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THE LEMON LAW AND THE INTEGRATED ENHANCEMENT OF CONSUMER RIGHTS IN SINGAPORE

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European in inspiration and British in design, the Singapore Lemon Law seeks to provide consumers with more effective redress against defective products. The 6-month presumption of non-conformity reverses the burden of proving the cause for a defect appearing within 6 months of delivery; in so doing, it places the burden of proof on the party better able to investigate the cause for the defect. The new statutory remedies of repair, replacement, rescission and price reduction add to the armoury of remedies and enhance the consumer's interest in the due performance of the contract. While constituting a distinct regime with its own norms and principles of operation, the Lemon Law draws on and interacts with the existing sales law and consumer protection law. This article examines the potential complexities arising from the integrative aspects of the Lemon Law and the adaptation issues arising from the interaction between the Lemon Law and the general law.

I. INTRODUCTION

The Singapore Lemon Law (hereinafter "the Lemon Law"), which is inserted as Part III of the *Consumer Protection (Fair Trading) Act*,[1] seeks to provide consumers with more effective redress against defective products.[2] While not appearing in the legislative text, the term 'Lemon Law' was used in both parliamentary debates and official press releases to refer to the package of amendments which vest in the consumer additional rights against suppliers of goods that do not conform to the contract.[3] The term originates in the United States, where 'lemon law' typically

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1 Cap 52A, 2009 Rev Ed Sing [*CPFTA*].

2 The *Consumer Protection (Fair Trading) (Amendment) Act* (No 7 of 2012) [*2012 Amendment Act*] was passed by Parliament on 9 March 2012 and took effect on 1 September 2012. Apart from inserting a new Part III into the *CPFTA*, the amendments also made changes to the *Hire-Purchase Act* (Cap 125, 2014 Rev Ed Sing) so as to align the implied terms under a hire-purchase contract to those covered by the *Sale of Goods Act* (Cap 393, 1999 Rev Ed Sing) [*SGA*] and the *Supply of Goods Act* (Cap 394, 1999 Rev Ed Sing). See *infra* note 18. Similarly, amendments related to the new rights were made in the *Road Traffic Act* (Cap 276, 2004 Rev Ed Sing) in order to allow for the transfer of the certificate of entitlement to replacement vehicles and for adjustments to be made to the taxes payable for the vehicle.

3 At the Second Reading of the *Consumer Protection (Fair Trading) (Amendment) Bill*, the Minister of State for Trade and Industry Mr Teo Ser Luck explained: "'Lemon laws' refer to consumer protection laws that provide remedies against goods with latent defects, also known as 'lemons'." (*Parliamentary Debates Singapore: Official Report*, vol 88 (9 March 2012) (Mr Teo Ser Luck)). The term has been consistently used in government press releases: see, for example, Ministry of Trade and Industry, Press Release, "Singapore's Lemon Law Takes Effect On 1 September 2012" (31 August 2012). The committee which

refers to legislation conferring on the consumer the right to seek a replacement or a refund if the goods continue to manifest defects after repairs.[4] In the Singapore context, 'lemon' is used in the broader sense of the word in American English to mean a defective good. In providing for a new right to replacement and a statutory right to rescission, the Lemon Law echoes some features of the 'lemon laws' found in the state laws of the United States.[5] It is, however, European in inspiration—for the Singapore Lemon Law is modelled on the United Kingdom (UK) *Sale and Supply of Goods to Consumers Regulations 2002*[6] which transposed the 1999 EC *Directive on the Sale of Consumer Goods and Associated Guarantees*.[7] In designating these additional consumer rights as the 'Lemon Law', Singapore has attached an American term as a handle to a product transplanted from the UK, which was, in turn constructed according to European instructions.

This article explores how the Lemon Law (located in Part III of the *CPFTA*) is deeply integrated with the existing rules pertaining to the sale and supply of goods to consumers, and the issues that result from their interaction. The superficial simplicity of the Lemon Law conceals a complexity that is not apparent from its text. The remedies are predicated on there being a breach of the terms of the contract, whether express terms or terms implied by statute. While implied terms like the condition of satisfactory quality are mandatory in consumer contracts, the precise expectations engendered are dependent on the circumstances of the contract. In the particular context of an implied term of satisfactory quality, the point beyond which a good is considered unsatisfactory is dependent on the nature and condition of the goods, the price, and the circumstances in which the contract was made. Section III examines how such scalability of the implied term impacts upon the operation of the 6-month presumption of non-conformity, which indubitably adds zest to the efficacy of the consumer's existing rights. In doing so, the section also analyses how the presumption of non-conformity operates differently from a guarantee against defect.

The nature of the additional statutory remedies introduced by the Lemon Law is discussed in Section IV. While they constitute a distinct parallel remedial regime, the

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was formed to look into the need for additional consumer protection laws was termed the "Lemon Law Taskforce": see Ministry of Trade and Industry, "Public Consultation on Amendments to the *Consumer Protection (Fair Trading) Act* and *Hire-Purchase Act*" (16 December 2010).

[4] Lemon laws in the United States typically cover—but are not necessarily confined to—the sale of vehicles. One such example is the Ohio Lemon Law, which covers only the sale of new vehicles. This prescribes that the manufacturer, its agent, or its authorized dealer is required to repair defects found in the new vehicle within the first year of delivery, or within the first 18,000 miles (whichever is earlier). If "after a reasonable number of repair attempts" the manufacturer, its agent or its authorized dealer is unable to make the vehicle conform to the contract, the buyer has the option of either seeking a replacement or a refund: Ohio Revised Code ("ORC") §1345.72(B) (2013). Such "reasonable number of repair attempts" is presumed if any of the following four conditions is met: (i) there is persistence of the same non-conformity after three or more repair attempts; (ii) the vehicle is out of service for 30 days or more by reason of repair; (iii) there have been eight or more attempts at repairing non-conformities that substantially impair the use or value of the car to the consumer; or (iv) there is continuance of a non-conformity that is likely to cause death or serious injury after one repair attempt (ORC §1345.73 (2013)).

[5] *Ibid*.

[6] SI 2002/3045 [*UK Regulations*].

[7] *Commission 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*, (1999) OJ, L171/12 [*EC Directive*].

statutory remedies can be used in conjunction with the remedies under the general law. The theoretical underpinnings of the remedies for breach of contract continue to be potentially relevant, notwithstanding the distinctive and parallel character of the remedial regime. This section examines the interaction between the two regimes, and in particular, the degree to which the existing principles under the general law might shape the application of the statutory remedies.

Underlying the 'integration' and 'interaction' issues in Sections III and IV is the concern over the operability of the Lemon Law regime by its intended beneficiaries—the consumers. If such integration and interaction portend a complexity that is not accessible to the ordinary consumer, it also generates greater room for erroneous expectations. This has consequential impact upon dispute settlement. This concern is demonstrated in Section II, where the 'fit' of the Lemon Law with the 'unfair practice' regime is examined with a view to highlighting some misunderstandings that can potentially arise from situating the Lemon Law in the *CPFTA*.

II. Strange Bedfellows: the Lemon Law and the 'Unfair Practice' Regime

Apart from their common purpose in enhancing the interests of consumers, there are few linkages between the existing Part II of the *CPFTA* and the Lemon Law which now occupies Part III of the *CPFTA*. Indeed, the very definition of the consumer is different in the two Parts.

Part II of the *CPFTA* is centred on the regulation of "unfair practices". When enacted, it was a new stand-alone statutory scheme constructed on the notion of 'unfair practice'.[8] The 'unfair practice' regime created a new regulatory regime with new institutions and actors to take action against unfair practices.[9] In addition, it confers on consumers the right to sue for 'unfair practice' as defined in s 4 of the *CPFTA*.

The notion of 'conformity' to the contract in Part III of the *CPFTA*, which is one of the key conditions to the availability of the new statutory remedies, draws on the existing concepts found in the law on the sale and supply of goods. The notion of goods, therefore, is not that found in the interpretation provision of *CPFTA* Part I;[10] rather, the definition that applies is that found in the principal statutory regime governing the applicable contract. Thus, the definition of 'goods' for a sale of goods transaction is that found in s 61(1) of the *SGA,*[11] while 'goods' for the purpose of a transaction covered by the *Supply of Goods Act* is that found in s 18(1)

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[8] *CPFTA*, *supra* note 1, s 4. The *Consumer Protection (Fair Trading) Bill*, which was passed by the Parliament on 11 November 2003 and took effect on 1 March 2004, was modelled on the Saskatchewan *Consumer Protection Act*, SS 1996, c C-30.

[9] The Minister may, under *CPFTA* s 8(10), appoint a "specified body" to monitor and take action against a supplier for unfair practice. These include seeking an injunction or judicial declaration against the supplier (s 9), and inviting suppliers to enter into voluntary compliance agreements (s 8). The latter may entail the supplier agreeing to compensate affected consumers and/or undertaking not to engage in specified unfair practices. The Injunction Proposals Review Panel created under *CPFTA* s 10 superintends the specified body's application for an injunction or a judicial declaration; the proposed application must receive the endorsement of the Panel before the specified body can make an application to the District Court or the High Court: *CPFTA* s 9(4).

[10] *CPFTA*, *supra* note 1, ss 12A(1) and 12A(5)(a).

[11] *Ibid*.

of that Act. Whereas the definition of 'goods' in *CPFTA* Part I covers the provision of credit, residential property and a voucher,[12] the notion of 'goods' for the contracts covered by the Lemon Law is narrower. The provision of credit would certainly not be covered; neither would residential property form the subject matter of a transaction covered by the Lemon Law.

The 'consumer', another key notion for determining the applicability of the Lemon Law, follows the definition found in another statute—the *Unfair Contract Terms Act*.[13] Again, the definition found in the general interpretation provision of the *CPFTA* is disapplied.[14]

The differences are not insignificant. Under s 12(1) of the *Unfair Contract Terms Act*:

> A party to a contract "deals as consumer" in relation to another party if—
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> (a) he neither makes the contract in the course of a business nor holds himself out as doing so;
> (b) the other party does make the contract in the course of a business; and
> (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.[15]

In contrast, the 'consumer' under s 2 of the *CPFTA*:

> ... means an individual who, otherwise than exclusively in the course of business—
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> (a) receives or has the right to receive goods or services from a supplier; or
> (b) has a legal obligation to pay a supplier for goods or services that have been or are to be supplied to another individual.

A number of differences are immediately apparent. First, whereas the *UCTA* permits a juridical person to be considered a 'consumer',[16] the *CPFTA* definition covers only a natural person. Second, whereas the *UCTA* adopts the notion of "mak[ing] the contract in the course of a business" to demarcate who is not considered a consumer, the *CPFTA* definition uses the narrower notion of dealing "exclusively in the course of business" for that end. Third, the goods which form the subject matter of a transaction covered by the Lemon Law must be of "a type ordinarily supplied for private use or consumption."[17] There is no similar qualification for the *CPFTA* definition.

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[12] *Ibid*, s 2.

[13] *Ibid*, s 12A(2).

[14] *Ibid*, s 12A(5)(a).

[15] Cap 396, 1994 Rev Ed Sing [*UCTA*].

[16] *R & B Customs Brokers v United Dominions Trust* [1988] 1 WLR 321 at 331 (CA) [*R & B Customs Brokers*]. Whenever a corporation which carries on a business makes a contract, it is in a broader sense making the contract in the course of a business. The Court of Appeal in *R & B Customs Brokers* held that for a transaction to be "in the course of a business" for the purposes of the *Unfair Contract Terms Act 1977* (UK), c 50, s 1(3)(a) [*UCTA (UK)*], the contract must be "integral to the business". Thus, the company which bought a car for use by its director was held to be a consumer as its primary business was in freight forwarding. The transaction involving purchase of a car lacked the regularity which would take it outside the realm of a consumer transaction and into the realm of its business.

[17] In the UK, this condition is disapplied in the case of an individual: *UCTA (UK)*, s 12(1A) (inserted in order to comply with the *EC Directive*, *supra* note 7, art 1.2(b)). The definition of "consumer goods"

To properly understand how the Lemon Law functions to protect the interests of the consumer, it is important to appreciate how the Lemon Law is deeply integrated with the existing law. This integrative feature of the Lemon Law portends a complexity that renders it less accessible to the consumer who seeks to rely on it. Indeed, its insertion into the *CPFTA* alongside the 'unfair practice' regime might even lead to confusion for those less familiar with how the Lemon Law is integrated with the existing sales law and consumer protection law. Section 12A(5) disapplies Part IV of the *CPFTA*. This includes s 13(1), which nullifies any attempt at excluding the operation of the *CPFTA*:

> The provisions of this Act shall prevail notwithstanding any agreement to the contrary and any term contained in a contract is void, if and to the extent that it is inconsistent with the provisions of this Act.

Without an appreciation of the integrative aspects of the Lemon Law, the less sophisticated consumer might come to the erroneous conclusion that a seller of goods is entitled to exclude the rights conferred by the Lemon Law. An accurate understanding of the restrictions on contractual exclusion is possible only if one is able to connect the Lemon Law with the *UCTA* and, depending on the type of contract in question, the *SGA*, the *Supply of Goods Act* or the *Hire-Purchase Act*.

The exclusion of any of the additional remedies accorded to the consumer under the Lemon Law counts as an exclusion of liability under s 13(1)(b) of the *UCTA*. To the extent that the remedy is connected with the breach of an obligation arising from ss 13, 14 or 15 of the *SGA*, it counts as liability which cannot be excluded or restricted by reason of s 6(2)(a) of the *UCTA*.[18] The exclusion of the additional remedies in respect of an *express term* in a covered consumer contract, on the other hand, is not unenforceable *per se*; instead ss 3(1) and 3(2)(a) of the *UCTA* prescribes that an exclusion clause in a consumer contract is unenforceable unless the term is proven to be 'reasonable'.

Had the Lemon Law been enacted as a distinct piece of legislation—or alternatively, inserted into the relevant provision of goods legislation—there would have been no need for the somewhat misleading disapplication provision. It may be that the problem can be mitigated to a degree by consumer education material which explains how the Lemon Law adds to the existing rights of consumers and is in turn cemented by the existing law.

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under the *EC Directive* is wider than that predicated by *UCTA (UK)*, s 12(1)(c). As the *EC Directive* contemplates only natural persons as consumers, s 12(1)(c) can continue to apply to juridical persons.

[18] *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] 2 SLR 1398 (HC) at paras 26-34 [*Speedo Motoring*], a case on appeal from the Small Claims Tribunal, where George Wei JC held that a consumer opting out from an "extended warranty" offered by the used car seller did not preclude reliance on the Lemon Law. The present article will confine the discussion to sale of goods contracts. For a supply of goods contract, the implied terms on quality and fitness for purpose are found in the *Supply of Goods Act*, *supra* note 2, ss 4(2) and 4(5) respectively. *UCTA* s 7(2) prescribes that as against a person dealing as a consumer, such terms cannot be excluded or restricted by contract.

The equivalent implied terms for a hire–purchase contract are now found in the *Hire-Purchase Act*, *supra* note 2, ss 6B(2) and 6B(6). These provisions were introduced by the *2012 Amendment Act*, *supra* note 2. They replace the implied terms on (merchantable) quality and fitness for purpose formerly found in ss 6(2) and s 6(3): see *Hire-Purchase Act*, *supra* note 2. *UCTA* s 6(2)(b) continues to refer to the old provisions as they were untouched by the 2012 amendments.

The complexity might be unavoidable given that the new statutory remedies were meant to be bolted on to existing consumer rights and integrated with the existing law on the sale of goods. As *CPFTA* s 13 sets out the mandatory nature of the Act, its disapplication by s 12A(5) can convey to consumers a misleading impression of whether the provisions of the Lemon Law can be excluded by contract. This might potentially lead to less sophisticated consumers settling their claims based on an inaccurate premise. Compared with the stand-alone and readily comprehensible language of the 'unfair practice' regime in Part II of the *CPFTA*, the Lemon Law is much less accessible to the ordinary consumer. While it might fulfil its dispositive function, its integrative aspects undermine the important didactic function that underpins its efficacy for consumers. Commenting on the incongruity that resulted from the insertion of the equivalent UK provisions into the *Sale of Goods Act 1979* (UK),[19] Bridge suggests that "[t]he time has come to separate consumer and non-consumer sales".[20] In Singapore, the salient exclusion of *CPFTA* s 13 adds to the difficulty of consumers attempting to accurately understand their rights, who must also appreciate that they need to connect the Lemon Law with the *SGA*, the *UCTA* and understand how case law has interpreted the statutory provisions. The resulting complexity compromises not only the ability of consumers to understand and assert their rights, but also complicates the dispute settlement process. More than the separation of consumer and non-consumer sales, a consumer sales regime should be readily understood and operated by both consumers and businesses.

III. How the 6-month Presumption of Non-Conformity Enhances the Efficacy of Existing Consumer Rights

A. *Uncertainties that Attend the Time within which the Right to Reject is Available Under the General Law*

The most salient contribution made by the Lemon Law lies in the additional remedies available to consumers should there be a failure to conform to the applicable contract. The additional rights accorded to the consumer under the Lemon Law are constructed upon the notion of non-conformity with the terms of an applicable consumer contract. In a contract for the sale of goods to a consumer, the goods do not conform:

> . . . if there is, in relation to the goods, a breach of an express term of the contract or a term implied by section 13, 14 or 15 of the *Sale of Goods Act*.[21]

Under the general law, the buyer has a right to damages when the seller breaches an obligation under a sale contract.[22] However, to the consumer who is purchasing a good for use or enjoyment, the right to damages may not be her preferred remedy. Damages for a hair dryer that works every other day do not address the consumer's desire for a reliable product. Such a defect would probably amount to a breach of the implied condition of satisfactory quality under *SGA* s 14(2). This means that the

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19 *Sale of Goods Act 1979* (UK), 1979, c 54.

20 Michael Bridge, "What is to be Done about Sale of Goods?" (2003) 119 Law Q Rev 173 at 176.

21 *CPFTA*, *supra* note 1, s 12A(4)(a).

22 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 (HL) (Lord Diplock).

buyer has a right to reject the goods and treat the contract as repudiated, provided this is exercised soon after the delivery of the item.

The problem with the right of rejection is that it is easily lost. Under *SGA* s 11(3), the right to reject is lost when there is 'acceptance'. *SGA* s 35(4) prescribes for deemed acceptance if "after the lapse of a reasonable time [the buyer] retains the goods without intimating to the seller that he has rejected them." What amounts to lapse of a reasonable time is ultimately a question of fact,[23] and thus depends on the precise circumstances of each case.

Reported judicial decisions on the question may offer some guidance, but may also be misleading to those who are not in a position to fully appreciate the due weight to be placed on the precedent. *Bernstein v Pamsons Motors*[24] is a well-known case in point. Here, the consumer-buyer of a new car was found to have lost his right to reject three weeks after delivery even though the car had only been driven for 140 miles. The decision in *Bernstein* was premised on the notion that both the nature of the defect and the speed with which the defect may be discovered are irrelevant to the concept of reasonable time;[25] today, such reasoning would be inconsistent with *SGA* s 35(5). Introduced in 1996,[26] s 35(5) directs that one of the relevant considerations in determining reasonable time for the purpose of s 35(4) is "whether the buyer has had a reasonable opportunity of examining the goods for [conformity with the contract]". Indeed, Sir Andrew Morritt VC has more recently in *Clegg v Andersson T/A Nordic Marine* opined that *Bernstein* "does not represent the law now."[27] As pointed out by the Law Commission, "[i]t is unlikely that *Bernstein* would be decided in the same way following the . . . amendments to *SoGA*."[28] While there are other cases involving the sale of cars which adopt a less stringent position,[29] *Bernstein*

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[23] *SGA*, *supra* note 2, s 59.

[24] [1987] 2 All ER 220 (QB) [*Bernstein*].

[25] *Ibid* at 230 (Rougier J):

> In my judgment, the nature of the particular defect, discovered *ex post facto*, and the speed with which it might have been discovered, are irrelevant to the concept of reasonable time in s 35 as drafted. That section seems to me to be directed solely to what is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete.

[26] *Sale of Goods (Amendment) Act* (No 43 of 1996). These amendments adopted those found in the *Sale and Supply of Goods Act 1994* (UK), c 35.

[27] [2003] EWCA Civ 320 at para 63 [*Clegg*]. The defects in the keel of a yacht were discovered soon after delivery. In ascertaining the lapse of reasonable time, account had to be taken of the negotiations which lasted for some 6 months.

[28] UK, Law Commission, *Consumer Remedies for Faulty Goods* (Consultation Paper No 317) (London: Her Majesty's Stationery Office, 2009); Scotland, Law Commission, *Consumer Remedies for Faulty Goods* (Consultation Paper No 216) (London: Her Majesty's Stationery Office, 2009), at para 2.12 [*Consumer Remedies for Faulty Goods*].

[29] *M & T Hurst Consultants Ltd v Grange Motors (Brentwood) Ltd* (October 1981) (EWHC): Buyer entitled to reject a used Rolls-Royce 3 months after delivery; *Bowes v Richardson & Son Ltd* (28 January 2004) (County Court): Buyer entitled to reject a new car seven months after delivery. As the promised repairs were never fully carried, the buyer did not have a chance to assess them and could not be held to have accepted the car; *Fiat Auto Financial Services v Connelly*, 2007 SLT (Sh Ct) 111 (Scot): Buyer entitled to reject a car 9 months after delivery and after 40,000 miles of use. The seller's attempt at repair and buyer's interest in receiving information by which to make his decision whether to reject may postpone deemed acceptance. See *Consumer Remedies for Faulty Goods*, *supra* note 28, at para 2.15 *et seq*.

continues to be cited in post-amendment literature as an outworking of reasonable time, if an extreme one.[30] Despite the many criticisms against *Bernstein*,[31] it has not been overruled.

Indeed, *Benjamin's Sale of Goods* cites *Bernstein*—not incorrectly—for the policy of finality behind the rule that lapse of reasonable time bars rejection.[32] The more nuanced position after the 1996 amendments does not posit that reasonable time runs only after defects are revealed. It continues to be true that reasonable time can pass without the buyer having any knowledge of the defect or the opportunity to discover it.[33] What the 1996 amendments have done is to posit the opportunity to discover the defect as a relevant factor in determining reasonable time. While this militates against a more precipitous outworking of the policy of finality, the effluxion of time might yet result in the loss of the right to reject—this notwithstanding the manifestation of the defects only later. Importantly, the uncertainty surrounding what amounts to 'reasonable time' provides the consumer precious little guidance on whether he continues to have the right of rejection, or whether the right of rejection has been lost.

B. *The 6-Month Presumption and the Presumptive Availability of Statutory Rights within the 6-Month Period*

The Lemon Law provides consumers greater certainty by demarcating a time frame within which the statutory remedies are presumed to be available. Under *CPFTA* s 12B(3), goods are deemed not to have conformed at the date of delivery if the goods:

> . . . do not conform to the applicable contract at any time within the period of 6 months starting from the date on which the goods were delivered to the transferee.

The transferor is entitled to rebut the presumption of non-conformity if he is able to establish that the goods conformed to the contract at the date of delivery; the transferor can also rebut the presumption by demonstrating that it is incompatible with the nature of the goods or the nature of the lack of conformity. However, to the extent that the non-conformity was discovered within six months of delivery, the presumption applies. As such, the consumer has presumptively a right to one or more of the statutory remedies predicated by the Lemon Law if the defect is manifested within 6 months of delivery. Pertinently, compared to damages, these remedies more closely approximate the consumer's interest in receiving the goods specified in the

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[30] See, for example, Colin Scott & Julia Black, *Cranston's Consumers and the Law*, 3d ed (London, UK: Butterworths, 2000) at 166. Noted the absence of a uniform approach and contrasting *Bernstein* with *Rogers v Parish* [1987] 2 All ER 232 (CA).

[31] In addition to the doubts expressed in *Clegg*, *supra* note 27, and by the Law Commission in *Consumer Remedies for Faulty Goods*, *supra* note 28, see FMB Reynolds, "Loss of the Right to Reject" (2003) 119 Law Q Rev 544.

[32] Michael Bridge, ed, *Benjamin's Sale of Goods*, 8th ed (London, UK: Sweet & Maxwell, 2010) at para 12-057.

[33] "In determining what is . . . a reasonable time, the court will consider whether the buyer has had a reasonable *opportunity* of examining the goods; but he may have accepted them, and so have lost the right to reject, even though he has not actually discovered the defect.": Edwin Peel, ed, *Treitel: The Law of Contract*, 13th ed (London, UK: Sweet & Maxwell, 2011) at para 18-083.

contract. In other words, they better protect the consumer's *performance interest* in the contract compared to the remedy of damages.[34]

The significance of the 6-month presumption of non-conformity lies, of course, beyond providing useful guidance on when the consumer has access to the additional statutory remedies. The presumption greatly improves the efficacy of the rights that consumers currently possess.

In theory, a consumer has an implied right to satisfactory quality of the goods transferred that cannot be excluded by contract. Should the goods fail to work after two or three months, the seller may be in breach of the implied term of satisfactory quality, of which 'durability' is a relevant consideration.[35] However, the concept of satisfactory quality depends on the circumstances of the sale, including the price. As such, the seller who sells at a discount a television without the usual guarantees may argue that the television complies with the implied condition of satisfactory quality as he has not warranted the durability of the television in the usual fashion. Moreover, to the extent that the breach of the implied condition of satisfactory quality requires the buyer to prove that the goods were defective at the point of transfer, the consumer-buyer is poorly placed to tender proof of such latent defects. The consumer typically does not inspect the goods for latent defects; indeed, taking apart the consumer goods for inspection exposes her to the allegation that the malfunctions arose from her actions. Moreover, given that an *ex post* investigation of the cause of the malfunction typically entails a cost that the consumer is unlikely to incur, the typical consumer will normally be reliant upon the adjudicator's preparedness to make an inference that a subsequently manifested defect is caused by a latent defect which existed at the point of delivery. Evidence that the good has been improperly used militates against such an inference, as does evidence that the good has not been properly maintained.

The presumption of non-conformity goes a long way toward addressing the evidential problems associated with proving the existence of the defect at the point of delivery. By presuming that a defect that is revealed within six months of the delivery of the goods existed at the point of delivery, s 12B(3) first addresses the uncertainties introduced by the time-lag between the point of delivery and the point where the malfunction manifested. If a handphone fails to function three months after delivery, the cause for the malfunction is presumed to exist at the point of delivery. Accordingly, the seller who seeks to rebut the presumption will have to prove that the goods conformed to the contract at the date of delivery; alternatively, he may prove that the application of the presumption is incompatible with the nature of the goods or the nature of the lack of conformity. As such, if he seeks to argue that

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[34] Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 Law Q Rev 628. In his article, Friedmann argues that since a contracting party enters into a contract on the premise that the contract is made in order to be performed, the only pure contractual interest consists of getting the promised performance. *Ergo*, a contracting party's interest in the contract consists of the performance interest. In so doing, Friedmann was arguing against the terminology inspired by Fuller and Perdue: the expectation, reliance and restitution interests. See L L Fuller and William R Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52. This article uses "performance interest" as the reference point for comparing the extents to which different remedies place an aggrieved party relative to his performance interest. The judicial order to repair, for example, situates an aggrieved party closer to his performance interest than an order for damages to be assessed.

[35] *SGA*, *supra* note 2, s 14(2B)(e).

the durability of the handphone does not extend to the time at which the problem manifested, the burden of proving such limited durability will rest on him.[36]

In effect, the presumption sets a presumptive benchmark of durability, subject of course to rebuttal by the nature of the contract, the nature of the goods or the nature of the defect. The clearest manner by which a business may rebut the presumption by the nature of the contract is to stipulate clearly in the contract terms the limited duration beyond which the goods are not expected to last. The expiry date on a box of cookies sets the limit on how long the goods are expected to last; as such, a box of cookies which is found inedible after the expiry date will not entail breach of the implied condition of satisfactory quality since the reasonable expectations as to durability are clearly set out on the item sold. The clear indication of durability has direct implications for what counts as satisfactory quality. Such clear indication of limited durability would probably also avail the used handphone seller who desires the disapplication of the presumption.

Absent such clear specification of durability, the purchaser of a handphone—albeit a used one—would expect the 'satisfactory quality' associated with a used handphone to entail a reasonable period of durability. How long a particular used phone is expected to last will depend on its age, its condition as well as the price. In the words of Sundaresh Menon JC (as he then was) in *Compact Metal Industries Ltd v PPG Industries (Singapore) Ltd*:

> (a) The inquiry whether the goods are of a satisfactory quality is an objective one to be undertaken from the viewpoint of a reasonable person . . .
>
> (e) At every stage of that inquiry, the Act clearly contemplates that the court should consider *any and all factors* that may be relevant to the hypothetical reasonable person.[37]

A very low price—given the condition of the good—points to lower expectations for its durability. It is thus conceivable that a used consumer goods seller who sold the good at a suitably low price may successfully argue that there can only be very limited expectations of durability and accordingly, that the good which breaks down within the 6-month period nonetheless conformed to the implied condition of satisfactory quality at the date of delivery. The burden, however, is on the seller to prove that such limited expectations inhere in the contract. A lower price from the buyer opting out of an extended warranty does not necessarily mean that all problems connected with matters covered by the warranty are beyond the expectations of the buyer. In *Speedo Motoring,*[38] the consumer bought a 3-year-old hybrid car from a used car dealer and found that the hybrid battery failed two months after delivery. It was found that the hybrid battery in a hybrid car "plays a crucial role in allowing the hybrid vehicle to fulfil its intended purpose"; taking into account the mileage and the

[36] The fact that the goods are used goods does not in itself to render them incompatible with the application of the presumption: *Speedo Motoring*, *supra* note 18. To rebut the presumption based on the nature of the goods will probably require a deeper examination of the nature of the specific good, including: its age, its condition and the price.

[37] [2006] SGHC 242 at para 102. Endorsed by the Court of Appeal in *National Foods Ltd v Pars Ram Brothers (Pte) Ltd* [2007] 2 SLR (R) 1048 at para 58 (CA).

[38] *Supra* note 18.

fact that the car was relatively new, Wei JC affirmed the determination of the Small Claims Tribunal that the car sold was not of satisfactory quality.[39]

What counts as 'satisfactory quality' depends in no small measure on the reasonable expectations given the circumstances of the contract. Here, it is unlikely that the business will succeed in restricting the scope of satisfactory quality through stipulations in the terms of which reasonable notice has not been given to the buyer; the 'signature rule' which operates on the formal reasoning that all terms attached to the written contract are incorporated by the mere signature of the contracting party is probably of little assistance to the business.[40] As *SGA* s 14(2) is rendered a mandatory term by *UCTA* s 6(2), it cannot be contracted out of. The scope of what counts as 'satisfactory quality' under s 14(2) is determined as a question of mixed law and fact. The fact that the customer has *signed* a contractual document setting out the durability or limited functions of the goods is only a circumstance to be considered. If the key to determining the scope of satisfactory quality is found in the reasonable expectations of the customer, a critical consideration should be whether the customer knows or should know of the limited qualitative expectations that reasonably attach to the goods. It is unlikely that the courts will take the view that an incorporated term is effective in reducing the scope of 'satisfactory quality', regardless of the manner of incorporation. To do so without scrutiny would permit easy circumvention of *UCTA* s 6(2), which renders mandatory the consumer's entitlement to the implied condition of satisfactory quality.

The salience of the stipulations on durability will no doubt be a relevant factor in discerning the threshold of satisfactory durability. A stipulation in small print that has not been brought to the attention of the buyer is unlikely to impact on the usual expectations of a buyer; as such, it is not likely to be effective in reducing the usual scope of what counts as satisfactory quality. A customer who purchases a used handphone will not reasonably expect it to have the durability of a new handphone; however, do the reasonable expectations of durability that attach to the handphone sold extend to no more than 2 weeks? 2 months? 4 months? The price at which the phone is sold is a relevant consideration, as is the observable condition of the phone. Nonetheless, in the absence of a durability stipulation, what counts as sufficient durability for the purpose of 'satisfactory quality' is a matter for determination by the adjudicator.[41]

Similar problems are presented when the used handphone does not totally break down, but when only certain functions subsequently prove unusable. *Ex facie*, the presumption posits that the defects existed at the point of delivery. The business

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[39] *Ibid* at para 70. This was despite the used car dealer sending the car for an evaluation test by a credible third party, STA. While Wei JC recommended pre-sale inspection by an independent third party to attest to the condition of the car, he made it clear that "[t]his court is certainly not taking the position that the conducting of an independent evaluation pre-sale is a panacea." (at para 72)

[40] 'Formal reason' is used in the sense contemplated by Atiyah and Summers, *ie* "a legally authoritative reason on which judges and others are empowered or required to base a decision or action, and such a reason usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action": P S Atiyah & Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford, UK: Clarendon Press, 1987) at 2. This is contrasted with a "substantive reason" which is "a moral, economic, political, institutional, or other social consideration" at 1.

[41] This is well demonstrated by *Speedo Motoring, supra* note 18 and accompanying text to note 38.

can attempt to rebut the presumption by arguing that 'satisfactory quality' does not include the durability of the function. It may be that the condition of the used good and the price at which it is sold will be sufficient to limit the reasonable expectations as to the continued vitality of the functions. There is, however, not the clarity that a guarantee provides. The resultant uncertainty potentially chills the willingness of the consumer to proceed toward formal adjudication, especially when he does not fully appreciate the intricacies of how the implied terms interact with the 6-month presumption.

An interesting question is how a stipulation of the following nature would serve to restrict the durability expectation that inheres in the implied condition of 'satisfactory quality':

> The business is unable to provide any assurance on the durability of the product sold. The business is also unable to provide an assurance on how long any of the usual functions of the product will continue to be operational after the delivery of the product.

Such a clause cannot be enforced as an exclusion or limitation clause—such a defence will be defeated by *UCTA* s 6(2). Its efficacy can only relate to the expectations that inhere in the 'satisfactory quality' of the product sold. Therefore, its impact has to be considered along with the other circumstances that affect the reasonable expectations of 'satisfactory quality'. These include: the salience of the stipulation in question, the price of the used product relative to a new product, the age of the used product, and the apparent condition of the product. Hence, a six-month-old iPhone sold at 85% of the price of a new unit is capable of generating certain reasonable expectations relating to durability—this, notwithstanding the business stating that it is unable to give any assurance on the durability of the product, or of the operability of any of its functions. The matter, at the end of the day, is not a question of construction of the contract, but rather what should count as 'satisfactory quality' given all the circumstances. It is not inconceivable—despite the presence of such a 'disclaimer'—for the court to determine that satisfactory quality of the used product extends to a reasonable durability following the delivery and that when the product broke down one month after delivery, this took place within the time where it was reasonable to expect that the product would work.

Importantly, the presumption addresses the reality that the consumer is often poorly placed to prove the existence of latent defects at the point of delivery. As such, the consumer whose computer fails to boot up within six months of delivery does not now have the burden of ascertaining the reason for the malfunction; the defect is presumed to exist at the point the computer was delivered. Unless the seller is able to rebut the presumption, the consumer will be able to seek the statutory remedies provided under the Lemon Law.

C. *How is the 6-Month Presumption of Non-Conformity Different from a Guarantee of Quality?*

The 6-month presumption is, however, conceptually distinct from a guarantee of quality. The reference point for the 6-month presumption is the time of delivery. If there is shown to be compliance with the relevant term at the point of delivery,

the right to the statutory remedies would not be triggered. The guarantee, on the other hand, is an undertaking of responsibility for defects which show up in the period covered by the guarantee. Can it be said that the 6-month presumption *functions* like a guarantee against latent defects for the equivalent period, even if they are conceptually different? Such functional equivalence can only be drawn if it is reasonable to expect that the goods will last at least 6 months. In such cases, the fact that the presumption frees the consumer from the burden of proving the cause of the malfunction does result in it bearing some resemblance to the guarantee of quality. The mere presentation of the malfunctioning items triggers the business' obligation to investigate the nature of the problem, if not to address it. However, as the earlier discussion with the used handphone illustrates, the notion of functional equivalence breaks down when it is arguable that there is no reasonable expectation that the good is to last 6 months. The 'guarantee' might be a convenient handle by which the unsophisticated consumer first appreciates the usual effect of the 6-month presumption; however, it is equally important to appreciate that the business can rebut the presumption by demonstrating, *inter alia*, that the consumer has no reasonable expectation that the durability of the good extends to the time when it broke down.

IV. The Additional Remedies Introduced by the Lemon Law and its Linkages with the Existing Law

A. *The Additional Remedies and Their Relationship* inter se

What are the additional remedies afforded by the Lemon Law? The four additional remedies introduced by the Lemon Law—repair, replacement, price reduction and rescission—are divided into two tiers. While the legislation does not refer to different tiers of remedies, such 'tiering' is consistent with the clear priority given to the remedies of repair and replacement (which will be referred to as "Tier 1 remedies") over the remedies of price reduction and rescission (which will be referred to as "Tier 2 remedies"). The notion of 'tiering' remedies, therefore, lends analytical clarity to the legislative scheme. To begin with, consumers are not entitled to request for a Tier 2 remedy unless one of the following conditions affecting Tier 1 remedies is satisfied: (i) Tier 1 remedies are impossible;[42] (ii) Tier 1 remedies are disproportionate in comparison to either of the Tier 2 remedies;[43] or (iii) the consumer has requested for a Tier 1 remedy, but the business has not effected the remedy within a reasonable time or has not effected the remedy without causing significant inconvenience to the transferee.[44] It is clear from the legislative scheme that the consumer is expected to look first to the Tier 1 remedies before requiring the provision of Tier 2 remedies. In this regard, the consumer has a right to choose between the two Tier 1 remedies, unless the chosen remedy is *disproportionate* in relation to the other remedy.[45]

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[42] *CPFTA*, *supra* note 1, s 12C(3)(a).
[43] *Ibid*, s 12C(3)(c).
[44] *Ibid*, s 12C(2)(a).
[45] *Ibid*, s 12C(3)(b).

Whether a remedy is proportionate to another is primarily determined by comparing the costs that the first remedy would impose upon the transferor and the costs that the other remedy would impose upon the same;[46] the comparison leads to the critical question whether the costs associated with the chosen remedy are *unreasonable* given the costs associated with the alternative, taking into account:

(a) the value of the goods had they conformed to the contract;
(b) the significance of the lack of conformity;
(c) the inconvenience to the consumer associated with the alternative remedy.[47]

The concept of 'disproportionality'—and the predicate 'unreasonableness' of the cost associated with the remedy sought—is slightly different from the 'unreasonableness' test used for determining whether to quantify loss by reference to the cost of cure or diminution in the market value of the defective property.[48] The choice between the cost of cure measure and the diminution in market value measure involves a cost-benefit analysis—the cost of cure is compared with the benefit sought to be conferred. It is only when the cost of cure is out of all proportion to the advantage to be conferred that the claim for cost of cure would be rejected and the diminution in market value taken as the measure of loss.[49]

In contrast, the disproportionality of a Part III remedy relative to another is determined primarily by comparing the relative costs of the remedies; it is not, *ex facie*, predicated on a cost-benefit analysis. Nonetheless, there is reason to posit that the remedies are framed by the policy toward according the consumer a remedy that more closely approximates the expected performance under the contract. First, the Tier 1 remedies are new remedies that conduce the due performance of the contractual obligations. Repair contemplates work on the defective good in order to bring it into conformity with the contractual specifications. Replacement requires the transferor to re-tender and render the performance expected under the contract. In seeking to go under the Part III remedial regime, the consumer is expected to seek remedies which have the outcome of due performance before seeking the Tier 2 remedies. 'Disproportionality–unreasonableness' of Tier 1 remedies relative to Tier 2 remedies serves to displace the presumptive priority of the former. Similarly, the consumer's choice of the preferred remedy is accorded presumptive validity—for it is again the 'disproportionality–unreasonableness' of the chosen remedy relative to the other remedies that the choice is not acceded to.

The displacement of a remedy by the criteria of 'disproportionality-unreasonableness' in relation to another remedy sets the context for its application. The consumer's performance interest is underscored first, by the statutory priority given to the Tier 1 remedies, and second, within the statutory restrictions, the statutory remedy preferred by the consumer. It is against this backdrop that one considers whether the costs associated with the chosen remedy are unreasonable when compared to another remedy. The exercise of discerning whether there is disproportionality of one remedy against another involves not merely a weighing of

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[46] *Ibid*, s 12C(4).
[47] *Ibid*.
[48] *Ruxley Electronics v Forsyth* [1996] AC 344 (HL) [*Ruxley*], followed in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR (R) 385 (HC).
[49] *Ruxley*, *supra* note 48; *Jacob & Youngs Inc v Kent*, 230 NY 239 (1921).

relative costs, but an ascertainment of such disproportionality in relative costs so as to *displace* it in favour of another. This presupposes that the alternative remedy provides an adequate remedy, for without the premise that the remedy is adequate, it is difficult to adjudge how the higher cost of an adequate remedy is to be compared with the lower cost of an inadequate remedy.

This works out in the classic scenario where the Lemon Law is traditionally applied. In the United States, the notion of Lemon Law is associated with consumer protection legislation that permits the consumer-car buyer to return the car upon finding that the car is riddled with problems.[50] That is, the car is what is colloquially known as a 'lemon'—a badly manufactured product. Suppose we have a scenario where the buyer of a 'lemon' car wishes to replace the car after numerous breakdowns and repairs. The seller resists. He argues that the cost associated with replacement is disproportionate to the cost of repair as the former is 10 times the cost of repair. To the seller, the previous repair costs are sunk costs, and thus irrelevant to the cost of repairing the *present* lack of conformity. As such, his preference is for repairs. If one confines oneself merely to inquiring into the costs associated with the remedy, one might have no choice but to accede to the argument that the cost of replacement is disproportionate and unreasonable. However, if the adequacy of the remedy is taken as a premise, the likely inadequacy of the repair remedy renders the relatively high cost associated with the replacement remedy reasonable given the history of repairs that failed to bring the car into conformity with the contract. The history of repairs would also point to the fact that the business has also caused significant inconvenience to the consumer and is unlikely to be able to bring the car into conformity without causing further significant inconvenience to the consumer. Due weight being given to the inconvenience consideration in s 12C(4)(c) in the circumstances would counterbalance the weight that is to be given to the difference in costs. Moreover, the significance of the lack of conformity need not be confined to the current defects, but is probably wide enough to include the lack of conformity as manifested in the history of the goods.

Under ss 12F(3) and (4), the court has the power to order another statutory remedy if it considers that remedy more 'appropriate'. There is no further setting out of the criteria for determining when another remedy is more appropriate. This is, *ex facie*, a very wide power to take into account any other consideration that the court considers relevant. Given that the consumer is accorded a right to the statutory remedies and that the discretion of the court to order another more appropriate statutory remedy is a qualification of that right, good reasons will have to be given for departing from the consumer's choice of remedy. It will not be surprising for the concept of 'appropriateness' to draw on present doctrines under the general law that serve to limit the assertion of entitlements. One such instance might be estoppel. If the consumer makes a representation and the seller acts in reliance on that representation to his detriment, estoppel might be directly applied or might take effect through the notion of 'appropriateness'. This points to the need to consider how common law principles might influence the application of the statutory remedies, a matter which will be discussed in Section IV(B)(2).

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[50] See *supra* note 4 and accompanying text.

B. *The Relationship Between the Lemon Law Remedies and the Remedies Available Under the General Law*

1. *Parallel Remedial Regimes*

The formal title for Part III—"Additional Consumer Rights in Respect of Non-Conforming Goods"—indicates that the statutory remedies introduced by the amendments are not intended to replace the existing rights of the consumer, but to add to and enhance the existing rights. This is also consistent with the *EC Directive* which was the cause of the *UK Regulations*, and which were in turn transplanted into Singapore as the Lemon Law. The transposition of the *EC Directive* into the UK by the *Regulations* is premised on art 8(1) of the *EC Directive*, which predicates that the rights resulting from the Directive are to be exercised "without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability". Apart from the title, the statutory text also reflects this premise. Section 12E, for example, clearly contemplates the continuance of the right to reject goods for breach of a condition.[51]

As 'additional rights', the Part III remedies should be open to combination with the remedies under the general law so as to provide the consumer with a package of remedies that more closely approximates his interest in the due performance of the contract. Hence, a consumer-purchaser of a car which has broken down should, in addition to the statutory right of repair, have the right to claim as damages the expenses associated with hiring another car for use during the period of repair. Also, if an important purpose of purchasing the goods is to provide pleasure and enjoyment, the consumer should in theory be entitled to claim damages for the loss of amenity associated with such loss of pleasure and enjoyment.[52] Singapore law shows signs of going beyond the English common law which allows such a claim only if the provision of pleasure or enjoyment is shown to be an important purpose underlying the contract.[53] In "The Crumbling Edifice? The Award of Contractual Damages for Mental Distress",[54] Andrew Phang (now Judge of Appeal in the Supreme Court of Singapore) proposed that the English common law rule against claims for non-pecuniary losses should no longer hold; instead, whether non-pecuniary losses are claimable should be determined by the remoteness rule. That is, if the non-pecuniary loss is within the reasonable contemplation of the parties, whether by the usual circumstances attending the contract or the especial circumstances made known prior to the contract, it should be claimable. This position was adopted by the Assistant Registrar in *Kay Swee Pin v Singapore Island Country Club*,[55] which grounds of decision relied on both the exception to the rule against non-pecuniary loss formulated by the House of Lords in *Farley v Skinner*,[56] as well as the proposed position articulated in "The Crumbling Edifice". Should the issue come before the

[51] See Section IV(B)(2).
[52] *Ruxley*, *supra* note 48.
[53] *Farley v Skinner* [2002] 2 AC 732 (HL).
[54] [2003] J Bus L 341 ["The Crumbling Edifice"].
[55] [2008] SGHC 143.
[56] *Supra* note 53.

Singapore Court of Appeal, it will not be surprising to see the traditional English position on non-pecuniary losses supplanted by the remoteness rule.

Apart from being additional remedies, the remedies introduced by the Lemon Law constitute a distinct parallel regime to the remedial regime under the general law. The self-contained nature of this parallel regime is seen first in the restricted nature of the court's discretion to determine that another remedy is more appropriate. As earlier noted, the adjudicator has the power to order another statutory remedy if it is considered more appropriate. This power, however, is confined to switching to another of the newly created statutory remedies; it does not extend to considering whether the remedies under the general law are more appropriate. The self-contained nature of the parallel regime is also observed in the rules which govern the priority between the statutory remedies; again, these rules do not extend to prescribing any priority between the statutory remedies and the remedies under the general law. This is further observed in the related rules circumscribing the availability of a remedy, for example, the rule on disproportionality and the rule that the consumer may seek Tier 2 remedies if the business fails to effect the requested remedy of repair or replacement (as the case may be) within a reasonable time and without causing significant inconvenience to the consumer.

2. *The Interaction Between the Parallel Regimes*

The parallel nature of the remedial regimes notwithstanding, there are, necessarily, rules to govern their interaction. The most salient is s 12E—if the consumer requires the business to repair or replace the goods, the consumer is not entitled to reject the goods and seek termination of the contract under the general law until he has given the business a reasonable time in which to carry out the request. This rule may be seen as one borne out of fairness to the business which has begun on a course of action pursuant to the consumer's request. Its justification, however, is not found solely in the prejudice to the business, for the rule also covers the scenario where the consumer changes his mind two minutes after communicating his request for the chosen remedy. In such a case, the business has not yet suffered a prejudice. Neither can it be said that the business has relied on the decision, except perhaps to assent to the consumer's request for repair. Instead, the rule can be seen as a reflection of at least two policy considerations. The first is the policy of finality—to render the choice binding (if only until the expiration of a reasonable time for repair). This is consistent with the absence of a requirement for an inquiry into the actual prejudice suffered by the business.[57] The second is the policy preference for the business to be given the opportunity to make repairs once the consumer has exercised this option.[58]

[57] The rule echoes the concept of election at common law: *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 at 398 (HL) [*The Kanchenjunga*]. There is, however, a difference. Whereas election at common law is final once it is made, an election to require repair does not preclude a subsequent election to terminate the contract under the general law.

[58] The business' right to repair in the present limited circumstance can be contrasted with the seller's right to repair under art 48(1) of the *Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 3 (applicable in Singapore by the *Sale of Goods (United Nations Convention) Act* (Cap 283A, 2013 Rev Ed Sing)). The extremely limited nature of the business' performance interest is also seen in the absence of a similar statutory constraint on the consumer who, after opting for the right to

The other connection between the two remedial regimes is found in the common aim of the two remedial regimes to provide remedies that approximate but do not exceed the consumer's performance interest. The consumer must generally not be placed in a better position than if the contract had been duly performed.[59] Insofar as the new remedies of repair and replacement give the consumer an entitlement to be placed in a position expected with the due performance of the contract, these remedies more closely approximate his performance interest than damages. However, the position that the consumer would have been placed with due performance would also constitute the limiting condition for the combination of the remedies under Part III and the general law. The fundamentality of the compensation principle under the general law predicates that the award of damages should not place the consumer in a better position than if the contract had been performed. This principle would continue to apply were damages sought in combination with one of the statutory remedies. For example, a consumer cannot seek both damages represented by the diminution in the value of the subject matter and repair; on the other hand, requiring repair and claiming for the loss of enjoyment until the completion of repairs would be consistent with the compensation principle.

The new statutory remedies will also have implications for the application of the doctrine of mitigation when the consumer chooses damages. By increasing the menu of remedies available, they impact on the question whether the consumer has acted reasonably in choosing damages rather than one of the statutory remedies. For example, the consumer who claims damages for a substitute purchase might be faced with the argument that the business could have readily given a replacement, and accordingly, that the additional cost associated with the substitute purchase is an avoidable cost which should not be attributed to the business.

This leads to an interesting and important question—to what extent are the principles under the general law applicable to shape the application of the statutory remedies? In this regard, as it is envisaged that a Tier 1 remedy will be effectuated through an order for specific performance, a material question is whether the principles which govern the availability of specific performance are applicable.

Take the principle that specific performance is not available if damages are adequate (the 'adequacy of damages' bar).[60] The principle reflects preference for damages as the primary remedy under the general law. Application of the principle would, first, be at odds with the premise in s 12B(2) that the consumer has a *right* to require repair or replacement. If a consumer transaction falls within the

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replacement under the Lemon Law, seeks to terminate the contract for breach of a condition under the general law.

[59] Exceptions to compensatory damages can be found in *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 (where the Canadian Supreme Court exceptionally awarded punitive damages for breach of contract) and *Attorney General v Blake* [2001] 1 AC 268 (HL) (where the House of Lords ordered an account of profits (restitutionary damages) for breach of contract). While admitting that there is room for restitutionary damages for breach of contract in exceptional cases, the Singapore courts have thus far not found a suitable case for the application of the exception: see, for example, *Friis v Casetech Trading* [2000] 2 SLR (R) 511 (CA), *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR (R) 22 (CA), and *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* [2005] 4 SLR (R) 561 (CA). As aptly put by the leading Singapore textbook on Contract Law, the law on restitutionary damages "is more than uncertain – it is, arguably, unformed": Andrew Phang Boon Leong, gen ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para 23.030.

[60] *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

ambit of *CPFTA* Part III, s 12B(2) prescribes that the transferee has a right to the relevant statutory remedies “under and in accordance with” the relevant provisions governing the new remedy. The use of the word ‘right’ suggests an entitlement akin to the right or entitlement to damages. The equitable remedy of specific performance is not customarily described as an entitlement, but as a remedy granted at the discretion of the court. Thus, even though the repair remedy is expected to operate through the procedural device of the specific performance order, it is unlikely that the adequacy of damages bar will be imported into the statutory scheme. Moreover, such an importation into the statutory scheme will have the consequence that damages can be substituted for the statutory remedy sought. There is no provision for such a power in the Lemon Law. The only provision for a power in the court to substitute another remedy for the one sought is found in *CPFTA* s 12F(3); this prescribes that the court is given the discretion to order another of the *statutory* remedies that it finds more appropriate.[61] The discretionary power in s 12F(3) does not extend to a power to substitute a remedy under the general law for a statutory remedy.[62] Once a transferee opts to go under the statutory remedial regime, the Lemon Law predicates that she can expect to obtain at least one of the prescribed remedies. It is probably fair to say that the statutory regime precludes the operation of a principle that substitutes a remedy under the general law for a statutory remedy.

While the order for specific performance is the means by which the repair remedy is given effect, the Lemon Law intends a very particular (statutory) remedy of specific performance—one whose premises are different from the general law. The remedy may draw from the general law principles, but the application of these principles must be consistent with the norms and imperatives of the statutory regime. The uncertainty objection, which posits that specific performance should be denied when it is not possible to fashion the order with precision, does not necessarily offend the *right* to a Lemon Law remedy. It may therefore operate within the ambit of the power found in s 12F(3) to order a more ‘appropriate’ statutory remedy. The objection rests on the notion that the person subject to the order should know exactly what he must do; the court must also be able to readily ascertain whether there is compliance. This explains CJ Miller’s doubts whether a mere order to repair the defect is sufficient:

> [I]t is an unusual use of specific performance to compel the seller to *repair* . . . Presumably the order to repair must be more specific than this and should inform the seller precisely what he must do to obey the order—and precisely which aspect of non-conformity must be corrected.[63]

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[61] CJ Miller, the general editor of the Special Supplement to the 6th edition of *Benjamin’s Sale of Goods*, envisages that specific performance of the repair remedy is likely to be ordered only in exceptional cases as “there would be scope for dispute as to whether the goods had been brought into conformity with the contract”: CJ Miller, ed, *Benjamin’s Sale of Goods: Special Supplement to the 6th edition* (London: Sweet & Maxwell, 2003) at para 1-019 [*Special Supplement*].

[62] A similar interpretation has been taken by the *Special Supplement* at paras 1-159 and 1-162 (“[T]he buyer may choose a Part 5A remedy even where common law would regard damages as ‘adequate’ (a factor that common law would regard as relevant if asked to grant an order of specific performance). The relevance of the words ‘disproportionate’ and ‘appropriate’ is defined by ss 48B and 48E in such a way that the only relevant comparison is with the other Part 5A remedies, and the notion of mitigation . . . is irrelevant.”)

[63] *Ibid* at para 1-181.

While it is true that the sanction for breach of the order is quasi-criminal, there is a built-in 'sanction' for poor repair work, whether intentional or otherwise. If a defect appears within 6 months after the delivery of the repaired good, the defect is presumed to exist at the point of delivery.[64] The time for application of the 6-month presumption is reset to the point of re-delivery.[65] The business which does a poor repair job faces the prospect of being revisited with another 6-month presumption of non-conformity. The prospect of quasi-criminal sanctions for breach of the court order should not be exaggerated. Merely because defects show up after repair does not mean that the business is in contempt of the court order. There must be proved a deliberate act undertaken in breach of the order.[66] The defect could be due to another latent defect, a further problem triggered by the repair work undertaken, or some imperfection in the reassembly process. The multiple possibilities behind subsequently appearing defects render the pursuit of a committal proceeding unlikely. The more probable result is that the consumer will continue to pursue his statutory remedies or his remedies under the general law rather than proceed to a committal order.

Another area where the general law potentially influences how the Lemon Law applies is found in the Tier 2 remedy of statutory rescission. Statutory rescission is different from termination for breach under s 11(2) of the *SGA*. Whereas the latter is predicated on a breach of condition, the former stems from 'non-conformity'. In addition to the breach of a term implied by ss 13, 14 or 15 of the *SGA*, non-conformity includes breach of *any* express term.[67] As such, s 11(3) (which prescribes when the right to terminate for breach of a condition is lost) does not apply. Under the Lemon Law, the court may decide to order another remedy because statutory rescission is considered inappropriate.[68] In determining whether statutory rescission is appropriate, it is not unlikely for a court to consider the bars which circumscribe the availability of rescission at common law: affirmation,[69] lapse of reasonable time,[70] intervention of third party rights[71] and the impossibility of *restitutio in integrum*.[72] The impossibility of *restitutio in integrum* objection, for example, may very well prevail in an attempt to return a defective toy that has been broken. However, it should also be clear that these cannot operate as 'bars' but only as considerations for determining whether statutory rescission is appropriate. Since the Lemon Law

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[64] *CPFTA*, *supra* note 1, s 12B(3).

[65] This is the plain meaning of *CPFTA*, *supra* note 1, s 12B(3) ("... goods which do not conform ... at any time within the 6 months *starting from the date on which the goods were delivered to the transferee*...") [emphasis added]. The position would be very different if the reference time was the date on which the goods were *first* delivered to the transferee.

[66] *Summit Holdings Ltd v Business Software Alliance* [1999] 2 SLR (R) 592 at paras 52, 53 (HC); *OCM Opportunities Fund II, LP v Burhan Uray (alias Wong Ming Kiong)* [2005] 3 SLR (R) 60 at para 27 (HC).

[67] *CPFTA*, *supra* note 1, s 12A(4)(a).

[68] *Ibid*, s 12F(3)(b).

[69] *Central Railway Company of Venezuela v Kisch* (1867) LR 2 HL 99 (misrepresentation); *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330 (PC) (misrepresentation); *North Ocean Shipping Co Ltd v Hyundai Construction Co* [1979] QB 705 [*The Atlantic Baron*] (duress); *Goldsworthy v Brickell* [1987] Ch 378 (CA) (undue influence).

[70] *Leaf v International Galleries* [1950] 2 KB 86 (CA).

[71] *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (CA) (undue influence).

[72] *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 (CA) (misrepresentation). Precise restitution, however, is not required: *O'Sullivan v Management Agency & Music Ltd*, *ibid*.

expects consumers to seek Tier 1 remedies before asking for statutory rescission, the lapse of reasonable time must accommodate this expectation.[73] As such, what counts as lapse of reasonable time under common law cannot be taken as a lapse of reasonable time under the Lemon Law—statutory rescission must contemplate the time spent on pursuing Tier 1 remedies. The statutory 'appropriateness' test can accommodate the considerations which operate in rescission under general law but the test must necessarily take into account the broader aims and objectives of the new statutory scheme to provide new remedies that place a greater premium on the consumer's performance interest than the general law.

To return to the question whether the principles which govern the availability of specific performance are applicable, the answer will have to depend on the principle sought to be applied. A principle which is inconsistent with the Lemon Law regime—the prime example being the adequacy of damages bar—would naturally have no place in the implementation of the new statutory regime. A principle that does not offend the norms of the new statutory regime might potentially feature in the court's deliberation through its discretion to order a more 'appropriate' statutory alternative. However, the exercise of the statutory discretion requires sensitivity to the statutory context. The concerns which weigh down the availability of specific performance under the general law cannot apply unfiltered by the objectives and imperatives of the new statutory regime. In particular, given the priority accorded to repair over price reduction and rescission, a court should be slow to diminish that statutory priority by the importation of principles which inhabit another remedial regime and which have very different priorities and premises. As between repair and replacement, the court should be slow to whittle down what the statute has designated as a right through the broad discretion to decide on a more 'appropriate' remedy.

V. Conclusion

The Lemon Law is, at first sight, a distinct remedial regime that runs parallel to the general law. A careful examination of the Lemon Law reveals that it is deeply integrated with both the *SGA* and the *UCTA*. At the same time, the norms that inhabit the Lemon Law necessarily shape and limit the application of the general law.

The parallel and distinct nature of the Lemon Law is seen in the absence of a judicial power to choose between the statutory remedies and the remedies under general law. The statutory remedies are 'rights'. They are not granted at the discretion of the court in preference to the remedies under general law. The judicial discretion to prefer another remedy is statutorily confined to another Lemon Law remedy. The distinctive nature of the Lemon Law is also observed in the statutory parameters of 'appropriateness', 'disproportionality' and 'unreasonableness', which, though sharing some similar attributes with their common law counterparts, should be interpreted on their own terms. The 'adequacy of damages' bar therefore has no application even though the right to repair is to be effectuated through a specific performance order.

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[73] This is consistent with *SGA*, *supra* note 2, s 35(6) which states: "The buyer is not by virtue of [s 35] deemed to have accepted the goods merely because . . . he asks for, or agrees to, their repair . . .".

The integrative aspects of the Lemon Law are probably most difficult for the layman unacquainted with the law. Reading the Lemon Law on its own terms—and ignorant of how the Lemon Law integrates with the *SGA* and the *UCTA*—the consumer may be misled into thinking that the Lemon Law can be contractually excluded. Further, whether the 6-month presumption of non-conformity applies depends, *inter alia,* on the ambit of the implied term of satisfactory quality. This, in turn, depends on the precise circumstances of the contract. There is no 'bright line' rule by which the layman readily ascertains whether the term is breached when, for example, a used good malfunctions within the 6-month period. This article has posited that the reasonable expectations engendered by the circumstances of the contract may help the layman to more readily ascertain the strength of his case. This, however, only renders the issue more tractable. It is not a simple-to-operate 'bright line' rule. Given that the Lemon Law draws on the existing law on the sale and supply of goods, the integrative aspects are many.

These portend issues of adaptation when the general law interacts with the Lemon Law norms. The prospect of a specific performance order to repair throws up the question whether the 'uncertainty' bar still applies, and if so, how the right shapes the concern that committal proceedings can be commenced for failure to comply with the judicial order. The adaptation issue also arises in determining whether statutory rescission is 'inappropriate' by reason of the bars to rescission under the general law.

There is no doubt that the Lemon Law adds zest to consumer rights. The 6-month presumption of non-conformity usefully shifts the burden of proof to the business, the party in a better position to ascertain the cause of the defects. It also provides a salient 6-month window period, which helpfully serves to draw consumers' attention to the presumption and the ease with which the right to a Lemon Law remedy can be established. This, together with the Lemon Law remedies, enhances the rights of consumers and accordingly, their bargaining position in negotiations with suppliers over the action to be taken when goods are found defective. The integration and adaptation issues identified in this article do not undermine the significance of the contribution the Lemon Law has made to consumer protection. However, they do demonstrate that while the Lemon Law discharges its dispositive function well, there is an underlying layer of complexity that the layman consumer will find difficult to understand and navigate.