlying principle in section 14, as reiterated recently by the Court of Appeal (*KG Bominflot Bunkergesellschaft für Mineraloele mbH & Co* v *Petroplus Marketing AG (The Mercini Lady;* see also *Neon Shipping Inc v Foreign Economic & Technical Corp Co of China*). The exceptions to the *caveat emptor* principle in the SGA have become so varied that commercial sellers will, in most cases, be under duty to supply goods of satisfactory quality and fit for their known purposes. As a result, manufacturers are liable for delivering defective goods and commercial buyers can exercise appropriate remedies,

including returning goods to retail sellers or requesting damages (sections 14-15 & 51-52 SGA; *Jones v Bright*).

To examine whether the English sales law can accommodate the particular needs of a commercial buyer engaged in the circular business model, this article will focus on two implied terms concerning the quality of goods, namely 'satisfactory quality' (section 14(2) SGA) and 'fitness for a particular purpose' (section 14(3) SGA). The commercial buyer may then be successful in claiming for remedies if a manufacturer is held liable for failing to design and produce 'goods compliant with CE'.

A- Implied satisfactory quality

The first assumption to consider is that the goods are commonly used in the circular business model. Section 14(2) of the SGA prescribes 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". This duty is strict: it is no defence to show that all care was taken (*Grant v Australian Knitting Mills Ltd*; *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*). Goods are of satisfactory quality if they "meet the standard that a reasonable person would regard as satisfactory", considering the description, price, and all other relevant circumstances (Section 14(2A) SGA). The required quality will be judged by reference to certain aspects of quality, such as fitness for all the purposes for which goods of the kind in question are commonly supplied; appearance and finish; freedom from minor defects; safety; and durability (section 14 (2B) SGA). It was argued in *Webster Thompson v JG Pears (Newark) Ltd* that although the list of aspects of quality refers mainly to intrinsic matters, the term 'satisfactory' extends to external matters. Intrinsic matters refer to the condition of the goods, including their appearance, finish and being free from defects, while external matters refer to an abstract notion of saleability or compliance with legal requirements (*Sumner Permain & Co v Webb & Co*). In *Webster Thompson*, the buyer was entitled to damages, since the animal by-products supplied were not of satisfactory quality, regardless of the actual physical condition of the goods. The buyer rejected the goods and the court confirmed that the goods were liable to be downgraded under EU Animal by-product Regulations.[6] The seller, owing to long-

[6] EU Regulation 1774/2002 lays down detailed rules concerning the collection, transport, storage, handling, processing, use and disposal of animal by-products that are not intended for human consumption.

standing dealings and knowledge of the industry, should have been familiar with the EU regulations, and the circumstances do not demonstrate that the seller could have relied on the buyer's skill or judgment in examining and detecting the defective quality of the goods. This decision shows that the legislative framework surrounding a particular type of goods is taken into account in defining the seller's scope of implied duty for providing satisfactory goods. Due to the absence of certain, specific legislative definition and regulation concerning CE, it is difficult to draw a clear analogy with these EU regulations that impose certain duties on manufacturers.

In the key case of *Jewson v Boyhan,* decided by Court of Appeal, the buyer ordered a number of boilers to be installed in its flats. The buyer intended to reject the boilers on the basis that they were neither of satisfactory quality nor reasonably fit for their purpose because they reduced the energy efficiency ratings of the flats. A special type of efficiency rating called 'Standard Assessment Procedure (SAP)' was in force at the time of contracting, which neither party was aware of. This energy rating, recommended by the government, seeks to achieve the broad purpose of minimising energy consumption by identifying a range of factors in efficiency, such as control of the heating system and the price of fuels used for space and water hearing. Following the installation of the boilers, the local authority required a new SAP rating calculation, the result of which was dramatically lower than the minimum standards prescribed in the Building Regulations.[7] As a result, two potential purchasers refused to proceed with their purchase because they were advised that no mortgage on the flats could be obtained. Nevertheless, the boilers were of appropriate quality in terms of their intrinsic characteristics. They were also capable of working to the reasonable satisfaction of the occupants of the flats, and there was no legitimate complaint that the boilers failed to function appropriately. The Court of Appeal decided that the boilers were completely capable of working to the reasonable satisfaction of the occupants of the flats. They were thus of satisfactory quality, based on section 14 (2). This shows that the court failed to take into consideration any broader issue concerning the energy efficiency of boilers based on their SAP, which had been prescribed under the operational Building Regulations. This judgment demonstrates that when a commercial buyer intends to purchase and obtain goods compliant with CE, it may need to

[7] The Building Regulations 1994 required the calculation of an SAP rating and the submission of its calculations to the local building control department when Building Regulations approval was sought.

incorporate a condition in the contract or may invoke the implied term of fitness for purpose prescribed in section 14(3), which will be explained.

In *Activa DPS Europe SARL v Pressure Seal Solutions Ltd*, the seller was required to provide postal machinery and equipment to the buyer, who failed to pay the contract price. The buyer claimed that it would be unable to dispose lawfully of the goods to its own customers within the EU, due to their lack of certification under the EU Directive 2004/108/EC. The purpose of this Directive is to ensure the harmonisation of national laws for protection against electromagnetic disturbance in order to guarantee the free movement of electrical apparatuses without lowering justified levels of protection. The Directive has been transposed into the law of England and Wales by the Electromagnetic Compatibility Regulations 2006, and as such the supplier was in breach of the applicable national legislation. The compliance of the apparatus with all relevant essential requirements, placed on the EU market, shall be demonstrated by an EC (electromagnetic compatibility) declaration of conformity issued by the manufacturer or his authorised representative (Electromagnetic Compatibility Regulations 2006, s 15). The buyer claimed for a breach of the implied term that the goods should be of satisfactory quality, and in particular, made reference to section 14(2B-A) stating "fitness for all the purposes for which goods of the kind in question are commonly supplied". The Court of Appeal was reluctant to give weight to this argument, disallowing the buyer to reject the goods. The primary defence of the seller was that the buyer was able to sell the goods without difficulty within and outside the European Union. The Directive has imposed a number of duties on manufactures to ensure that conformity is achieved through a process of self-assessment by manufacturers. There was, however, no evidence that the Directive was implemented strictly in the EU Member States where the buyer was to trade, although the Directive has been in force in England and Wales. A conclusive evidence must show that the competent national authorities restrict sales of uncertified products. The court made a reference to the well-known case of *Bramhill v Edwards*, where it was established that the seller's quality obligation contained in Regulation 8 of the Road Vehicles Regulations 1986, while being in force, were never brought into effect rigorously. The goods in question were mobile caravans imported from the United States, which had a width of 102 inches against a maximum width of 100 inches, thus being slightly wider than permitted by the Regulations. The caravans were not held to be in contravention of satisfactory quality requirement, following section 14 (2), since in practice, such vehicles were still able to be insured and the authorities failed to implement the Regulations.

However, a starkly different decision from *Activa* and *Bramhill* was taken in *Lowe v W Machell Joinery Ltd*, where the seller supplied the buyer with a bespoke wooden staircase to be installed in the buyer's barn, which was going to be used as a dwelling house. Although the seller had fully complied with the design agreed between the parties, the buyer rejected the goods, arguing that the staircase failed to satisfy the requirements of the Building Regulations Act 1984. Under section 7, a failure to comply with an Approved Document does not of itself render a person liable to civil or criminal proceedings, but if in any such proceedings it is alleged that a person has violated a provision of the Building Regulations, failure to comply with an Approved Document "may be relied upon as tending to establish liability". The Regulations were clearly in force in the sense that if the building control officer did not approve the work done, the Regulations would be deemed not complied with. This could lead to criminal sanctions if the building were used, or to a notice by the local authority requiring the breach to be remedied, and to possible civil liability as well. The Court of Appeal held the seller liable under both the satisfactory quality and fitness for purpose tests:

> If the purpose for which the goods are to be used (having been made known, if necessary, to the seller under section 14(3)) is one for which compliance with the Building Regulations is or may be essential, fitness of the goods for their purpose must surely include the compliance of the goods, when installed and used, with the Building Regulations.

A significant factor in this ruling seems to be the seller's being the manufacturer, who was reasonably expected to be aware of the Regulations and should have noticed that the staircase would not meet the standards set by the Regulations before accepting the buyer's order, or at least prior to finalising the design. This decision was made, despite the seller strictly followed the design agreed with the buyer.

As shown, compliance with regulations imposing broader requirements than those of private interests of parties, such as the requirements of the Building Regulations Act, can partly constitute implied obligations of seller under section 14(2) SGA. There is, however, lack of consistency in the case law concerning the implementation of those regulations. It is unclear whether relevant rules underpinning the principles of circular economy are in force in the UK. The government's policy paper, the Strategy, preferring a light-touch regulatory approach,

seeks to incentivise manufacturers to preserve material resources by improving resource efficiency and contribute towards a circular economy in England. In particular, it sets minimum requirements through ecodesign to encourage resource efficient product design. However, it appears that the only relevant set of rules, concerning design and production of goods compliant with CE and being rigorously enforced, is the Eco Design Directive 2009/125/CE and in particular, the Ecodesign for Energy Related Products Regulations 2010.[8] However, no case law has been found to examine the court's judicial approach. The latter set of rules regulate many types of energy-consuming products, provided that they meet generic or specific measures concerning their use of energy. The aim is to reduce their environmental impact, improve their energy efficiency and cut greenhouse gas emissions. As such, it has a wide scope of application, covering many products such as air conditioners, boilers, dishwashers, washing machines, and, in general, electrical and electronic household and office equipment. The manufacturer or authorised representative is responsible for compliance, and they should evaluate the products at the design stage with reference to relevant measures prescribed in the regulations, and then self-certify. Non-compliance with this regulation is an offence incurring penalties, explicitly mentioned in Part 6, when responsible persons fail to fulfil the conformity assessments, declarations of conformity and the CE marking. While regulations of this sort, which oblige the manufacturers to produce goods with less adverse environmental impact, are welcome, the regulations do not require them to produce goods in such a way that they can be reused, or easily repaired and recycled; i.e., being compliant with CE. There is an urgent need for the EU and, in particular, the UK, to devise and strictly implement a set of rules addressing the core principles of circular economy so that the manufacturers could be held into account, from a private sales transaction perspective.

B- Particular purpose, whether explicitly or impliedly known to the seller

An alternative avenue is whether the courts may recognise, through section 14 (3), that goods produced are compliant with CE. This section states that the goods supplied by a seller in the course of business must be reasonably fit for any particular purpose of the buyer which is expressly or impliedly made known to the seller, and the buyer relies upon the seller's skill or

[8] During the transition period from 1 February to 31 December 2020, these EU legislations remain enforceable in the UK. Furthermore, the UK government has announced that from January 2021 all EU ecodesign requirements entered into force before 31 December 2020 will remain effective in the UK. <https://www.gov.uk/government/publications/meeting-climate-change-requirements-if-theres-no-brexit-deal/meeting-climate-change-requirements-if-theres-no-brexit-deal#energy-related-products-ecodesign-and-energy-labelling>

judgement. The cases preceding the SGA 1893 failed to draw a consistent distinction between the fitness for purpose and merchantable quality terms. Nevertheless, a clear fitness for purpose strand emerged in *Jones v Bright*, in which sheets of copper purchased for sheathing a barque became perforated in use, lasting only for one four-month trip, as opposed to the normal four years. The seller was held liable for damages for breaching the implied term of fitness for purpose. The judgment made in this case is significant in potentially holding a manufacturer responsible for producing goods compliant with CE for various reasons. First, this is the first judgment which distinctly recognised the seller's liability in terms of providing goods that are fit for particular purposes. Second, the judgement clearly rejects the spirit of *laissez faire* and *caveat emptor* by frankly asserting that the courts should take responsibility for promoting quality control in the manufacture of goods, in that they should "make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied". The case further spells out that manufacturers should learn the lesson that "they must not aim at underselling each other by producing goods of inferior quality and that the law will protect purchasers who are necessarily ignorant of the commodity sold".

The modern law based on section 14(3) of the SGA imposes a strict liability on the seller. The seller is under absolute duty to supply goods that are fit for the buyer's purpose, but they should be reasonably fit. This confers upon the subsection a degree of flexibility that, in certain instances, decrease the seller's responsibility (Bridge, 2014). Three significant cases will be analysed to realise whether and how the commercial buyer, intending to purchase goods compliant with CE, can establish a seller's liability on the basis of the implied term of fitness for purpose. The presumption here is that the buyer does not have a commonplace purpose; rather it is viewed as a particular purpose.

In *Henry Kendall & Sons v William Lillico & Sons Ltd,* a dealer of animal feedstuffs sold a quantity of Brazilian groundnut extract to a buyer, who was involved in the distribution chain. At the time of contract, the dealer knew that the extract would be resold to compounders of animal feed, but not whether the extract would ultimately be compounded into cattle feed or poultry feed. The groundnut extract was deemed unfit, since it was toxic in varying degrees to both cattle and poultry. If it had been the case that the toxic extract was particularly harmful to poultry and not to other animals, the dealer could have argued that the buyer failed to

communicate his particular purpose, and hence deprived the dealer of any opportunity to exercise his skill or judgment due to the absence of necessary information.

For a prospective seller to be held liable for damage incurred to poultry, it was debatable whether the seller might merely be informed that the extract was required for animal feed or whether the buyer had to communicate clearly that it was destined for poultry. The court, however, opined that a buyer of groundnut extract would in future have to inform the seller if the feed were ultimately to be fed specifically to poultry (*Henry Kendall*, para 79). Lord Reid further explained that the key to the implied terms of quality and fitness for purpose is reliance: the reasonable reliance of the buyer upon the seller's ability to make or select goods which are reasonably fit for the buyer's purpose, coupled with the seller's responsibility to do so (*Henry Kendall*, para 78). The seller is free to choose whether or not to undertake such a responsibility. However, the seller must be provided by the buyer with sufficient, clear information to acquaint himself with what he is being relied upon to do, so that he can make or select goods which are fit for the particular purpose that the buyer requires them.

The House of Lords' decision in *Henry Kendall* implies that a commercial buyer with the intention of obtaining goods compliant with CE would have to be explicit and disclose fully his particular purpose, including his ultimate use of the goods. However, this reasoning has to be modified to take into account another more recent House of Lords decision in *Ashington Piggeries Ltd v Christopher Hill Ltd.* Norwegian producers were contracted to deliver a quantity of herring meal to English compounders of animal feed. The issue was that the foodstuff so supplied caused thousands of mink to die because the meal was contaminated by an agent toxic to mink, a by-product of the preserving process adopted by the Norwegian producers. Although the Norwegian producers were not informed of the ultimate destination of the goods, the buyers had provided for the compound a bespoke formula, which, had it been adhered to, would not have contained the toxic agent. The producers were held liable for damages based on section 14(3), even though they were unaware, and had probably never contemplated, that the herring meal would eventually be fed to mink (*Ashington Piggeries*, 452). The House of Lords decided that it was sufficient for the buyers to establish that herring meal was generally unfit for compounding into animal feed, and had the producers reasonably contemplated the matter at the contract date, they would have realised it was not unlikely that

the herring meal would be unsuitable to be fed to a range of animals, including mink (*Ashington Piggeries*, 455).

The House of Lords' decision in favour of the buyer in *Ashington Piggeries* involves an expansion of section 14(3) liability, in that it improves the evidentiary position of the buyer. To show general unsuitability, a buyer need not show that goods of the same type have actually injured animals other than mink in the range covered by animal feed in general. Rather, the presence of toxicity would boost evidentiary inference of unfitness across the range (*Ashington Piggeries*, 492). The burden would then shift to the seller to demonstrate that the contaminated meal could be fed to other animals in the range, so that the special vulnerability of mink would be regarded as an idiosyncrasy, which rendered the supplied meal unsuitable for them, and falling within the buyer's scope of responsibility. Unless, as is not the case here, the buyer had communicated this idiosyncrasy to the sellers so as to signal reliance on them to provide for it. It was therefore sufficient to establish liability under this subsection by showing that the seller had general knowledge that the foodstuff was required for livestock, without any need for the buyer's explicit identification of the animals which would consume the food. Such a decision was more recently approved in *JP Pears (Newark) Ltd v Omega Proteins Ltd* (2009). This case established that if the manufacturer enjoys long-standing dealings and knowledge of the industry, it can reasonably be presumed that such manufacturer should know the buyer's particular purpose, and as such, they may be held liable for breach of the implied term of reasonable fitness for purpose (*JP Pears*, para 39).

Following the House of Lords' decision in *Ashington Piggeries*, the purpose of purchasing and obtaining the goods compliant with CE may be accommodated within the meaning of a particular purpose. The manufacturer's general knowledge that the goods are fit for that particular purpose would thus be sufficient for liability under section 14(3). Further explicit communication by the buyer is nevertheless desirable. As long as the manufacturer and buyer are on the same page about the use of goods in the circular business model, the buyer does not need to communicate explicitly that the manufacturer should design and produce goods compliant with CE. This purpose should be viewed as commonly known rather than as idiosyncratic. However, this concluding remark may not always be judicially accepted. Lord Diplock's dissenting speech in *Ashington Piggerries* echoed the strict judgment in *Henry*

Kendall & Sons, and seemed regressive in stating that the "swing of the pendulum from *caveat emptor* to *caveat venditor* has now gone far enough". Lord Diplock's *obiter dictum* has been revived in several decisions concerning the statutory condition of fitness for purpose, which shows that the pendulum may be commencing its ponderous swing in the direction of *caveat emptor*. This may indicate that the buyer has to clearly communicate its particular purposes to the manufacturer, in order to convey meticulous knowledge so that the buyer can safely rely on the manufacturer's skill.

A representative decision was made by the Privy Council consequent upon the appeal against the New Zealand Court of Appeal's ruling in *Hamilton v Papakura DC*, where a buyer had a horticulture business in which he grew tomatoes hydroponically, i.e. entirely in water, without soil. The seller, which was the city council, distributed the water supply. The buyer alleged damage caused to his tomatoes, which he attributed to toxic residues of herbicides in the water supplied. Evidently, the tomatoes of other growers in the area were similarly affected. Although the particular purpose of the use of water was not expressly communicated to the seller, the latter knew well that there were horticulturists in the area, and following the judgment made in *Ashington Piggeries*, this was sufficient to demonstrate the seller's liability, based on the implied term of fitness for purpose. Despite this reasoning, the Privy Council held that the buyer had neither expressly nor by implication made known to his seller the particular purpose for which the water was needed and thus the conditions for invoking the statutory implied term of fitness for purpose had not been fulfilled. The local authority, complying with its statutory duty to provide drinking water to the requisite standard, was not under an implied duty to satisfy the special requirements of individual users who required water of a higher quality for their purposes. Considering that the seller was generally aware of the presence of commercial horticulturists in the area of the water supply, both the New Zealand and the SGA spell out that the buyer's purpose can be made known by 'implication'. It has long been the law that this requirement can be established where the seller has acquired knowledge of the buyer's purpose (NZ Sale of Goods Act, section 16 (c); SGA section 14(3)). Justice Gault stated that the buyer should, however, communicate his purpose to the seller in general context of the contract to purchase, which can be interpreted as an express communication (*Hamilton v Papakura DC*). Such decision that the buyer must specifically communicate his purpose evokes *caveat emptor*, which was also the position adopted in *M/S Aswan Engineering Establishment Co v Lupdine Ltd*. In this case, the buyers received a consignment of liquid waterproofing compound in

plastic pails for shipment to Kuwait, where they owned an engineering business. On arrival, the temperature inside the containers became so high that the pails melted and the entire consignment was damaged. The Court of Appeal decided that the pails were of satisfactory quality in that they were fit for any of the purposes for which they were commonly purchased, with regard to the description applied to the goods and to all other relevant circumstances. The pails were supplied for the purpose of exporting the compound and were suitable for that purpose, notwithstanding their collapse under extreme conditions. The court's view was grounded on the seller's lack of specific knowledge that plastic pails were required for exporting to a country with particular climatic conditions, which could be rectified by the buyer's sufficient communication. Therefore, the type of damage and the conditions in which it occurred were deemed outside the scope of what was reasonably foreseeable by the seller.

The case law supports the view that the buyer relies on the manufacturer's skill and judgment, if the particular purpose of purchasing and using goods compliant with CE is clearly communicated. It is uncertain whether the buyer can ever rely on the manufacturer's implied obligation when the purpose of using goods in the circular business economy is reasonably contemplated. Those decisions made in *Hamilton* and *M/S Aswan Engineering* appear to be overly restrictive, and inconsistent with the judgment in *Ashington Piggeries*, where Lord Guest emphasised that "if the seller knows the purpose for which the buyer requires the goods, then no express intimation by the buyer is necessary". It is submitted that this opinion, with respect, may run counter to the rationale underlying the implied terms. If the buyer needs to fully communicate to the manufacturer any specific purpose for which the goods might be used, including the use of goods in the circular business model, two issues may arise. First, the buyer itself may not be fully and precisely aware of its future plan at the time of contracting, and subject to changes in the market, they may adopt different strategies in sub-selling or using the goods. Second, if the buyer is presumptively well aware of its future plan, they would be wise to incorporate them into the contract terms, as either conditions or warranties, so that in cases of breach, the buyer can confidently invoke them to establish the manufacturer's liability and exercise appropriate remedies.

V- Concluding remarks

Products made for use in circular business models should have an extended lifecycle, reduced resource and energy consumption during their use phases, and be suitable to be reused or dismantled and recycled or recovered at the end of life. For the scenario where a buyer intends to purchase and obtain goods compliant with CE, this article analysed two avenues within the remit of implied quality terms in English sales law whereby the buyer may hold the manufacturer responsible for designing and producing such goods. The first assumption was that such a purpose is well known to the seller through public law quality standards. The criterion, then, is whether any law with such characteristics is in force. The Ecodesign for Energy Related Products Regulations 2010 is amongst few regulations reinforcing aspects of the guiding principles of the CE, which satisfies that criterion. As discussed, the Court of Appeal in *Bramhill v Edwards* adopted a favorable approach toward the manufacturer, by setting a high bar in the sense that not only should the buyer persuade the court that the relevant regulation is in force, but also that it is enforced strictly. As such, the manufacturer can be held contractually liable on the grounds of violating the implied term of satisfactory quality, stated in section 14 (2) SGA, if the products fail to comply with the required measures prescribed in the regulations. While this sort of regulation, which obliges the manufacturers to produce goods with less adverse environmental impact, is welcome, the regulations do not require them to necessarily produce goods complaint with CE. There is an urgent need for the EU and in particular, the UK especially following Brexit to devise and strictly implement a set of rules addressing design, leading to increases in the life-time of a product, so that the sellers or manufacturers could be held contractually accountable.

The second alternative assumption examined was that the buyer's purpose may be viewed as uncommon, not being widely known, for which section 14(3) of the SGA can be employed. The question was the extent to which the buyer should communicate its particular purpose of using goods compliant with CE. As shown, the case law is inconsistent: on one hand, *Ashington Piggeries* may favour the view that a generally known purpose of employing the products in the circular business model should be sufficient to uphold a seller's liability for the goods to be fit for the buyer's particular purpose. On the other hand, modern decisions made in *M/S Aswan* and *Hamilton v Papakura* indicate that the buyer must communicate explicitly its particular purpose to enhance the seller's knowledge so that the buyer can safely rely on the seller's skill and judgment. These decisions appear restrictive and commercially unrealistic.

Once the buyer's purpose of using goods in the circular business model is known to the seller, a measure of responsibility automatically shift to the latter such that, where necessary and appropriate, it should investigate the buyer's needs. As such, it is unacceptable that the seller may seek to eschew its obligation by showing that it has received inadequate information from the buyer. In light of recent judicial decisions, the buyer should therefore ensure that his full intention to use goods for a particular purpose is properly conveyed to the seller.

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