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**THE NATURE AND EFFECT OF SECTION 56 OF THE CONSUMER
PROTECTION ACT 68 OF 2008 AND THE UNCERTAINTIES SURROUNDING IT**

By

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FORMAL DECLARATION

I hereby declare that this thesis is my own work, and that all sources of information have been acknowledged accordingly. To the best of my knowledge, neither the substance of this thesis, nor any part thereof is being submitted for any degree in any other University.

It may be made available for photocopying and inter-library loan.

MARTINA FGR MUTASA

29 September 2017

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ABSTRACT

Consumer protection is a global phenomenon and has seen many countries enact legislation in an attempt to protect consumers from exploitation. Consumers have been exploited in a number of ways, one of which is the sale of defective products which often result in serious consequences such as injury or death. In a bid to protect the consumer, South Africa enacted the Consumer Protection Act 68 of 2008. The CPA introduced the consumer's rights to safe, good quality goods (section 55) and the implied warranty of quality (section 56). The study is aimed at evaluating the above mentioned sections with the intention of highlighting areas of uncertainty and, where legislative gaps exist, making recommendations on how these provisions could be interpreted, extended and modified to sufficiently protect all interested parties. Currently, the CPA provisions lack specific standards of conformity for products, particularly relating to quality. Of particular interest to the study is the choice of remedies given solely to the consumer in the event of breach of warranty of quality. As a secondary issue, the study also analyses the treatment of minor defects and the position of the voetstoots clause in light of the CPA, which is questionable. The study makes comparative analyses of consumer protection legislation in specific legal systems with the aim of developing suitable solutions to improve the specified provisions of the CPA. The legal jurisdictions that are considered are namely the United Kingdom (UK), other EU member states and the United States of America (USA). It is hoped that the submissions made will be considered, that decisive statutory reforms will be made with the intent of narrowing the legislative gaps and move the CPA in a more progressive direction ultimately granting consumers the same or similar protection as its international counterparts.

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LIST OF ABBREVIATIONS

BIS	Department of Business, Innovation and Skills
CI	Consumers International
CISG	UN Convention on Contracts for the International Sale of Goods
CP	Consultation Paper (on Consumer Remedies for Faulty Goods)
CPA	Consumer Protection Act
CPSA	Consumer Product Safety Act
CPSC	Consumer Product Safety Commission
CPSIA	Consumer Product Safety Improvement Act
CRA	Consumer Rights Act
CSD	Consumer Sales Directive
DTI	Department of Trade and Industry
EC	European Community
EU	European Union
FTC	Federal Trade Commission
GEAR	Growth, Employment and Redistribution Framework
NCA	National Credit Act
NCT	National Credit Tribunal
RDP	Reconstruction and Development Programme
SADC	Southern African Development Community
SANCU	South African National Consumer Union
SoGA	Sale of Goods Act
TFEU	Treaty on the Functioning of the European Union
UCC	Uniform Commercial Code
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGCP	United Nations Guidelines for Consumer Protection

USA

United States of America

WPTPS

White Paper on the Transformation of the Public Service

CHAPTER 1

INTRODUCTION

1.1 THE PURPOSE OF THE STUDY

Consumer law is considered to be an innovative branch of the law that started to develop in the second half of the 20th century.¹ The overall development and evolution of consumer law epitomises the universal willingness to develop and promote the rights and interests of consumers as important players in the market,² particularly because consumers require protection due to their position as the weaker party in transactions.³ Micklitz and Durovic further stated that ‘as a consequence, many countries worldwide have adopted diverse forms of national regulatory frameworks for the protection of consumers’.⁴ Most developed countries that have free market economies have found it not only important, but necessary to effect legislation that ensures the protection of consumers and their rights as well and tackles issues of fair trade, competition, and compliance.⁵

South Africa recently heeded the call to protect its own consumers from exploitation and abuse by establishing a comprehensive legal framework designed to protect, promote and advance the social and economic welfare of South African consumers.⁶ This came after the realisation that the consumers often suffered injustices during transactions and their needs were inadequately catered for.⁷ It became important for the government to develop strong consumer protection policies and frameworks to regulate the relationships between suppliers and consumers.⁸ The formulation and enactment of the Consumer Protection Act 68 of 2008⁹ thus sought to bring balance and equity for the market players.

The purpose of the dissertation is to analyse the implied warranty of quality created by sections 55 and 56 of the CPA. The focus will be on key points that have been identified as

¹HW Micklitz, M Durovic *Internationalization of Consumer Law: A game changer* (2017) 1.

² Ibid.

³ Ibid.

⁴ Ibid. C Twigg – Flesner, HW Micklitz ‘Think Global – Towards International Consumer Law’ (2010) 33 (3) *Journal of Consumer Policy* 201.

⁵ Micklitz, Durovic (note 1) 2.

⁶ Purpose of the CPA – s 3(1)(a) CPA. See also Department of Trade and Industry (DTI) Green Paper Vol. 471 09/04 in GG 26774 (9 September 2004) 4.

⁷ Ibid.

⁸ GN 471 of GG 26774, 9/09/2004; 10.

⁹ In the Republic of South Africa (hereinafter referred to as the CPA). S 3 CPA

problematic, uncertain or as giving rise to substantial interpretational issues. Other sections that may be of relevance will also be considered.

The ultimate goal of the dissertation is to give clarity to sections 55 and 56 and to make recommendations on how these provisions could be interpreted, extended or modified to sufficiently protect all interested parties. This study will propose that there must be a balance between the protection awarded to consumers and the burden that has been placed on suppliers. To further assist, a comparative analysis of similar provisions in other jurisdictions and international consumer legislation will be undertaken.

1.2 SOURCES AND APPROACH TO THE DISSERTATION

The dissertation will make use of a combination of two research methods: the legal historical method and the legal comparative method. The legal historical method is used to establish the development of legal rules and, in some instances propose solutions or amendments to the existing law based on historical facts. In this study however, this method will be used to provide a brief history of the relevant legal rules and the legislation that will be relied on.

The legal comparative method is usually used to ascertain if the historical origins of a problem are the same or different; to find solutions for new legal developments or to compare similar legal rules or problems and possibly if one system can give solutions to the other that may lack a certain rule or provision. In this study, this method will be relied on to compare the South African legislation on consumer protection to other legal systems where similar legal rules exist and attempt to find solutions for the uncertainties and discrepancies raised in the South African provisions.

The South African Constitution¹⁰ for example was compiled from various constitutions worldwide and thereafter adapted to meet South Africa's particular needs, therefore comparative analysis with other legal systems is not a new concept to South African law given that section 2 of the CPA provides that applicable foreign law, international law, conventions, declarations or protocols *may* be considered in its interpretation.¹¹

The dissertation will make use of and analyse existing text. It will be characterised by library-based research relying on legislation, published journal articles, books, case law, electronic sources and databases and any internet based articles relevant to the research problem and

¹⁰ 1996.

¹¹ S 2 CPA

objectives discussed above. This is viewed to be the most appropriate method to collect information for the dissertation.

1.3 STRUCTURE OF THE DISSERTATION

Chapter 2 begins with a brief historical overview of the common law regarding the treatment of latent defects in South Africa; followed by the background to, and development of, South African consumer law and the motivation for the formulation of the CPA.

Chapter 3 introduces the concept of consumer protection in the CPA and outlines the purpose, interpretation and application of the Act. It further defines and addresses important terms in the Act such as ‘consumer’, ‘goods’ and ‘supplier’ as well as other terms and definitions necessary to fully understand the application of the CPA.

The way in which the CPA has extended the common law is critically analysed in Chapter 3. The relevant statutory provisions are regarded as very controversial by most writers. Special attention is directed towards the consumer’s rights to safe, good quality goods (section 55) and the implied warranty of quality (section 56). To assist in the task, foreign and international consumer law is taken into consideration. The CPA expressly states that in the interpretation of its provisions, consideration may be given to international law, applicable foreign law, conventions, protocols and declarations.¹²

Chapter 4 consists of a comparative analysis of the consumer protection legislation in specific legal systems, namely the United Kingdom (UK), other EU Member States and the United States of America (USA). These countries were chosen because they are first-world countries with developed consumer protection legislation. The United Kingdom has been included because as an economic market leader, it has had the opportunity to develop its consumer legislation over a longer period of time. It has encountered similar issues as those that will be raised in this dissertation and devised some notable solutions. The EU Member States have been included to take into account the different approaches adopted in various jurisdictions in the European Community particularly with regards to the Directive on consumer sales. The United States of America has been considered because it is a first world country and applies a diverse approach in its provisions. Other relevant consumer law bodies and provisions will also be considered. The objective is to find suitable solutions to the ambivalences present in the provisions of the CPA.

¹² S 2(2) CPA

Recommendations and concluding remarks are made in Chapter 5.

CHAPTER 2

HISTORICAL OVERVIEW OF, AND BACKGROUND TO, THE SOUTH AFRICAN LEGAL SYSTEM

2.1 INTRODUCTION

Consumer law and the concomitant consumer regulation are both aimed at ensuring that the consumer is provided with sustainable and efficient rights as well as sufficient redress against producers and suppliers of goods and services.¹ In order to have a clearer appreciation and understanding of the issues faced by the consumer today, an overview of the history and development of consumer law in South Africa is necessary.

2.2 OVERVIEW OF THE COMMON LAW AND ITS DEVELOPMENT

2.2.1 *Background History*

It has always been assumed that the concept of consumer protection and strict product liability was new to our law², but this is not the case: It was indicated that remedies for damages caused by defective manufactured goods were initially recognised under Roman law with remedies mainly limited to sale of slaves and livestock in the market place.³ This remained the position until later when the remedies applied to all sale agreements.⁴ These remedies were then adopted into Roman-Dutch law by classic Roman-Dutch writers and are still in existence in South African Roman-Dutch (common) law today.⁵

¹ United Nations Conference on Trade and Development (UNCTAD) website ‘Manual on Consumer Protection’ (2016) available at <http://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf>, accessed on 23 May 2017: page 2 – 7. See Consumer Rights website ‘What is the purpose of Consumer Protection Laws’ (no date) available at <http://www.consumerrights.org.in/articles/what-is-the-purpose-of-consumer-protection-laws.php>, accessed on 17 January 2018. See also University of Minnesota – Human Rights Library ‘Guidelines for Consumer Protections, UN Department of International Economic and Social Affairs, A/RES/39/248’ (1986) available at <http://hrlibrary.umn.edu/links/consumerprotection.html#EconomicInterests>, accessed on 17 January 2018.

² *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd* 1975 (2) SA 457 (W) at 458.

³ These were rescission of the sale and return of purchase price if the defect was sufficiently important (*actio redhibitoria*) or a reduction in the purchase price to an amount the buyer would have paid had he known of the defect (*actio quanti minoris*). See J Gordley ‘The Origins of Sale: Some Lessons from the Romans’ (2010) 84 (6) *Tulane Law Review* 1437, 1463.

⁴ RW Lee *The Elements of Roman Law* 4 ed (1956) 315. See also Gordley (note 3) 1463; D McQuoid-Mason ‘Consumers and Product liability’ D McQuoid-Mason (ed) et al *Consumer Law in South Africa* (1997) 65.

⁵ PCA Snyman ‘Products liability in modern Roman-Dutch law’ (1980) 13 (2) *CILSA* 177, 177; See also ML Du Preez ‘The Consumer Protection Bill: A few preliminary comments’ 2009 *TSAR* 58, 58; the author also states this fact. The writers are referred to here (as well as their work) - Grotius (Hugo de Groot) who wrote *Introduction to Dutch Jurisprudence* published in 1631 which laid the foundations of Roman-Dutch law which would be built on by Vinnius, Voet, Noodt and Van Leeuwen: see P Van Warmelo ‘Our legal Heritage’ (1977) *De Rebus Procuratoriis* 252, 254. Simon van Groenewegen van der Made who was a commentator of Grotius and wrote *A treatise on the laws abrogated and no longer in use in Holland and neighbouring regions* in 1649: see BZ Beinart ‘A Biographical Note including References to his Legal Opinions and Notes on Grotius’ Inleidinge’ (1988) 56 (3) *The Legal History Review* 333-340. Johannes Voet’s *Commentarius ad Pandectas* first

With regards to what was accepted as a defect, Grotius a well known Roman-Dutch jurist drew a distinction between a defect in the *res vendita* of what he termed ‘so serious a character that the buyer would not have bought if he had known of it’, and a defect ‘which impaired the ordinary use of the *res vendita*’.⁶ Voet made note of the distinction drawn by Grotius and submitted that the *actio redhibitoria* lies on account of a defect of such a nature that the purchaser would not have purchased if he had known of it, and the *actio quanti minoris* if the defect was of such a nature that if the purchaser had known of it he would not have given so high a price for it.⁷ Van der Linden submitted similar ideas on the matter as well.⁸

Under Roman-Dutch law, the *actio redhibitoria* entitled a purchaser to return a defective article to the seller and obtain repayment of the purchase price, while the *actio quanti minoris*

published in 1698-1704: see A Domanski ‘Fundamental Principles of Law and Justice in the Opening Title of Johannes Voet’s *Commentarius ad Pandectas*’ (2013) 19 (2) *Fundamina: A Journal of Legal History* 251, 253. Robert Joseph Pothier’s *Treatise on the contract of sale (Traite du contrat de vente)* (1748), see P Van Warmelo ‘Our legal Heritage’ (1977) *De Rebus Procuratoriis* 709, 711. Simon van Leeuwen’s *The Roman Dutch Regt* (and he also coined the term Roman-Dutch law); Ulrik Huber’s *The jurisprudence of my time* 1686: see AWG Raath ‘Aspects of Ulrich Huber’s Theory of Universal Public Law and Post-Constitutional Contracting’ (2012) 75 *Journal of Contemporary Roman-Dutch Law* 206-222 and G van Nifterik ‘Ulrik Huber on fundamental laws: a European perspective’ (2016) 1 (4) *Comparative Legal History* 2-18. Gerard Noodt who was a dutch writer on jurisprudence: see J Van Eijnatten ‘Gerard Noodt’s standing in the Eighteenth - Century Dutch Debates on Religious Freedom’ (1999) 79 (1) *Dutch Review of Church History* 74-98. Arnoldus Vinnius who published *Jurisprudence abridged, or the Partitions of civil law in four books* (1624-1631) see LB Varela *Spatial and Temporal Dimensions for Legal History: Research Experiences and Itineraries* (2016). Dionysius Godefridus van der Keessel was a well known scholar in his lifetime, but he did not publish much of significance. However several of his lectures on Roman-Dutch law were republished in English in the 20th century because of their significance for South African law: see DV Cowen, RW Lee ‘Roman – Dutch Law’ *Encyclopedia Britannica* (no date) available at <https://www.britannica.com/topic/Roman-Dutch-law#ref469042>, accessed on May 2017. Joannes van der Linden who wrote what is considered his best work, his Introduction to Roman-Dutch Law under the name of *Regtsgeleerd, Practicaal, en Koopmans Handboek*, issued in 1806: see T Wallinga ‘Joannes van der Linden and his draft Code for Holland’ (2010) 16 (1) *Fundamina: A Journal of Legal History* 563-577. See also J Witte *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (2007) 150.

⁶ At 3.15.7. Grotius said the following: “If the thing sold has any defect of which the buyer was unaware at the time of the sale; then, if the defect is such that the buyer would probably not have bought, had he known of it, the buyer may return the thing and get back his money; but, if the sale would probably have proceeded notwithstanding the defect, the buyer may demand return of so much of the purchase-money as will reduce it to what he would have given had he known of the defect If the defect is of such a character that the thing is in consequence less adapted to its ordinary use, the buyer has the option of returning the thing and demanding back the purchase-money or of keeping the thing and demanding back the difference between what he gave and what he would have given, or, if he prefers, the difference between what he gave and the actual value of the property. However, this option lasts for one year only: otherwise the buyer must rely upon the aforesaid common law.’ This was quoted in *Hackett v G & G Radio and Refrigerator Corporation* 1949 (3) SA 664 (A) at 682 per Watermeyer CJ. It was also referred to in *Erasmus v Russell’s Executor* 1904 TS 365 at 373.

⁷ Voet 21.1.4 and 5. This was highlighted in *Hackett v G & G Radio and Refrigerator Corporation* supra at 683 per Watermeyer CJ.

⁸ At 1.15.9 where he wrote the following (Juta’s translation): ‘Should the property sold have any substantial defect or be burdened with any secret charge, he is bound to make a relative reduction in price, or even to cancel the sale, if he has willingly and knowingly deceived the vendee.’ – mentioned in *Hackett v G & G Radio and Refrigerator Corporation* supra at 683 per Watermeyer CJ.

entitled a purchaser to a reduction of the purchase price for defects in the article purchased. However, the Roman-Dutch law extended the Roman law⁹ granting liability for consequential damages where the product was sold by a person who had made the thing (an artificer or *artifex*).¹⁰ According to Voet, the artificer/manufacturer was liable for consequential loss even if he/she was ignorant of the defects and gave no warranty, on the basis that, being the manufacturer, he was to be equated with a person having knowledge of the defects.¹¹

The influential French writer Pothier considered the above and submitted that there should be strict liability for defective and dangerous products based on what was termed a law-imposed warranty. Pothier emphasised that goods sold should be free of defects which could render them dangerous or unfit for the purpose for which they had been purchased, and if they were defective in this sense, his submission was that liability would be on the merchant seller.¹² However, the extent of the merchant seller's liability would be dependent on whether or not he/she had knowledge of the defect.¹³

Pothier states that where a seller is ignorant or has no knowledge, the warranty would only extend to the thing sold and not to any damage beyond that. The merchant seller would thus be obliged to return the purchase price to the purchaser. He would not be liable for any extended damage the defect in the article sold may have caused to the purchaser – this was termed a variation or addition to the *actio redhibitoria*. This was a variation because previously the seller could only be held liable for the aedilitian remedies, regardless of his knowledge of the presence of defects in the product. Liability for consequential damages was solely on the manufacturer/artificer, irrespective of his knowledge of the presence of the defect. Pothier thus extended the rule such that merchant sellers were not only liable for the cost of the defective product alone (aedilitian remedies), but would be liable for consequential damages where they had knowledge of the presence of the defect – this rule is still applicable in South African law today.¹⁴

⁹ Roman law gave no claim for consequential damages unless there was some other cause of action such as fraud or breach of contract or breach of express warranty. See *Evans & Plows v Willis & Co* 1923 CPD 496 at 504.

¹⁰ Voet 21.1.10 and Grotius 3.15.7. See also McQuoid-Mason (note 4) 78.

¹¹ Voet 21.1.9 – “if the seller was an artificer who could easily and ought to have known of the existence of the defect, from the precepts of his own art, this is to be held as knowledge on his part”. Taken from *Erasmus v Russell's Executor* 1904 TS 365 at 373.

¹² Snyman (note 5) 179; s 212 and 213 of Pothier's *Contract de Vente*.

¹³ *Ibid*; s 212 of Pothier's *Contract de Vente*.

¹⁴ See *Kroonstad Westelike Boere Ko-op Vereniging Beperk v Botha* 1964 (3) SA 561 (A) at 571.

Where the seller had knowledge of the defect, Pothier is of the opinion that the seller's warranty extends to include damage caused to the purchaser by the defective good: '...because this reticence of the seller is a fraud which he has committed against the buyer, and he is therefore obliged to make reparation for all damage which results from it.'¹⁵

A second basis for liability was adopted and is known as the public profession of expertise in relation to the goods. If the seller is a manufacturer or a dealer who publicly professes to have expert skill and knowledge in the thing sold, he is presumed to be aware of latent defects in the articles that he manufactures or sells.¹⁶ The manufacturer that delivers a product in a defective condition can be held liable for damages caused by the defect on two grounds. He can be held liable in contract towards the other contracting party either for breach of contract or for latent defects.¹⁷ Pothier sets this out clearly by initially highlighting that regardless of whether or not a merchant, manufacturer or expert had knowledge of a defect, he was liable nonetheless due to the fact that he sold articles of his own make –

'...the reason is that the artificer by the profession of his art...he renders himself in favour of those who contract with him responsible for the goodness of his wares for the use to which they are naturally destined. His want or skill or want or knowledge in everything that concerns his art is imported to him as a fault. It is the same in regard to a merchant...By public profession which he makes of his trade he renders himself responsible for the goodness of the merchandise which he has to deliver for the use to which it is destined. If he is the manufacturer, he ought to employ...good workmen for whom he is responsible. If he is not the manufacturer, he ought to expose for sale none but good articles...'¹⁸

The above mentioned authorities were often considered by South African courts and were initially approved and declared as part of the law in 1904 in the case of *Erasmus v Russell's*

¹⁵ Snyman (note 5) 179; s 212 of Pothier's *Contract de Vente*.

¹⁶ M Maleka 'Manufacture, Sell and Be Liable for Latent Defects: *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd*' (2009) 21 (4) *SA Merc LJ* 576, 576.

¹⁷ M Reinsma 'Products liability under Dutch law' (1975) 8 (1) *CILSA* 71, 72. The manufacturer may also be liable both contractually and in delict where the act was fraudulently committed. The manufacturer may also be liable in delict to all third parties who do not have a contractual relationship with him.

¹⁸ Pothier's s213. Voet made a similar remark in 21 1 10 and 19 2 14 saying 'Every one ought certainly to know what concerns his own art...'

Executor.¹⁹ The court held, relying on Grotius 3 15 7, Voet 21 1 10 and Pothier's s214, that even where an express representation had been made at the time the sale was conducted, consequential damages would not arise where the seller was not aware of the defect.²⁰ Over the years, the courts would continuously refer to these authors' writings but the court in *Young's Provision Stores v Von Ryneveld*²¹ after careful consideration of the old authorities, modified Pothier's rule such that a seller bore liability regardless of whether or not he was aware, or had means of knowing about the defect.

Shortly after this the courts considered, for the first time, the question of the liability of the seller to compensate the buyer in full where the issue concerned implied guarantees against defects. The case in point was *Hackett v G & G Radio and Refrigerator Corporation*.²² The court said such a guarantee could arise as an inference of fact from the circumstances of the case or as a result of a generalisation or rule of law that is applicable to the type of business of the seller. The court also pointed out that there would be difficulties in the application of Pothier's rule in all cases as it placed too much weight on sellers and there wasn't much in terms of legislation to refer to.²³

In the case of *Kroonstad Westelike Boere Ko-op Vereeniging v Botha*²⁴ the court considered the extent to which Pothier's rule could apply in South African law. It was held that Pothier's rule did form part of South African law. However, the court watered down a dealer's liability by limiting liability for latent defects to circumstances where the dealer publicly professes to have attributes of skill and expert knowledge of the goods sold. Holmes JA held that in these cases the law irrebuttably attaches to the dealer the liability in question, save only where he has expressly or by implication contracted out of it.²⁵ The case of *Kroonstad* was accepted as law with regard to implied contractual conditions²⁶ and this was affirmed in the case of

¹⁹ 1904 TS 365 – in the case, an executor had sold ten supposedly healthy cows to a farmer by public auction, however unknown to the parties the cows were suffering from tick fever. Nine of the ten beasts died a few days later as well as sixteen others that had mingled with the infected cows. The farmer sued for return of the purchase price as well as consequential damages.

²⁰ The court made reference obiter to Voet and Pothier's exception where a merchant sells work of his own manufacture or articles which he professes to have special knowledge.

²¹ 1936 CPD 87.

²² 1949 (3) SA 664 (A).

²³ *Hackett v G & G Radio and Refrigerator Corporation* supra at 692. The court made reference to the English Sale of Goods Act 1893 (UK).

²⁴ 1964 3 SA 561 (A).

²⁵ Ibid para 571A – 572A.

²⁶ *Holmdene Brickworks v Roberts Construction Co Ltd* 1977 3 SA 670 (A) at 671H and at 683A where reference is made to authorities for implied contractual conditions - the case of *Kroonstad* is cited.

*Holmdene Brickworks v Roberts Construction Co Ltd*²⁷ where the Appellate Division defined that which is regarded as the present law as follows:

“The legal foundation of respondent’s claims is the principle that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge *is liable*²⁸ to the purchaser for consequential damage caused to the latter by reason of *any latent defect*²⁹ in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls in one of the abovementioned categories, the law *irrebuttably*³⁰ attaches this liability to him, unless he has expressly or impliedly contracted out of it.”³¹

The case of *Kroonstad* was heavily criticised for several reasons. Firstly, prior to the decision in the *Kroonstad* case, there were three approaches to the Pothier rule relating to liability of merchant sellers.

A seller was liable:

- a) *ipso facto* if it was their business to deal in a particular kind of good,³² or
- b) if they dealt in goods that caused the harm;³³ or
- c) if they sold goods of their own manufacture or articles of which they professed to have special knowledge.³⁴

The *Kroonstad* case clearly favoured the third approach.³⁵ However, it failed to provide guidelines for determining who was considered as having such skill and expert knowledge, stating that it was a question of fact to be decided from the circumstances of the case and is

²⁷ 1977 3 SA 670 (A) at 671H.

²⁸ Own emphasis.

²⁹ Own emphasis.

³⁰ Own emphasis.

³¹ *Holmdene Brickworks v Roberts Construction Co Ltd supra* at 682-683. This was also highlighted in *Kroonstad Westelike Boere Ko-op Vereeniging v Botha* at 562A-F.

³² *Lockie v Wightman & Co Ltd* 1950 (1) SA 361 (SR) at 365-368; *Evans & Plows v Willis & Co* 1923 CPD 496 at 498 (obiter); *Young’s Provision Stores (Pty) Ltd v Van Ryneveld* 1936 CPD 87.

³³ *Hackett v G & G Radio and Refrigerator Corporation* (note 22); *Odendaal v Bethlehem Romery Bpk* 1954 (3) SA 370 (O) at para 373G-374A.

³⁴ *Erasmus v Russell’s Executor supra* at 374 (obiter) which was followed in *Seggie v Philip Brothers* 1915 CPD 292 at 306 (however there was no reference made to Pothier in the judgment); *Greenberg & Sons v Burton* (1905) 10 HCG 39 at 46.

³⁵ At 571.

an issue which still stands currently particularly in relation to retailers.³⁶ Secondly, the Appellate Division criticised it for unduly extending a dealer's liability as well as restricting it unrealistically noting that the passage of time in which this decision had been relied on may have weakened rather than strengthened its authority.³⁷ To this end, the Appellate Division suggested that the decision had to be reconsidered so as to modernise South African law and align it with current laws.³⁸ McQuoid-Mason gives a comprehensive list of compelling arguments, both in the international and South African context, that are in favour of discarding the *Kroonstad* test and applying strict liability on all manufacturers irrespective of the existence or absence of a contractual link between themselves and the consumers.³⁹

³⁶ Ibid para 571G-H.

³⁷ *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A) at 572. Schutz JA said the following in this regard: 'It seems to me cumbrous, wasteful and uncertain of result, and therefore unjust, to require a buyer to prove and a seller to resist in case after case the proposition that the latter publicly professes to have attributes of skill and expert knowledge in relation to particular goods.'

³⁸ In the *Langeberg* case, the court highlighted that the court in *Kroonstad* had overlooked the fact that the reasons that made the rule it applied appropriate to the mid-eighteenth century were largely anachronistic in the mid-twentieth century – per Schutz JA at 571. The learned judge went further and highlighted that modern merchants were often denied the opportunity to see, feel or to smell the produce that passed through their hands as they could not break seals without invalidating guarantees – at 572.

³⁹ (note 4) 108-109. Reference is made to the American case of *Escola v Coca-Cola Bottling Co of Fresno* 24 Cal 2d 453, 150 P 2d 436 (Cal 1944) which lists them as follows:

- a) The manufacturer is in the best position to reduce the risk.
- b) Losses suffered by individual consumers may be overwhelming to them, but can be insured against by the manufacturer and distributed amongst the public as a cost of doing business.
- c) The manufacturer is responsible for placing the product on the market.
- d) Strict liability against the seller means that the latter must in turn sue the manufacturer, which leads to needless circuitry and litigation; the consumer should be able to sue the manufacturer directly in strict liability without privity.
- e) Consumers lack the means and skill to investigate the soundness of the product for themselves.
- f) Advertising and marketing devices used by manufacturers, such as trademarks, lull consumers into a false sense of security concerning the quality of the goods.

The factors in the South African context which are in favour of strict liability for manufacturers whether or not they are in privity with consumers are as follows:

- a) The notion of strict liability to protect the public from dangers is not foreign to our common law.
- b) The vast majority of manufacturers do not sell directly to the public, therefore (under the *Kroonstad* case) most manufacturers cannot be held strictly liable for their harmful products, even though they are responsible for introducing the goods into the market place.
- c) Sellers who are often 'unwitting conduits' for latently defective manufactured products are held strictly liable for harmful goods if they profess skill and expert knowledge in relation to them, while the manufacturers who introduce defective products into the market place are protected by the consumer's need to prove fault.
- d) Ordinary craftspeople and artists who do not flood the market with masses of potentially dangerous goods, but who sell directly to the public, are held strictly liable for their products, whereas large-scale manufacturers who swamp the market through intermediaries are not.
- e) As South Africa re-enters the global economy many of its trading partners such as the United Kingdom, the European Union, the United States, Japan and Australia, have introduced strict liability for defective and dangerous products, and there is likely to be increasing pressure on this country to do the same.

The new Constitution emphasises notions of fairness and justice which can be used to develop a new *boni mores* to assist the development of the common law to protect vulnerable consumers against dangerous or defective

2.2.2 *The Common Law Position prior to the Consumer Protection Act*

Prior to the commencement of the CPA the common law provided various provisions with regards to consumer protection under aedilician remedies. The CPA brings with it a myriad of remedies and protections; however, it does not abolish the common law.⁴⁰ Therefore these and other common law provisions are still actively relied on in transactions or agreements where a consumer opts to bring an action in terms of the common law: it remains a governing authority.⁴¹

2.2.2.1 Definition of a Defect

A defect is defined as the non-conformance of a product with the specified requirements, or non-fulfilment of user expectations (including the safety aspects).⁴² Defects are further classified in four categories: (1) Category 1: very serious, directly causes serious injury or catastrophic loss; (2) Category 2: serious, directly causes significant injury or economic loss; (3) Category 3: major, related to significant problems with respect to intended normal or reasonable use; and (4) Category 4: minor, relating to minor problems with intended normal or reasonable use.⁴³ A *latent defect*⁴⁴ is defined as an impairment of the usefulness of the thing sold, which may cause failure or malfunction, and is not discoverable through general inspection by an ordinary person (one who is not an expert).⁴⁵ Lord Reid highlighted it as follows: ‘...By definition a latent defect is something that could not have been discovered at the time by any examination which in the light of then existing knowledge, it was reasonable to make’.⁴⁶ It has also been defined as an abnormal characteristic which materially impairs the usefulness or effectiveness of the *res* for the purpose for which it was sold or for which things of that type are ordinarily intended to be used.⁴⁷ The latent defect then results in the *merx* being unfit for the purpose for which it was intended or which it is normally used.⁴⁸

products, by imposing strict liability on manufacturers for consequential damages irrespective of privity of contract.

⁴⁰ S 5 CPA

⁴¹ Ibid.

⁴² Business Dictionary, available at <http://www.businessdictionary.com/definition/defect.html>, accessed on 17 January 2018.

⁴³ Ibid. Definition focused on manufacturing sector.

⁴⁴ Own emphasis.

⁴⁵ CJ Nagel et al *Commercial Law* 4 ed (2011) 223-224. See also Business Dictionary, available at <http://www.businessdictionary.com/definition/latent-defect.html>, accessed on 17 January 2018.

⁴⁶ *Henry Kendall & Sons v William Lillico & Sons Ltd and Others Holland Colombo Trading Society v Grimsdale & Sons Ltd [Consolidated Appeals] Grimsdale & Sons v Suffolk Agricultural and Poultry Producers Association, Ltd* [1969] 2 All ER 444 at 450.

⁴⁷ R Sharrock *Business Transactions Law* 8 ed (2011) 294.

⁴⁸ J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clause and liability for damages’ (2012) 45 (3) *De Jure* 455, 456.

A defect can manifest itself in a number of ways within products or goods.⁴⁹ South African law applies the standard general principles of liability to all defects regardless of the nature of the defect.⁵⁰ In the case of *Holmdene Brickworks (Pty) Ltd*⁵¹ a latent defect was defined.⁵² The court said for a latent defect to be established, it should be determined whether it was easily visible and reasonably discoverable by an ordinary purchaser and whether or not the purchaser was aware of the defect at the time of conclusion of the contract.⁵³ This aspect must be determined objectively – it is attached to the usefulness of the thing sold and not on the special knowledge of the purchaser.⁵⁴ The defect must be material and substantial to qualify as latent; it must affect the usefulness of the *merx*;⁵⁵ it must have been in existence at the time of conclusion of the contract; and the purchaser must not have been aware of it at the time⁵⁶ – the onus is on the purchaser to prove the latter point.⁵⁷ The feature that will now determine whether a defect is latent or patent is the nature of a defect in question.⁵⁸

2.2.2.2 Warranty against Latent Defects

A warranty is defined as ‘a statement or representation made by the seller contemporaneously with, and as part of, the contract of sale, though collateral to the express object of it, having reference to the character or quality or the title to the goods or article sold, and by which he promises or undertakes that certain facts are or shall be as he represents them.’⁵⁹ A warranty can either be express or implied: it is express where it is a product of statements made by the

⁴⁹ Examples are through harmful ingredients, poor preparation, the presence of foreign objects, bad/poor product design, goods deteriorate before sale, bad packaging and poor instructions or warnings. See McQuoid-Mason (note 4) 71.

⁵⁰ See McQuoid-Mason (note 4) 71-72.

⁵¹ *Holmdene Brickworks v Roberts Construction Co Ltd supra* at para 680. See also *Dibley v Furter* 1951 4 SA 73 (C) at 81A-B; *Ciba – Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) para 48 at 465G-J.

⁵² It was defined as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *merx*.

⁵³ *Holmdene Brickworks v Roberts Construction Co Ltd supra* at para 680.

⁵⁴ Nagel et al (note 45) 223. Barnard (note 48) 457.

⁵⁵ *Holmdene Brickworks v Roberts Construction Co Ltd supra* at para 683H.

⁵⁶ *Holmdene Brickworks v Roberts Construction Co Ltd supra* at para 684A.

⁵⁷ Barnard (note 48) 457.

⁵⁸ *Ibid. Holmdene Brickworks v Roberts Construction Co Ltd supra* at 677.

⁵⁹ JH Walters *The Doctrine of Implied Warranties* (LLB thesis, Cornell University, 1896) 1.

seller before or at the time of contracting, forming part of the contract,⁶⁰ and it is implied where it applies automatically by operation of law due to the nature of the transaction.⁶¹

Under Roman law, every contract of sale is subject to an implied warranty of latent defects.⁶² The way in which the warranty is applied determines the remedies applicable to the purchaser where breach of the warranty occurs. Where an implied warranty is breached, the purchaser has access to the aedilitian remedies for relief, without having to prove the element of fault (these are the *actio quanti minoris* and *actio redhibitoria*).⁶³ Where an express warranty is breached, the remedy afforded to the purchaser is cancellation of the contract and a claim for damages in terms of the *actio empti*.⁶⁴ It is submitted that under the common law, a purchaser is afforded the option to use the aedilitian remedies even where a contractual remedy is available, however, a claim for damages would not be available.⁶⁵

2.2.2.3 Aedilitian Remedies

The aedilitian remedies are the Roman law legal actions that are applicable with regards to implied warranty against latent defects. The parties can exclude liability by agreement.⁶⁶ These remedies are considered to be *sui generis* as they do not arise from breach of contract or any unlawful conduct by the seller,⁶⁷ but rather are based on the existence of a latent defect in the product at the time of sale,⁶⁸ and the purchaser had no knowledge of its existence at the time the contract was concluded.

Remedies can also be instituted where a seller fraudulently conceals the defect⁶⁹ and where a *dictum promissum* was made. In the case of *Phame (Pty) Ltd v Paizes*⁷⁰ the court defined a

⁶⁰ Also known as a contractual warranty. It is a term of the contract and must be complied with – see T Woker ‘Consumers and Contracts of Purchase and Sale’ D McQuoid-Mason (ed) et al *Consumer Law in South Africa* (1997) 21-22.

⁶¹ Ibid. Implied terms or *naturalia* are automatically included, by operation of law (*ex lege*), in any contract belonging to one of the classes of specific contract traditionally recognised in South Africa. *Naturalia* are based on what is fair and reasonable between contracting parties over contracts of that kind: Sharrock (note 47) 186.

⁶² Du Preez (note 5) 58.

⁶³ McQuoid-Mason (note 4) 82. Barnard (note 48) 457.

⁶⁴ Barnard (note 48) 457.

⁶⁵ Ibid.

⁶⁶ That is, through a *voetstoots* clause for example – this would state that the thing is sold ‘as it is’ or ‘as it stands’. See also M Loubser, E Reid *Product Liability in South Africa* (2012) 28.

⁶⁷ JC van der Walt ‘Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middle van sy defekkt produk’ (1972) 35 *THRHR* 224, 226.

⁶⁸ Snyman (note 5) 177.

⁶⁹ Although the remedy in such a case would be delictual. See also R Van den Bergh ‘The Roman tradition in the South African contract of sale’ (2012) 2012 (1) *TSAR* 53, 59.

⁷⁰ [1973] 3 All SA 501 (A) at 510.

dictum et promissum as a declaration made by the vendor during the negotiations concerning the quality or value of the *merx*, which can reasonably be construed as intended to be acted on by the buyer, that turns out to be false/incorrect. The statement had to go beyond mere praises and puffing.⁷¹ Holmes JA pointed out that Roman – Dutch authorities were clear on the issue of the application of aedilician remedies with regards to a *dictum et promissum*: if a seller made a *dictum et promissum* concerning the quality of a *merx* and it fell short of it, the aedilician remedy was available by operation of law and there was no need to invoke a warranty or term to confirm the breach.⁷² It was also highlighted that aedilician remedies were available even where misrepresentation was innocently made.⁷³ fraud was not a pre-requisite for relief.⁷⁴

In *Corbett v Harris*⁷⁵ the case involved the sale of a farm. There had been a verbal representation which ended up being false. Kotze J said ‘...When a man offers a farm or anything else for sale, it is not every statement made by him, which subsequently turns out to be untrue, that will justify either a rescission of the contract or a diminution of the purchase price...But, where the vendor makes a representation or an assertion of a positive and material fact in regard to the quality or quantity of the thing the case will be different. Such conduct on his part will amount to a definite promise or warranty, for a breach of which he will be liable. It matters not whether the vendor was aware or ignorant of the deficiency or fault in the quality or quantity of the thing sold, and the *actio redhibitoria* or the *actio quanti minoris* will lie against him, according to the circumstances...it makes no difference whether the purchaser was misled by the fraud or ignorance of the vendor, who must perform what he has represented or promised.’⁷⁶

⁷¹ *Phame (Pty) Ltd v Paizes* (note 70) at 513. This was dependent on the circumstances of each case. Factors to be considered were:

1. Whether the statement was made in answer to a question from the buyer;
2. The materiality of the statement to the known purpose for which the buyer was interested in purchasing;
3. Whether the statement was one of fact or of personal opinion; and
4. Whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have been known to do.

⁷² *Phame (Pty) Ltd v Paizes* (note 70) at 512.

⁷³ *Phame (Pty) Ltd v Paizes* (note 70) at 508 - as long as the *merx* suffered from a latent defect and the seller made a *dictum et promissum* to the buyer upon the faith of which the buyer entered into a contract or agreed to the price in question.

⁷⁴ *Phame (Pty) Ltd v Paizes* (note 70) at 508.

⁷⁵ 1914 C.P.D 535.

⁷⁶ *Corbett v Harris* (note 75) at 543-544. See also *Bowditch v Peel & Magill* 1921 A.D. 561 at 572, Innes CJ said the following as obiter, that innocent misrepresentation gave no right to claim damages. The judge was not referring to a claim similar to that in the *Phames*'s case.

The rationale for these remedies is to protect and aid purchasers.⁷⁷ The remedies give the purchaser the right to cancel the contract and claim repayment of the purchase price as well as certain expenses such as interest (*actio redhibitoria*), or the purchaser may claim a reduction in the purchase price while retaining the *merx* (*actio quanti minoris*).⁷⁸

The main objective of *actio redhibitoria* is to set aside the contract and claim restitution.⁷⁹ The onus is on the purchaser to show that a reasonable person would not have purchased the *merx* had he been aware of the latent defect.⁸⁰ Some writers are of the view that the purchaser does not have to prove that the defect existed at the time of sale, but rather that at the time of sale ‘...the beginnings of what is later seen to be a defect’ were present.⁸¹ The test would then be whether the latent defect is serious enough to render the *merx* unfit for the purpose for which it was intended.⁸² The buyer may claim return of the purchase price, payment of all foreseeable and necessary expenses that were incurred as a result of this sale as well as payment of expenses that were incurred in examining the *merx* for the purposes of discovery of the defect and costs associated with returning the *merx* to the seller, but is not entitled to claim consequential damages.⁸³

The *actio quanti minoris* is relied on where the defect is not serious enough to dissuade the purchaser from purchasing the product in question but instead the purchaser is entitled to a *pro rata* reduction in the purchase price to the market value of the product taking into account its defective state.⁸⁴ The test that is applied is objective and the measure of relief is calculated as the difference between the purchase price and the market value of the article in its damaged state.⁸⁵ This was held as the correct standard to apply in *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd*⁸⁶ after Innes CJ explained that it would be difficult to

⁷⁷ AJ Kerr *The Law of Sale and Lease* 3 ed (2004) 107. See also Barnard (note 48) 458.

⁷⁸ McQuoid-Mason (note 4) 78. Lee (note 4) 315.

⁷⁹ T Woker (note 60) 52. Kerr (note 77) 113.

⁸⁰ Barnard (note 48) 458.

⁸¹ Ibid. Kerr (note 77) 115.

⁸² Barnard (note 48) 458. Barnard also refers to *De Vries v Wholesale Carsen'n Ander* 1986 (2) SA 22 (O).

⁸³ Sharrock (note 47) 296.

⁸⁴ R Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 318. See also R Zimmerman and D Visser *Civil law and Common law in South Africa* (1996) 380, T Woker (note 60) 52-53 and Kerr (note 77) 127-129.

⁸⁵ Ibid. In the case of *Ranger v Wykerd* 1977 2 SA 976 (A) at 999 Trollip JA confirmed that market value of the *merx* referred to the market value of the *merx* in its deficient state.

⁸⁶ 1916 AD 400.

ascertain the price the buyer would have paid had he known of the defects, and even so, it would be a difficult measure to adopt in each case⁸⁷ due to its subjective nature.

The purchase price of an article is easy to attain however, the market price of a defective article is not as easy to determine. Market value can only be determined with reference to a particular time, place and thing sold.⁸⁸ Several different methods have been relied on to ascertain market value such as expert valuations,⁸⁹ opinions of experienced dealers in the particular thing sold,⁹⁰ actual sales of similar goods,⁹¹ actual disposal by the purchaser of the defective article or similar articles,⁹² industry standards or guides⁹³ and lastly the value of the shortfall.⁹⁴ In a situation where there is no market value for the *merx*, other legitimate methods of valuation may be considered to come to a fair and reasonable estimate, such as subtracting the cost of repair from the purchase price paid on conclusion of the contract.⁹⁵ There is no consideration made for damages or interest where any of the above takes place as a consumer would have already acquired the products at a reduced price due to the existence of the defect, therefore would not be entitled to any further relief.⁹⁶

It is also important to note that the purchaser may claim a *pro rata* price reduction once for every latent defect that existed at the time of the contract⁹⁷ or for any *dictum et promissum*.⁹⁸ Where the product is patently defective, the purchaser will have to rely on the ordinary remedies for breach of contract unless he has accepted voetstoets.⁹⁹

⁸⁷ *SA Oil and Fat Industries Ltd* case (note 86) at 413.

⁸⁸ SJ Cornelius 'Banda v Van der Spuy 2013 4 SA 77 (SCA) Quantifying a claim with the *actio quanti minoris*: recent case law' (2013) 46 (3) *De Jure* 868, 872. Cornelius also highlights several cases here. With regards to time and place of sale: *Wilson v Simon and Lazarus* 1921 OPD 32 37, *Katzoff v Glaser* 1948 4 SA 630 (T), *Banda v Van der Spuy* 2013 4 SA 77 (SCA). With regards to the thing sold: *Didcott v White* 32 NPD 269.

⁸⁹ *Katzoff v Glaser* (note 88); *Gannet Manufacturing Co Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C); *Sarembock v Medical Leasing Services (Pty) Ltd & Another* 1991 1 SA 344 (A) at 353.

⁹⁰ *Sarembock* (note 89) at 353.

⁹¹ *Bloemfontein Market Garage v Pieterse* 1991 (2) SA 208 (O); *Sarembock* (note 89) at 354.

⁹² *Didcott* (note 88) at 275.

⁹³ *Auto Dealer's Digest in Colt Motors (Edms) Bpk v Kenny* 1987 4 SA 378 (T).

⁹⁴ *Rustenburg v Douglas* 1905 EDC 12. See Cornelius (note 89) highlights these valuation methods at 874.

⁹⁵ *Sarembock* (note 89) at 352.

⁹⁶ *Ibid.* See also *Bloemfontein Market Garage* (note 91).

⁹⁷ Barnard (note 48) 458, Nagel et al (note 45) 226 – 227.

⁹⁸ E Kahn et al *The Principles of the law of Sale and Lease* (2010) 37.

⁹⁹ E Kahn et al (note 98) 39-40.

2.2.2.4 Actio Empti

The *actio empti* may be used where there is an express or tacit warranty given in terms of the contract or agreement that the product is free from defects or where there was a misrepresentation by the seller concerning the qualities of the product.¹⁰⁰ In terms of the common law, it is necessary to highlight that a purchaser will always be able to rely on aedilician remedies even where a contractual remedy is present¹⁰¹, but a claim for damages would not be available to a purchaser with regards to aedilician remedies.¹⁰²

2.2.2.5 Voetstoots

A contract of sale can be constructed so as to exclude liability on the part of the seller for some or all the defects in the goods and for misrepresentation regarding the condition of the goods using an exemption clause.¹⁰³ The liability the seller wishes to exempt himself from is known as product liability.¹⁰⁴ The term ‘voetstoots’ is usually applied in these cases. Voetstoots was derived from the Roman-Dutch law term “stoten” which meant to push the thing sold with one’s foot to indicate delivery and sale of the property without dealing with complaints later.¹⁰⁵ Kerr described a voetstoots clause as a clause that clearly indicates that the seller is not to be held responsible for defects and the goods are sold “as is” or “with all their faults”.¹⁰⁶ The defects may be any one of, or a combination of the following: the quality of the product, the manufacturing process or the actual design of the product, the absence of sufficient warnings as to dangerous features on the product or the absence of adequate instructions for the safe and proper use of the product.¹⁰⁷

When parties include a voetstoots clause, it is usually to exclude liability for latent defects or excluding any warranty or guarantee as to the quality of the goods, whether expressly or impliedly.¹⁰⁸ Where parties have contradicted themselves¹⁰⁹ Barnard suggests that the courts

¹⁰⁰ Loubser & Reid (note 66) 24. The court in *Van der Merwe v Meades* 1991 2 SA 1 (A) that a purchaser had to prove that the seller was aware of the existence of the latent defect at the time of conclusion of the contract and concealed it with the intention to defraud. Here the purchaser will be entitled to use the *actio empti* even where there was a voetstoots clause. See also Barnard (note 48) 459.

¹⁰¹ *Hackett v G & G Radio & Refrigerator Corporation* 1949 3 SA 664 (A) is the authority relied on for the premise that over the years, the *actio redhibitoria* absorbed some of the characteristics of the *actio empti*.

¹⁰² Barnard (note 48) 457.

¹⁰³ Loubser and Reid (note 66) 32.

¹⁰⁴ MM Botha, EP Joubert ‘Does the Consumer Protection Act 68 of 2008 provide for Strict Product Liability? – A Comparative Analysis’ (2011) 74 *THRHR* 305, 306.

¹⁰⁵ Barnard (note 48) 460.

¹⁰⁶ Kerr (note 77) 150.

¹⁰⁷ Botha, Joubert (note 104) 307.

¹⁰⁸ Loubser and Reid (note 66) 32.

should ask which clause reflects the true intentions of the parties.¹¹⁰ In *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another*¹¹¹ the court highlighted that the issue was to determine what the parties intended when they referred to an ‘implied warranty of quality’– of which the court found that the intention was indeed to exclude liability.¹¹²

Where a seller is aware of defects present in the goods sold and decides not to inform the purchaser of this, the court in *Orban v Stead*¹¹³ confirmed that under the common law, there was no general duty of disclosure on a seller; however, there were three possible circumstances where the seller’s silence would result in an action based on non-disclosure:

- i) where there is concealment,
- ii) where there is a designed concealment, or
- iii) where there is a simple non-disclosure.¹¹⁴

The court stated that the duty to disclose arose where one party was aware of the other party’s ignorance of a material fact or where one party was aware that some relevant information was made available only to him.¹¹⁵ The court held that a seller had no duty to disclose if he was unaware that the purchaser acted under an erroneous belief (he would be able to rely on a voetstoots clause where he had acted honestly¹¹⁶); but if a seller stood by with full knowledge that a purchaser was acting in erroneous belief and the seller chose to rely on the purchaser’s ignorance to entice him into the contract then the seller was guilty of designed concealment,¹¹⁷ and, could not say that the purchaser may have discovered the truth by exercising reasonable diligence.¹¹⁸ The law was reiterated in *Van der Merwe v Meades*¹¹⁹

¹⁰⁹ For example a warranty is given that the *merx* is free of defects by the seller, but the contract also contains a voetstoots clause.

¹¹⁰ Barnard (note 48) 460.

¹¹¹ 2005 (6) SA 1 (SCA).

¹¹² *Consol Ltd t/a Consol Glass* (note 111) at 21 para [58] per Brand JA. ‘...In these circumstances it must, in my view, be accepted that when the parties agreed to exclude liability for any ‘implied warranty of quality’ they intended that exclusion to pertain to this most commonly known ‘implied warranty’ as well...’

¹¹³ 1978 2 SA 713 (W) 717.

¹¹⁴ *Orban v Stead* supra at 717-18. See also Barnard (note 48) 461.

¹¹⁵ *Orban v Stead* supra at 720B.

¹¹⁶ The honesty requirement was referred to by the court in *Waller v Pienaar* 2004 6 SA 303 (C) after considering the ruling in *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA) at 180 – 181 which found that the defect was within the seller’s exclusive knowledge and that the seller was aware of the fact that the purchaser did not know about the defect. The court held that intentional or negligent breach of the duty to disclose will automatically attract delictual liability based on public policy. Barnard (note 48) 461.

¹¹⁷ *Orban v Stead* supra at 718. See also *Van Bergh v Coetzee* 2001 (4) SA 93 (T) at 95.

¹¹⁸ *Orban v Stead* supra at 719. See also Barnard (note 48) 461.

where Shongwe J. highlighted that a seller would be deprived of the protection afforded by a *voetstoots* clause where the seller was aware of the defect in the *merx* at the time of making the contract and concealed its existence from the purchaser with the purpose of defrauding him.

In the case of *Mayes and Another v Noordhof*¹²⁰ the court reached seems to have followed the rationale in the *Van der Merwe* case. The defendant in this case sold property to the plaintiffs, a couple, but did not inform them about a squatter camp that was situated next to the property.¹²¹ When the plaintiffs discovered the presence of the squatter camp, attempts were made to return the land but the defendant refused thereby leading to the plaintiffs seeking redress from the court. The court indicated that the action of the plaintiffs would only succeed if they could prove that the defendant withheld information with wrongful intent.¹²² In addition to this, Fagan J held that although there was no direct evidence that the defendant had intended to defraud the plaintiffs, there did exist circumstantial evidence that the defendant wilfully withheld information with the intention to defraud the plaintiffs and accordingly granted the plaintiffs' application.¹²³ In *Truman v Leonard*,¹²⁴ the court confirmed that a seller could only rely on the *voetstoots* clause if the seller had acted honestly where a purchaser had raised the fraudulent concealment of a latent defect; that is, the operation of the *voetstoots* clause was confined to cover latent defects which the seller did not deliberately conceal in order to induce the contract.

2.2.2.6 Manufacturers' and Merchants' Liability

Aedilician remedies cannot provide a buyer with recourse for consequential loss caused by the presence of latent defects in the product.¹²⁵ Instead, legal precedent has continuously illustrated that a buyer can hold a seller liable for consequential loss (as well as a claim in terms of aedilician remedies¹²⁶) where the seller is a manufacturer or merchant seller of the *merx*,¹²⁷ even if the merchant or manufacturer was unaware¹²⁸ of the defect.¹²⁹ There are four

¹¹⁹ 1991 2 SA 1 (A) at 96. Loubser and Reid (note 66) 33 also point out that one cannot contract out of liability for fraud.

¹²⁰ 1992 (4) SA 233 (C).

¹²¹ At 234.

¹²² At 247.

¹²³ At 247 – 248.

¹²⁴ 1994 (4) SA 371 (SE) at 373.

¹²⁵ Sharrock (note 47) 297.

¹²⁶ The liability of a seller who is a manufacturer to pay consequential loss does not exclude his liability under aedilician law – Sharrock (note 47) 299.

¹²⁷ *Ibid.* See also Botha, Joubert (note 104) 307.

instances where a seller will be liable for consequential damages brought about by defective products; where the seller acts fraudulently, where the seller breaches an express warranty, where the seller breaches an implied warranty and where the seller acts negligently or intentionally.¹³⁰

Liability arises because the manufacturer sells products produced by his own skill while a merchant professes specialised knowledge of the products he deals in.¹³¹ In the case of *Kroonstad*, the court held that ‘liability attaches to a merchant seller...where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold...the law irrebuttably attaches to him the liability in question, save only where he has expressly or by implication contracted out of it’.¹³² It is clear from the above that liability for consequential loss can be excluded by agreement between the parties.¹³³ However it must also be noted that where there was no contractual relationship to begin with, the buyer can still make a claim against the manufacturer but the onus is on the buyer to prove fault on the part of the manufacturer and furthermore that he (the buyer) has suffered damage.¹³⁴

Two cases were considered influential with regards to the above. The court in *Ciba – Geigy (Pty) Ltd*¹³⁵ explained that it was not required that there be a contractual relationship between the manufacturer and the consumer. If a manufacturer commercially distributed a product, and during the course of its intended use, it caused damage to the consumer as a result of a defect, the manufacturer acted wrongly and therefore unlawfully based on the legal

¹²⁸ Ignorance is not a defence against liability – highlighted in *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 (3) SA 593 (SCA) at para [31]. McQuoid-Mason (note 4) 78, Botha, Joubert (note 104) 307.

¹²⁹ Loubser and Reid (note 66) 28. Barnard (note 48) 462. Some of the leading cases stated are *Erasmus v Russell’s Executors* (note 19); *Young’s Provision Stores (Pty) Ltd v Van Ryneveld* (note 21); *Lockie v Wightman and Company* 1950 1 SA 361 (SR); *Odenaal v Bethlehem Romery Bpk* 1954 3 SA 370 (ODP); *Kroonstad Westelike Ko-Operatiewe Vereniging Bpk v Botha* (note 24); *Holmedene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* (note 26) at para 682 – 683; *Sentrachem Bpk v Weinhold* 1995 (4) SA 312 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* (note 37); *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A); *Ciba – Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* (note 51) at 465; *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* (note 128).

¹³⁰ McQuoid-Mason (note 4) 78, Botha, Joubert (note 104) 307.

¹³¹ Loubser and Reid (note 66) 28. Sharrock (note 47) 298.

¹³² *Kroonstad* (note 24) at 571H-572A.

¹³³ Sharrock (note 47) 299.

¹³⁴ McQuoid-Mason (note 4) 78. Loubser & Reid (note 66) 24. This was also stated in the case of *Ciba – Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* (note 51) at para [64] and [66] at 470, where the court explained that a contractual nexus between the manufacturer and consumer was not a requirement.

¹³⁵ *Ciba – Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* (note 51 above).

convictions of the community.¹³⁶ Hence both the merchant and the manufacturer are held to be jointly and severally liable; the merchant's liability is based on a contractual warranty while the manufacturer's liability is based on the law of delict.¹³⁷ The decision received support from academics who hoped the line of thought would extend to future judgements¹³⁸ while others criticised it and raised questions of its applicability in the modern commercial setting.¹³⁹

Another decision of importance was given in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*.¹⁴⁰ The court accepted that the manufactured product in question was defective when it left the respondent's control, and also that its defective condition had caused the alleged harm.¹⁴¹ It was also accepted that the respondent, as manufacturer, although under no contractual obligation to the appellant, was under a legal duty in delictual law to avoid reasonably foreseeable harm resulting from defectively manufactured medicine being administered to the first appellant and, secondly, that that duty had been breached.¹⁴² There was unlawful conduct on the part of the respondent: hence the essential enquiry became whether liability attaches even if the breach occurred without fault on the respondent's part. With regards to imposing strict liability, the court held that although there could be reasons for imposing strict liability on manufacturers, it was inappropriate for the courts to impose it.¹⁴³ The court was not prepared to discard the common-law requirement of fault but felt the responsibility of developing the common law rested on the legislature.¹⁴⁴

¹³⁶ *Ciba – Geigy (Pty) Ltd* supra at 470. 'By putting into circulation potentially harmful things in that manner the manufacturer is not merely exercising a legal right but is encroaching upon the rights of others not to be exposed,...In other words, it is an encroachment upon the rights of others to set hidden snares for them in the exercise of their own rights. To refrain from doing so is a duty owing to the world at large and in no sense owing to certain persons in advance and in particular.'

¹³⁷ *Ciba – Geigy (Pty) Ltd* supra at 475. Barnard (note 48) 463.

¹³⁸ J Neethling and J Potgieter 'Die Hoogste Hof van Appel laat die deur oop vir strikte vervaardigers-aanspreeklikheid' (2002) *TSAR* 582 -586. These two writers supported the court's decision to move towards product liability for manufacturers. Barnard (note 48) 463.

¹³⁹ Lotz et al criticised this decision and questioned whether the Pothier rule was still applicable to the modern trade environment of today: Barnard (note 48) 463.

¹⁴⁰ 2003 2 ALL SA 167 (SCA).

¹⁴¹ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* supra at para [7] at 291E.

¹⁴² *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* supra at para [7] at 291F-G.

¹⁴³ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* supra at para [26] and [37] at 297D and 300E.

¹⁴⁴ *Ibid*.

2.3 DEVELOPMENT OF THE SOUTH AFRICAN CONSUMER FRAMEWORK

The development of South African consumer protection was much slower than that of counterparts in Europe and the United States of America.¹⁴⁵ Although slow, South African consumer protection was more progressive in its development. The apartheid government, along with most of its policies, deprived the majority of South Africans of economic, political and human rights and excluded many from having equal provision of and access to basic services.¹⁴⁶ Black consumers suffered the most¹⁴⁷ and consumer protection was non-existent for this marginalized majority. Only the rich and affluent white members of society had some level of protection.¹⁴⁸

The development of consumer groups in South Africa started in the 1950s, primarily focused on giving advice and information.¹⁴⁹ Groups such as the South African National Consumer Union (SANCU), the Housewives' League and the National Black Consumer Union were among them.¹⁵⁰ Although the general *consensus* was that these groups had little impact on the South African government, it seems the pressure they exerted led to the establishment of the South African Co-ordinating Consumer Council in 1972, which was an umbrella body created to co-ordinate and handle consumer interests.¹⁵¹ However, this Council devoted most of its attention to issues affecting businesses and the government as opposed to issues affecting consumers.¹⁵²

In 1976 the Trade Practices Act¹⁵³ was enacted with the intention to protect the interests of consumers, with particular emphasis on those unreasonably prejudiced or deceived.¹⁵⁴ One of the shortcomings faced by the Act was that it did not give authority to take effective action against un-conscionable or corrupt business practices.

¹⁴⁵ D McQuoid-Mason 'Consumers and Consumerism' D McQuoid-Mason (ed) et al *Consumer Law in South Africa* (1997) 1, 7.

¹⁴⁶ Department of Trade and Industry (DTI) Green Paper Vol. 471 09/04 in GG 26774 (9 September 2004) 4; McQuoid-Mason (note 145) 9.

¹⁴⁷ Preamble of the CPA.

¹⁴⁸ McQuoid-Mason (note 145) 7.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ McQuoid-Mason (note 145) 8.

¹⁵² Ibid.

¹⁵³ 76 of 1976.

¹⁵⁴ As illustrated in *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd and Others* 1990 (4) SA 136 (D); T Woker 'Business Practice Statutes and Consumer Protection' D McQuoid-Mason (ed) et al *Consumer Law in South Africa* (1997) 122.

The enactment of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988¹⁵⁵ was an attempt by legislature to address these deficiencies.¹⁵⁶ Its stated purpose was to prohibit and control unfair business practices, but it did not contain a list of practices that could be considered as unfair.¹⁵⁷ Consequently the Act made provision for the establishment of a Business Practices Committee that had the mandate to investigate business practices and make recommendations to the Minister to have those they deemed harmful declared as such.¹⁵⁸ If the Minister accepted the recommendation, he had to publish a notice in the Government Gazette declaring the particular business practice as unfair and directing parties and businesses alike to avoid it.¹⁵⁹ The implementation of the Act was cosmetic in nature, in my opinion, because it lacked comprehensive guidelines or a list of possible unfair practices to provide ease of reference for the Committee to address its core purpose. It can be assumed that any suspicious business practice submitted to the Committee would have to go through a long and tedious process of investigation and deliberation before it could be declared as unfair by the Committee and the Minister would still have to make his personal enquiries and analysis before he adopted those recommendations. . One can see how this process could drag on for months or years, particularly since this would not be the only function of the Minister.

In 1992, the Committee then promulgated Report No. 15, a list of ‘deceptive’ and ‘unconscionable’ practices that were widely worded and had the ability to be applied extensively.¹⁶⁰ Among them were the following:

- A representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that it does not have;¹⁶¹
- A representation that the subject of a consumer transaction is of a particular nature, standard, quality, grade, style or model that it is not.¹⁶²

¹⁵⁵ Previously called the Harmful Practices Act 71 of 1988.

¹⁵⁶ Du Preez (note 5) 63.

¹⁵⁷ Preamble of the Act. See also Woker (note 154) 123.

¹⁵⁸ S 2 read with s 4 and s 8. No Author, Business Practices Committee Report 61 available at https://www.acts.co.za/consumer-affairs-committee-reports/r61_1__introduction, accessed on 20 September 2016; Woker (note 154) 123.

¹⁵⁹ T Woker ‘Why the need for Consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act’ (2010) 31 (2) *Obiter* 219.

¹⁶⁰ Business Practices Committee Consumer Codes (Report No 15) 61 4, GN R444 GG 13988 of 18 May 1992; Woker (note 154) 123.

¹⁶¹ Business Practices Committee Consumer Codes 61.

¹⁶² Business Practices Committee Consumer Codes 61.

The Unfair Business Practices Act had the potential to be a powerful tool. However, as Woker rightly pointed out, the Committee was under-resourced and not as effective because it had no powers to redress.¹⁶³ The role of the Committee was purely advisory to the Minister and if a practice was declared illegal then it was left to the South African Police Service and the public prosecutor to hold parties accountable.¹⁶⁴ This was often not done as both these government bodies had more immediate criminal matters to attend to.¹⁶⁵

After 1994, in the spirit of the new constitutional dispensation, it became increasingly necessary to promote equity of consumption of goods and services among the people as well as to provide vulnerable members of society with rights and appropriate redress. The White Paper on the Transformation of the Public Service (WPTPS)¹⁶⁶ set out eight transformation priorities, of which the transformation of service delivery was identified as one.¹⁶⁷ The Batho Pele - “People First” White Paper on Transforming Public Service Delivery¹⁶⁸ was then drawn up with the objective of building a public service that was capable of improving the effectiveness in delivery of public services to all citizens in South Africa. It was relevant as it was a bold step in the direction of a national concern for public service delivery and improvement; a step that would play a part in encouraging the future development of a holistic piece of legislation that would encompass all South Africans.

The Batho Pele was based on eight principles, which have come to be known as the “Batho Pele Principles”. These were:

- a) consultation of citizens about the level and quality of public services they receive and are offered,
- b) citizen awareness of service standards to be made available, access to services,
- c) courtesy and consideration for citizens,
- d) full, accurate information about public services for citizens
- e) openness and transparency about how national and provincial departments are operated,
- f) redress offered in situations where the appropriate standard of service is not delivered, and

¹⁶³ Woker (note 159) 220.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Published 24 November 1995.

¹⁶⁷ Ibid.

¹⁶⁸ Department of Public Service and Administration White Paper (18 September 1997).

g) economical and efficient provision of public services – value for money.¹⁶⁹

They were focused on how to improve the efficiency and effectiveness of service delivery by providing a basis for setting standards in public service delivery.¹⁷⁰ Government also found itself in the peculiar situation where it had not reached a stage in its development where it could implement these principles sufficiently. Furthermore, the lack of standards of performance meant it would be difficult to ascertain when goals were being achieved.¹⁷¹

South Africa had no single definitive consumer protection legislation that was holistic in its approach towards every consumer or that clearly set out the rights and obligations of all players within the market. Consumer law was very fragmented and based on principles that were not applicable to a developing, democratic society.¹⁷² The government recognised these issues and attempted to redress them by introducing various economic and social policies such as the Reconstruction and Development Programme (RDP) and the Growth, Employment and Redistribution framework (GEAR).¹⁷³ These developments were, however, insufficient to address both the historical problems and new emerging challenges.¹⁷⁴

The South African Department of Trade and Industry (DTI), through its Minister, recognised that the present regulations¹⁷⁵ were gravely insufficient in protecting the consumer, particularly because the balance of power in the market was more in favour of businesses and there were imbalances in information and product safety.¹⁷⁶ Fundamental rights of consumers were being overlooked.¹⁷⁷ South Africa had safety standards in some areas,¹⁷⁸ but most manufactured goods had no safety standards.¹⁷⁹ Legislation in the form of the Standards

¹⁶⁹ Department of Public Service and Administration White Paper (18 September 1997) para 3.

¹⁷⁰ White Paper (note 168 above) para 1.1.2.

¹⁷¹ See also GN 471 of GG 26774. 9/09/2004; 8.

¹⁷² GN 471 of GG 26774. 9/09/2004; 23.

¹⁷³ GN 471 of GG 26774. 9/09/2004; 9.

¹⁷⁴ Ibid.

¹⁷⁵ Over the years, a number of different consumer related statutory provisions intended to protect consumers had been included in various statutes. These were Sale and Service Matters 25 of 1964; Alienation of Land Act 68 of 1981; Consumer Affairs (unfair Business Practices) Act 71 of 1998. However most of these provisions are industry specific - Cosmetics and Disinfectants Act 54 of 1972; Estate Agency Affairs Act 112 of 1976; Housing Development Schemes for Retired Persons Act 65 of 1988; Liquor Act 27 of 1989; Gambling Act 33 of 1996; Counterfeit Goods Act 37 of 1997; Genetically Modified Organisms Act; Competition Act 89 of 1998; Financial and Intermediary Services Act 37 of 2002; Electronic Communications and Transactions Act 25 of 2002; Liquor Act 59 of 2003; National Gambling Act 7 of 2004; National Credit Act 34 of 2005 etc 15 of 1997. See also GN 471 of GG 26774. 9/09/2004; 23.

¹⁷⁶ GN 471 of GG 26774. 9/09/2004; 24.

¹⁷⁷ GN 471 of GG 26774. 9/09/2004; 22, 24.

¹⁷⁸ Medicines, foodstuffs, transport, electrical goods.

¹⁷⁹ GN 471 of GG 26774.9/09/2004, 31.

Act¹⁸⁰ provided for the setting of voluntary or compulsory standards,¹⁸¹ but there was no legal provision that codified the right of the consumer to have safe products or that imposed liability on manufacturers where the goods were defective or unsafe. There was effectively no right to recourse where defective or unsafe goods caused damage or harm to a consumer.¹⁸²

Quality of products was another overlooked area. The Draft Green Paper on the Consumer Policy Framework¹⁸³ was formulated and it recommended that a minimum mandatory standard be set. It required that the product “meets a basic level of quality and performs to a reasonable expectation...a product should be suitable for the purpose the consumer communicated to the supplier when negotiating or arranging to buy it, or a purpose that is obvious from the circumstances in which the sale took place.”¹⁸⁴ It further highlighted the importance of introducing and setting guarantees and warranties to protect the consumer against non-conformity and non-performance by the supplier. Issues such as the right to return a product and the option to claim a refund or a replacement were also raised with indications that they would be better regulated by law.¹⁸⁵

Prior to the end of apartheid, South Africa had increased international trade and participation in global markets, which had the positive effect of giving consumers wider choice and offering competitive prices.¹⁸⁶ Because there was a gap in legislation concerned with consumer protection, there were no clear consumer rights or guiding principles, nor was there a specific body of law assigned to handle consumer related issues.¹⁸⁷ There were no clear product safety standards set or enforced on imported goods - this easily resulted in the market being flooded with unsafe, counterfeit and substandard products.¹⁸⁸ Most consumer transactions were characterised by imbalances in both information and bargaining power. The new black consumer was more vulnerable as regulations that were present sought to address white consumer issues.¹⁸⁹ The new black consumer was new to the market, vulnerable, and in most cases poor with low or no literacy levels thus was easily taken advantage of.¹⁹⁰

¹⁸⁰ 29 of 1993.

¹⁸¹ Ibid; s 22.

¹⁸² GN 471 of GG 26774. 9/09/2004, 31 – 32.

¹⁸³ GN 471 of GG 26774. 9/09/2004, 33.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ GN 471 of GG 26774.9/09/2004, 17.

¹⁸⁷ GN 471 of GG 26774.9/09/2004, 17, 31. Du Preez (note 5) 64.

¹⁸⁸ GN 471 of GG 26774.9/09/2004, 17, 31-32. Du Preez (note 5) 64.

¹⁸⁹ Du Preez (note 5) 64.

¹⁹⁰ GN 471 of GG 26774.9/09/2004, 4, 11.

Another serious consideration was that most regional and international neighbours had formulated consumer protection legislation and South Africa had fallen behind significantly.¹⁹¹ It was feared this could have an adverse effect on global and international transactions especially if any issues arose.¹⁹² It became evident that there was a need for specific codified legislation to not only guide the welfare of all consumers but to provide a consistent framework of statutes, policies and government authorities to regulate the relationship between businesses and consumers.¹⁹³ There was a need for the introduction of rights with regards to quality, safety, liability and other comprehensive consumer rights; an indication of how these rights and rules would be implemented and what redress would be available to consumers.¹⁹⁴

It was essential to develop rights, rules and guiding principles so as to promote consumer confidence and certainty, to educate the society of the rights and recourse available to them and to attempt to address the challenges that were brought about by apartheid with the aim of encouraging fair and equitable market practices and a competitive culture.¹⁹⁵ It was critical to formulate legislation that would not only redress the historical issues from the past but that would also be progressive enough to be able to tackle the new and ever evolving challenges of the future.¹⁹⁶

The Consumer Protection Bill¹⁹⁷ was then birthed through a process initiated by the Department of Trade and Industry with the view of recommending a new consumer protection regime for South Africa.¹⁹⁸ It was initially published for public comment in 2006¹⁹⁹ and being the first legislation of its kind, it was met with a myriad of reactions.²⁰⁰ Often referred to as a bill of rights for consumers,²⁰¹ it was described as “ground breaking,

¹⁹¹ Ibid 17.

¹⁹² Ibid 17, 18.

¹⁹³ GN 471 of GG 26774.9/09/2004, 10. See also Department of Trade and Industry South Africa, ‘Overview of Consumer Protection Legislation in SA’ (slide 2) available at https://www.issafrika.org/crimehub/uploads/dti_presentation_OverviewofAct.pdf, accessed on 20 September 2016.

¹⁹⁴ GN471 of GG 26774.9/09/2004, 13, 31, 33.

¹⁹⁵ Ibid 22, 24.

¹⁹⁶ GN471 of GG 26774.9/09/2004, 18.

¹⁹⁷ 3rd Draft of the bill [B 19 2008] (hereinafter referred to as the CPA bill). The Bill has only been referred to for purposes of illustrating chronological flow of events.

¹⁹⁸ Du Preez (note 5) 59.

¹⁹⁹ GN 418 of GG 28629 15/03/2006.

²⁰⁰ J Maphosa ‘If you didn’t buy it, you still benefit’ (2008) 8 (10) *Without Prejudice* 55-56; S Du Chenne ‘Consumer Protection Act: finally a voice for consumers: legislation’ (2011) 2011 (1) *Professional Accountant* 10; Woker (note 159) 217-231; Du Preez (note 5) 59.

²⁰¹ J Maphosa ‘Consumer Protection Bill’ in *Business Brief* (Dec/Jan 2008).

new and dynamic legislation that would soon set a benchmark internationally”²⁰² because it was informed by policy principles of equity and accessibility. It was viewed as “a complete revamp and modernization of the existing consumer protection framework in South Africa,”²⁰³ encouraging market integrity and transparency between players. It was called “legislation that was set to change the legal landscape and which would leave South African consumers amongst the best protected in the world”²⁰⁴ as it empowered the consumer society and influenced consumer safety (quality goods and services that are safe for the consumer and for the environment). It had its fair share of public and academic criticism as some described it as complicated, overly optimistic and far reaching.²⁰⁵

The Consumer Protection Act²⁰⁶ was then enacted and it came into effect on 1 April 2011. It aims to protect the interests of all consumers through the core fundamental consumer rights it has created and the various provisions it has set up to ensure preservation of these rights. Its mandate is to ensure transparent and efficient redress for those consumers that have been subjected to exploitation or abuse in the marketplace. It was also created to formulate standards and rights pertaining to consumer education and protection, eliminate improper business practices and improve the quality of consumer information and responsible consumer behaviour in line with international standards.²⁰⁷

Like the Bill, some academics criticised the Act²⁰⁸ and believed it was not user friendly as it was not in plain and understandable language,²⁰⁹ thereby making it difficult for vulnerable consumers to understand it.²¹⁰ Much like the Constitution of the Republic of South Africa,²¹¹ the CPA was partially founded on other international consumer protection instruments.²¹² It

²⁰² Mpahlwa address at Consumer Law Conference (13/03/2008) available at <http://www.info.gov.za/speeches.2008/08031909451003.html>, accessed on 13 September 2016.

²⁰³ Mphahlele ‘Consumer Protection Bill will help consumers make informed decisions’ (part 2) 2007 FSB Bulletin 3rd Quarter 10.

²⁰⁴ T Seopa ‘South Africa: Is Your Business Ready for the New Consumer Protection Bill?’ available at <http://allafrica.com/stories/200805300928.html>, accessed on 19 September 2016.

²⁰⁵ See also Du Preez (note 5) 60, 61.

²⁰⁶ 68 of 2008 (hereinafter referred to as the CPA).

²⁰⁷ Preamble of the CPA.

²⁰⁸ See R Rolando ‘Watch your back! It’s the Consumer Protection Act’ *Food Review* May 2011; W Jacobs, PN Stoops, R van Neikerk ‘Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis’ (2010) 13 (3) *PELJ* 302, 302, 305.

²⁰⁹ See M Gouws ‘A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act’ (2010) 22 *SA Merc LJ*. See also PN Stoop, C Churr ‘Unpacking the right to plain and understandable language in the *Consumer Protection Act* 68 of 2008’ (2013) 16 (5) *Potchefstroom Electronic Law Journal* 514-553; Barnard (note 48) 484; Loubser, Reid (note 66) 35.

²¹⁰ Gouws (note 206) 82.

²¹¹ Constitution of the Republic of South Africa, 1996.

²¹² Preamble of the CPA.

has introduced considerable changes to commercial law and is continuously viewed as a major advance and an important milestone in South Africa's legal development. The hope is that it will stimulate a culture of continued legal evolution.²¹³

2.4 CONCLUSION

The government of South Africa realised early on that change with regards to protection afforded to consumers needed to be introduced so as to provide all consumers with the same degree of protection. The enactment of the CPA came as a welcome advancement as it offered a codified piece of legislation to cater for all players within the market. It was seen as capable to address most of the issues including those relating to quality, non-conformity and non-performance and it was hoped it would offer redress and protection for the vulnerable consumer. Although it suffered a large amount of criticism on the onset, the CPA was eventually viewed as a solid piece of legislation, however there were issues raised concerning its capacity to be understood and applied to its full potential. Some of these issues related to interpretation with sections such as section 56 being identified as controversial and lacking sufficient clarity. These and other challenges will be addressed in the following chapter.

²¹³ E van Eeden *Consumer Protection Law in South Africa* (2013) 2.

CHAPTER 3

THE CONSUMER'S RIGHT TO SAFE, GOOD QUALITY GOODS AND THE IMPLIED WARRANTY OF QUALITY

3.1 INTRODUCTION

The Consumer Protection Act was signed into law on 24 April 2009, but most of its provisions only came into effect on 1 April 2011. The Act provides eight fundamental rights: these are the right to equality in the consumer market; the consumer's right to privacy; the consumer's right to choose; the right to disclosure and information; the right to fair and reasonable marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions; and the right to fair value, good quality and safety.¹ These rights are recognised internationally and the Act provides an extensive framework that aims to protect these rights through their development and enhancement as well as through elimination of unethical suppliers and unfair business practices.²

The Act has been referred to as 'ambitious and comprehensive legislation that aims to regulate the consumer market as widely as possible'.³ However, it is not without its flaws. Several academic writers⁴ critically analysed the CPA in a bid to establish how it had modified the rules of the common law and the legal positions of the consumer and the supplier. They agreed that the CPA had a number of controversial provisions, most of which are to be found in Chapter 2 dealing with fundamental consumer rights. Though viewed as a cornerstone piece of legislation and often described as a culmination of several decades of debate and legal development in South African consumer protection,⁵ the Act will still require clarification and modification in some areas and it is hoped that it will eventually raise the general levels of ethics and service in the business environment.⁶ This chapter seeks to examine and evaluate the consumer's right to safe, good quality goods and the implied

¹ Contained in Chapter 2 of the CPA.

² Preamble of the CPA.

³ T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (Original Service 2014) Introduction pg 1 Para 2.

⁴ W Jacobs, PN Stoops, R van Neikerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13 (3) *PELJ* 302; J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clause and liability for damages' (2012) 45 (3) *De Jure* 455; T Naudé, 'The Consumer's right to safe, good quality goods and the Implied warranty of quality under section 55 and 56 of the Consumer Protection Act 68 of 2008' (2011) 23 (3) *SA Merc LJ* 336; R Rolando 'Watch your back! It's the Consumer Protection Act' *Food Review* May 2011; C Morrissey, A Coetzee, A. 'Does this mean voetsek voetstoots?' (2010) 10 (4) *Without Prejudice* 12 - to name a few.

⁵ E van Eeden *Consumer Protection Law in South Africa* (2013) 23.

⁶ R Rolando 'Watch your back! It's the Consumer Protection Act' *Food Review* May 2011 at 11.

warranty of quality. It analyses the remedies afforded under section 56 and the uncertainties that surround these remedies.

3.2 OVERVIEW AND SCOPE OF THE CPA

The aim of the Act is to protect consumers from abuse and exploitation in the marketplace and thus it provides consumers with a ‘bill of rights’. As with any protective measure, the bill of rights is useless unless there are mechanisms in place to ensure effective, efficient and affordable enforcement.⁷ In addition to this, both consumers and suppliers must be aware of and, understand the protective measures and the mechanisms of enforcement in order to sufficiently rely on them. However, awareness and overall protection can only be achieved if the provisions are clear and understandable. The CPA attempts to limit disadvantages relating to the lack of comprehension of visual representations experienced by consumers with low literacy levels or limited fluency in the language, among other things.⁸ This is crucial because the majority of South Africans are vulnerable to abuse due to illiteracy and, in some instances, ignorance.⁹ The CPA also implements standards and norms through national legislation in the form of s 22 and s 50 that aim to protect the consumer by providing improved standards of consumer information and the promotion of a consistent enforcement framework relating to consumer transactions and agreements.¹⁰

Christie and Bradfield correctly state that “...the real value in the legislation lies in the mechanisms it has introduced for the relatively more accessible and informal resolution of consumer disputes’.¹¹ Therefore in as much as the consumer needs to be educated and made aware of protective measures, legislation must be drafted in such a way that allows for easy understanding with no need for clarification. Currently, section 56 offers remedies to a consumer in relation to the warranty of quality, but does not offer sufficient guidelines as to how remedies could be selected and applied in a reasonable manner.

⁷ The CPA makes provision for the protection of consumer rights and the consumer’s voice under Chapter 3: specifically sections 68 to 78.

⁸ S 3(1)(b)(iv) CPA. See also M Gouws ‘A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act’ (2010) 22 *SA Merc LJ* 79, 82.

⁹ *Ibid.*

¹⁰ Gouws (note 8) 82. Section 22(2) of the CPA provides that for the purposes of the Act, a notice, document or visual representation must be written in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, while section 50 governs written consumer agreements and requires that they are written in plain and understandable language.

¹¹ RH Christie, GB Bradfield *The Law of Contract in South Africa* (2011) 22.

Consumers should be sufficiently empowered to understand which remedy applies to a particular situation, how it applies and the protective measures available in that regard. Suppliers should be aware of situations that warrant the use of remedies and the way in which a particular remedy will be applied, as well as how it will affect him as a supplier. The CPA has been criticised for failing to clearly articulate its intentions particularly under section 55 and 56.¹² The balance between protecting the consumer and the burden on the supplier regarding remedies needs to be clearly defined to eliminate the possibility of exploitation on either side.

3.2.1 Purpose of the CPA

The purposes of the Act are to promote and advance the social and economic welfare of consumers in South Africa.¹³ This will be done by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.¹⁴ The Act also aims to reduce and ameliorate any disadvantages experienced in accessing any supply of goods or services by consumers who are low – income persons or persons comprising low – income communities,¹⁵ as well as those who live in remote, isolated or low – density population areas or communities.¹⁶

The Act also takes into consideration minors, seniors or other similarly vulnerable consumers,¹⁷ or consumers whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.¹⁸

The CPA aims to promote fair business practices¹⁹ as well as to promote and advance the social and economic welfare of consumers in South Africa (in particular, the vulnerable consumers) by protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices and deceptive, misleading, unfair or fraudulent conduct.²⁰

¹² Reference is made to the articles in note 4 above.

¹³ S 3(1)(a) CPA

¹⁴ S 3(1)(a) CPA

¹⁵ S 3(1)(b)(i) CPA See Van Eeden (note 5) 40 – 43.

¹⁶ S 3(1)(b)(ii) CPA

¹⁷ S 3(1)(b)(iii) CPA

¹⁸ S 3(1)(b)(iv) CPA

¹⁹ S 3(1)(c) CPA

²⁰ S 3(1)(d) CPA

This is in line with the right to fair value, good quality and safety as enshrined in Part H of the Act.

It seeks to improve consumer awareness and information as well as encourage responsible and informed consumer choice and behaviour.²¹ It further aims to promote consumer empowerment and develop a culture of consumer responsibility through activism, education, choice and vigilance.²² Lastly, it aims to provide for an accessible, consistent, harmonised, effective and efficient system of consensual resolution of disputes arising from consumer transactions as well as an equally effective and efficient system of redress for consumers.²³

To the extent consistent with advancing the purposes and policies of the Act, section 4(4) provides that the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer –

- (a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
- (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to –
 - (i) the content of the document;
 - (ii) the manner and form in which the document was prepared and presented; and
 - (iii) the circumstances of the transaction or agreement.

Additional responsibilities are prescribed to the National Consumer Commission²⁴ to ensure the realisation of the purposes of the Act.²⁵ The Commission is instructed to take all reasonable and practical steps to promote the purposes of the Act, to conduct research and to propose policies relating to consumer issues to the Minister.²⁶

3.2.2 Interpretation of the CPA

The Preamble gives a general overview of the purpose of the CPA while section 3 provides specific purposes. Section 2 states that the Act must be interpreted in a manner that gives

²¹ S 3(1)(e) CPA

²² S 3(1)(f) CPA

²³ S 3(1)(g) - (h) CPA

²⁴ It was established in terms of s 85(1) CPA

²⁵ S 3(2) CPA

²⁶ S 85 CPA

effect to these purposes.²⁷ Where a provision in the Act, when read in its context can reasonably be construed to have several meanings, a court or the National Consumer Tribunal²⁸ must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights generally.²⁹

Section 2(2) further provides that applicable foreign law, international law, conventions, declarations or protocols relating to consumer protection may also be considered for the purposes of interpretation. It is also important to note that the CPA preserves the common law provisions in that it provides that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.³⁰

3.2.3 Application of the CPA

The Act has a wide scope and application as it applies to every transaction occurring in South Africa³¹ unless it is exempted by subsection (2), or in terms of subsections (3) and (4).³² The Act also applies to goods or services promoted or the supplier of goods and services herein.³³

The Act applies to goods or services that are supplied or performed in terms of a transaction to which this Act is applicable, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any

²⁷ S 2(1) CPA. Section 3 outlines how these purposes are to be achieved.

²⁸ Referred to as NCT.

²⁹ S 4 (3) CPA.

³⁰ S 2(10) CPA. See Sharrock *Business Transactions law* (2011) 572, van Eeden (note 5 above) 353 footnote 365.

³¹ W Jacobs, PN Stoops, R van Neikerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13 (3) *PELJ* 302, 309 footnote 51: the writers highlighted that there is uncertainty surrounding the meaning and the scope of the terms "occurring within South Africa". They refer to the National Credit Act which applies to transactions "having effect in South Africa" citing it as clearer.

³² S 5(1)(a) states that every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4). Subsection (2) is highlighted in 2.3 of the chapter. Subsection (3) and (4) state the following:

(3) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of –

(a) any other national legislation; or
(b) any treaty, international law, convention or protocol.

(4) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (3) –

(a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and
(b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

³³ This is subject to the following:

(b) The Act applies to the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless-

(i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
(ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);

other goods or services.³⁴ Lastly, the Act is applicable to goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).³⁵ The Act however does not apply to the following:

- a) transactions for the supply or promotion of goods or services to the State;³⁶
- b) transactions in terms of which the consumer is a juristic person³⁷ whose asset value or annual turnover, at the time of the transaction, is more than or equal to the threshold value determined by the Minister in terms of section 6;³⁸
- c) transactions that have been exempted by the Minister in terms of sections 5(3) and 5(4);³⁹
- d) transactions that constitute credit agreements under the National Credit Act (but goods and services subject to such a credit agreement are not excluded from the application of the Act);⁴⁰
- e) transactions pertaining to services to be supplied under an employment contract;⁴¹
- f) transactions that give effect to a collective bargaining agreement in terms of the Labour Relations Act, 1995 (Act 66 of 1995) and the Constitution;⁴²

³⁴ S 5(1)(c) CPA.

³⁵ S 5(1)(d) CPA.

³⁶ S 5(2)(a) CPA. The Act does not contain a definition of the word “State” hence it is viewed as unclear whether the definition would include other entities in which the State is a member or shareholder.

³⁷ According to section 1, this includes a body corporate, a partnership or association, or a trust as defined in the Trust property Act 57 of 1988.

³⁸ S 5(2)(b) CPA. The National Credit Act has the same exemption for juristic persons (cited in sections 4(1)(a)(i), 4(1)(b) and 9(4)). The CPA does not provide the manner in which information on a juristic person’s annual turnover or asset value is to be obtained; there is also the view that a differentiation between juristic persons that would qualify as consumers and juristic persons who are not protected in terms of the CPA should be fair and based on accessible information to avoid discrimination.

³⁹ S 5(2)(c) CPA. In terms of section 5(3), only a regulatory authority may apply to the Minister for an industry – wide exemption from one or more provisions of the Act on the basis that the provisions overlap or duplicate a regulatory scheme regulated by the authority under national legislation, treaty, international law, convention or protocol. It follows that an individual supplier or a representative body may not apply for an exemption from the Act. In terms of section 5(4), the Minister may, by notice in the *Government Gazette*, grant an exemption to an industry, after receiving advice from the Commission. This kind of exemption may only be granted to the extent that the regulatory scheme ensures the achievement of the purposes of the Act and its provisions. The exemption may also be subject to limits or conditions necessary to ensure achievement of the purposes of the Act.

⁴⁰ S 5(2)(d) CPA. The National Credit Act provides for incidental credit agreements; these are credit agreements in terms of Ss 1, 5(2) and 8(4)(b) of the National Credit Act. An incidental credit agreement is only considered as a credit agreement twenty ‘business days’ after the supplier of goods or services charges interest or fees for late payment of an account (s2(5) of the NCA). This means that during the first twenty business days, an incidental credit agreement does not constitute a credit agreement in terms of the NCA. The issue is then whether the CPA can apply to an incidental credit agreement that is not yet a credit agreement in terms of the NCA.

⁴¹ S 5(2)(e) CPA. It is not clear if this exemption includes temporary employment contracts, but the general assumption is that all employment contracts fall under the exemption.

⁴² S 5(2)(f) CPA. Section 23 of the Constitution.

- g) transactions giving effect to a collective agreement as defined in section 213 of the labour Relations Act, 1995 (Act 66 of 1995).⁴³

The CPA is not applicable to ‘once – off’ transactions or where the goods and services are not supplied in the ordinary course of business.⁴⁴ If any goods are supplied within South Africa to any person in terms of a transaction that is exempt from the application of the Act, those goods, as well as the importer or producer, distributor and retailer thereof are still subject to sections 60 and 61 of the Act, which deal with unsafe goods, safety – monitoring, recall and product liability.⁴⁵

3.3 IMPORTANT DEFINITIONS

In order to determine the application and effect of the Act, the most important and relevant definitions of the Act must be analysed.

3.3.1 Transaction

The initial important definition is that of a ‘transaction’. The English Oxford Living Dictionaries⁴⁶ define a transaction as an instance of buying or selling something or the action of conducting business. The Business Dictionary⁴⁷ gives a commerce related definition: an exchange of goods or services between a buyer and a seller which comprises three elements, (1) transfer of goods/service and money, (2) transfer of title which may or may not be accompanied by a transfer of possession and (3) transfer of exchange rights. A transaction in terms of paragraph (a) of the definition of a ‘transaction’ given in section 1 is, in respect of a person acting in the ordinary course of business, –

- i. an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
- ii. the supply by that person of any goods to or at the direction of a consumer for consideration; or

⁴³ S 5(2)(g) CPA.

⁴⁴ Reliance is placed on the definition of a transaction. This definition is given in s1 of CPA and in 3.1 below. A transaction is referred to as a transaction in the ordinary course of business; hence a once off transaction would be excluded as it is not performed in the ordinary course of a person’s business.

⁴⁵ S 5(5) CPA. See also Van Eeden (note 5) 55.

⁴⁶ English Living Oxford Dictionaries available at <https://en.oxforddictionaries.com/definition/transaction>, accessed on 14 October 2016.

⁴⁷ Business Dictionary available at <http://www.businessdictionary.com/definition/transaction.html>, accessed on 13 October 2016. The general definition states that a transaction is an agreement, contract, exchange, understanding, or transfer of cash or property that occurs between two or more parties and establishes a legal obligation.

- iii. the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.

‘Consideration’ in this instance means anything of value given and accepted in exchange for goods or services, including:

- a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit, electronic chip, or similar object;
- b) labour, barter or other goods or services;
- c) loyalty credit or award, coupon or other right to assert a claim; or
- d) any other thing, undertaking, promise, agreement, or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.⁴⁸

However, supply for consideration is not always a requirement of a transaction as it is pointed out that certain arrangements must be regarded or deemed as a transaction irrespective of whether a charge or economic contribution is required⁴⁹; arrangements such as those between a supplier and consumer regarding the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society, or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise.

Paragraph (b) of the definition of a ‘transaction’ goes on to state that a ‘transaction’ is any interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a), that is:

- a) the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society, or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;
- b) a solicitation of offers to enter into a franchise agreement;

⁴⁸ S1 of the CPA sv ‘consideration’.

⁴⁹ S 5(6) CPA.

- c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- d) a franchise agreement or an agreement supplementary to a franchise agreement; and
- e) the supply of any goods or services to a franchise in terms of a franchise agreement.⁵⁰

The Act applies to potential franchises or franchise agreements regardless of the exclusion in section 5(2)(b)⁵¹; the Act applies to a transaction contemplated in section 5(6)(b) to (e) irrespective of whether the size of the juristic person falls above or below the threshold⁵² determined in terms of section 6. The reason for the above could be due to the fact that franchise agreements are usually concluded between a larger franchisor and a smaller juristic person established by an individual or by a few individual consumers as the franchisee.⁵³

The Act also applies to ‘transactions’ in terms of section 5, irrespective of whether the supplier resides or has its principal office outside South Africa, or irrespective of the supplier’s nature⁵⁴ or that a licence is required to supply products and services or part thereof to the public.⁵⁵ The effect is that the Act then also applies to foreign franchisors and suppliers of goods and services in terms of every transaction occurring within South Africa. Writers have suggested that this could result in enforcement, jurisdictional and choice of law issues.⁵⁶

3.3.2 Consumer

The Business Dictionary defines a consumer as a purchaser or end user in the distribution chain of a good or service.⁵⁷ The CPA defines a ‘consumer’ as –

- (a) any person to whom goods and services are marketed in the ordinary course of the supplier’s business;

⁵⁰ S 5(6)(a) – (e) CPA.

⁵¹ S 5(2)(b) states that the Act does not apply to transactions in which the consumer is a juristic person whose asset value or annual turnover equals or exceeds a threshold value to be determined by the Minister.

⁵² The threshold determination is contemplated in s 6 of CPA. Subsection (1) provides that on the early effective date as determined in accordance with item 2 of Schedule 2, and subsequently at intervals of not more than five years, the Minister, by notice in the *Gazette*, must determine a monetary threshold applicable to the size of the juristic person for the purposes of section 5(2)(b). Subsection (2) provides that the initial threshold determined by the Minister in terms of this section takes effect on the general effective date as determined in accordance with item 2 of Schedule 2, and each subsequent threshold takes effect six months after the date on which it is published in the *Gazette*.

⁵³ Jacobs et al (note 31) 313.

⁵⁴ S 5(8)(c) CPA.

⁵⁵ S 5(8)(a) – (d) CPA.

⁵⁶ Jacobs et al (note 31) 313.

⁵⁷ Business Dictionary available at <http://www.businessdictionary.com/definition/consumer.html>, accessed on 14 October 2016.

- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to the transaction concerning the supply of those goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).⁵⁸

A juristic person can in some instances be considered as a consumer in terms of the Act. However, the Act will not offer protection for a juristic consumer whose asset value or annual turnover equals or exceeds the threshold set by the Minister.⁵⁹

3.3.3 Goods

Another important definition is that of 'goods'. The Business Dictionary defines 'goods' as an inherently useful and relatively scarce commodity or physical, tangible item (article, material, supply, wares, merchandise) produced from agricultural, construction, manufacturing or mining activities, that satisfies some human want or need.⁶⁰ The Act defines 'goods' extremely broadly as including –

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in the section; and
- (e) gas, water and electricity.⁶¹

⁵⁸ S 1 sv 'consumer'.

⁵⁹ S 5(2)(b) CPA. The current threshold is R2 million.

⁶⁰ Business Dictionary available at <http://www.businessdictionary.com/definition/goods.html>, accessed on 13 October 2016.

⁶¹ S 1 sv 'goods'.

3.3.4 Supplier

A supplier is a person or entity that is the source for goods or services.⁶² The CPA defines a supplier as a person who markets any goods or services.⁶³ To fully understand the definition of a supplier, it is important to understand the term market. ‘Market’ is defined as ‘supplying’ or ‘promoting’ goods or services. To promote is to advertise, display or offer to supply goods or services in the ordinary course of business for consideration. It is also referred to as making any representation in the ordinary course of business that could be inferred as expressing willingness to supply goods or services for consideration or engagement in any other conduct in the ordinary course of business that could reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.⁶⁴ To supply in relation to goods, includes selling, renting, exchanging and hiring in the ordinary course of business for consideration. Therefore the definition of supplier has a wide interpretation.

3.3.5 The supply chain: Producers, distributors, retailers, importers

The Act regulates the marketing of goods and services to consumers as well as the relationships, transactions and agreements that exist between them and producers, distributors, retailers and importers of goods and services ‘acting in the ordinary course of business’. A producer is a person who grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods in the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business.⁶⁵

A distributor in relation to any particular goods, means a person who, in the ordinary course of business is supplied with those goods by a producer, importer or other distributor, and who, in turn, supplies those goods to either another distributor or to a retailer.⁶⁶ A retailer⁶⁷ is a person who, in the ordinary course of business, supplies goods to a consumer. This definition is similar to that of a supplier. However, it is limited to the component of

⁶² Your Dictionary.Com available at <http://www.yourdictionary.com/supplier>, accessed on 15 October 2016.

⁶³ S 1 sv ‘supplier’.

⁶⁴ S 1 sv ‘promote’.

⁶⁵ S 1 sv ‘producer’ as contemplated in paragraph (a) of the definition.

⁶⁶ S 1 sv ‘distributor’. It is also defined as an entity that buys noncompeting products or product lines, warehouses them, and resells them to retailers or direct to the end users or customers: taken from Business Dictionary available at <http://www.businessdictionary.com/definition/distributor.html>, accessed on 04 November 2016.

⁶⁷ A person or business that sells goods to the consumer directly: available at <http://www.businessdictionary.com/definition/retailer.html>, accessed on 04 November 2016.

supplying.⁶⁸ An importer is a person who brings goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.⁶⁹

The supply chain is not exclusive to the relationship between the retailer and the consumer, but includes other parties. The supply chain is an entire network of organisations that are involved, through upstream and downstream linkages, in the different processes and activities that produce value in the form of products and services in the hands of the ultimate customer.⁷⁰ It comprises all activities associated with the flow and transformation of goods⁷¹ starting from the raw material stage; producers convert the material to products, warehouses are used for storage, distribution centres facilitate delivery to the retailers, who then in turn bring the product to the ultimate user or consumer.

The Act defines the supply chain with respect to any goods as the collectivity of all suppliers who directly or indirectly contribute to the ultimate supply of those goods to a consumer, whether as a producer, importer, distributor or retailer.⁷² Supply chains are an integral part of the flow of goods and exist to maximize customer value and achieve a sustainable competitive advantage.⁷³ Every product that reaches an end user or consumer represents the cumulative effort of multiple organizations. It is a chain of linkages flowing from one party to another. Each part has to play its role in order for the chain to function effectively and efficiently. Therefore without efficient supply chains, the ability to meet consumer needs as and when required would be virtually impossible.⁷⁴

3.4 THE RIGHT TO FAIR VALUE, GOOD QUALITY AND SAFETY

It is not unreasonable for a consumer who makes a purchase of goods from a retailer to assume that the retailer accepts responsibility for the goods and their condition, including

⁶⁸ Van Eeden (note 5) 48.

⁶⁹ S 1 sv 'importer'.

⁷⁰ M Christopher *Logistics and Supply Chain Management: Strategies for Reducing Cost and Improving Service* (1998) 4.

⁷¹ WMJ Hugo, JA Badenhorst-Weiss, EHB van Biljon (ed), *Supply Chain Management: Logistics in Perspective* (2007) 5.

⁷² 'S 1 sv 'supply chain'.

⁷³ Hugo et al (note 71) 5 - 20.

⁷⁴ Hugo et al (note 71) 8.

variables such as ensuring that the goods meet certain standards of quality, are in good working order and, most importantly, are free of defects.⁷⁵

Prior to the CPA, only common law rules existed to protect the consumer against latent defects in goods, and these rules could be limited or excluded by contract. Part H⁷⁶ of the CPA contains rights relating to fair value, good quality and safety, among others. In this paper, the focus is on the consumer's rights to safe, good quality goods as well as the implied warranty of quality and the remedies associated with it. These sections are contained in Part H and are in line with the aim of protecting consumers from hazards to their well-being and safety as listed in the preamble.

3.4.1 *Applicable definitions*

3.4.1.1 Definition of a 'defect'

Section 53 of the CPA outlines definitions that are applicable to the right to fair value, good quality and safety. One such definition is of a defect.⁷⁷ A defect is defined as an imperfection that causes the person or thing with the defect to fall short of perfection.⁷⁸ Section 53 defines a defect as any *material imperfection*⁷⁹ in the manufacture of the goods or components, that renders the goods less acceptable than persons *generally would be reasonably entitled to expect* in the circumstances; or any *characteristic* of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.⁸⁰

⁷⁵ J Maphosa 'Manufacturers and suppliers beware: consumer law' (2009) 9 (5) *Without Prejudice* 36, 36. See also T Woker 'Consumers and Contracts of Purchase and Sale' D McQuoid-Mason (ed) et al *Consumer Law in South Africa* (1997) 50.

⁷⁶ S 53 – 61 CPA.

⁷⁷ S 53 (1)(a) CPA

⁷⁸ Your Dictionary.Com available at <http://www.yourdictionary.com/defect>, accessed on 15 October 2016. Business Dictionary available at <http://www.businessdictionary.com/definition/defect.html>, accessed on 16 October 2016 defines it as a frailty or shortcoming that prevents an item from being complete, desirable, effective, safe, or of merit, or makes it malfunction or fail in its purpose.

⁷⁹ Business Dictionary available at <http://www.businessdictionary.com/definition/imperfection.html>, accessed on 01 November 2016 defines an imperfection as a departure of a quality characteristic from its intended level or state, however it does not affect the conformance of the product or service with its specifications or usability. Loubser and Reid in the Commentary on the Consumer Protection Act – Section 53 paragraph 4 state that the word imperfection relates to the manufacture in respect of goods or components, which can include design and to performance in respect of services, rather than the inherent quality of the services. The definition does not specify the nature of the imperfection which leaves doubt as to faults impairing safety and quality. However it is clear that the fault must cause harm as highlighted in s 61(5).

⁸⁰ S 53(1)(a)(i) and (ii) CPA. The common law defines a defect as either latent or patent. A latent defect is an impairment of the usefulness of the thing sold and is not discoverable upon reasonable inspection by an ordinary person.

The word material has been judicially defined as meaning serious, substantial or important.⁸¹ The defect cannot be insignificant. The CPA definition requires that the imperfection be less *acceptable* than persons generally would be reasonably entitled to expect in the circumstances. Acceptable has been defined as the ability to be tolerated or allowed.⁸² The other standard present is that of the ‘consumer expectation test’ or the ‘legitimate expectations test’. This test has the element of reasonableness built into it.

Loubser and Reid⁸³ analysed the European experience of the consumer expectations approach and suggested that the definition of a defect in the Draft Consumer Protection Bill of 2006 had to be amended to remove the consumer expectations test, and proposed that a defect should be assessed in terms of a general standard of reasonableness. Van Eeden, though acknowledging the merit of the view given by Loubser and Reid, argued against it stating that the current wording of the definition was closer in relation to the language used in international instruments and that the CPA had introduced a modified negligence liability regime.⁸⁴

Van Eeden⁸⁵ also submits that several definitions in section 53, and in particular the definition of a defect, require proof of the imperfection or characteristic, as well as proof of the state of the goods without the imperfection or characteristic. He goes further and suggests that proof is also required of what people would reasonably be entitled to expect in the circumstances. Jacobs et al indicate that it is unusual that the method for determining a defect is what “persons generally would be reasonably entitled to expect in the circumstances” instead of perhaps what a “reasonable consumer or a consumer would reasonably expect”.⁸⁶

Botha and Joubert⁸⁷ argued in favour of the view presented by Loubser and Reid criticising the consumer expectations test by highlighting that the test was more inclined to design defects and that it was “an impossible task for the ordinary consumer to define what he expects of the technical design characteristics of a product.”⁸⁸ It was the general consensus

⁸¹ *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785.

⁸² English Oxford Living Dictionaries available at <https://en.oxforddictionaries.com/definition/acceptable>, accessed on 01 November 2016.

⁸³ ‘Liability for products in the Consumer Protection Bill 2006: A comparative critique’ (2006) 17(3) *Stell LR* 431.

⁸⁴ Van Eeden *A guide to the Consumer Protection Act* (2009) 245; J Barnard ‘The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clause and liability for damages’ (2012) 45 (3) *De Jure* 455.

⁸⁵ (note 84) 245.

⁸⁶ Jacobs et al (note 31) 363.

⁸⁷ ‘Does the Consumer Protection Act 68 of 2008 provide for strict product liability? – A comparative analysis’ 2011 (74) *THRHR* 316.

⁸⁸ *Ibid* 316

that the precise extent of the test for defective goods or services should be determined on the facts of each case, by the court's interpretation, taking all relevant circumstances into account.⁸⁹

It seems correct therefore to agree with the views of Loubser and Reid as well as Botha and Joubert and submit that the consumer expectations test places an immensely large decisive burden on the consumer; such consumer that may or may not have the requisite knowledge and understanding to make such a judgment call. It also places the consumer in a peculiar position as the consumer has to exercise discretion and decide a material fact in a matter which he is a part of and where such decision will arguably have a favourable effect on him.

More recently it has been submitted that the courts would have to make an assessment of reasonable expectations through reasoned analysis of factors such as the following:

- the standard intended for the goods or their components by the producer or supplier;
- standards or duties prescribed by legislation for the product;⁹⁰
- the possible prevention of the harmful effect of the goods or their components by an alternative manufacturing process or design;
- the risk, benefit, utility and cost of the goods, components or services;
- the manner in which, and purposes for which, the goods or their components have been marketed, the use of any get – up or mark in relation to the goods or their components and any instructions for, or warnings with respect to doing or refraining from doing anything with or in relation to the goods or their components;⁹¹
- what might reasonably be expected to be done with or in relation to the goods or their components; and
- the time when the goods or their components were manufactured or supplied.⁹²

The weight to be attached to the factors above in assessing whether a defect is in existence as well as its seriousness will be for the court to decide. This is more prudent than leaving the decision in the hands of the consumer.

⁸⁹ Jacobs et al (note 31) 363; Barnard (note 84) 466.

⁹⁰ In this instance it must be noted that s 61(4)(a) excludes liability for harm caused by goods if the harm is 'wholly attributable to compliance with any public regulation'.

⁹¹ It must be noted that s 61(1)(c) provides for liability for harm caused by goods if the harm is caused wholly or partly by inadequate instructions or warnings provided to the consumer.

⁹² M Loubser and E Reid Chapter 2: Fundamental Consumer Rights: Section 53, p53-6 Para 9 in T Naudé & S Eiselen (eds) Commentary on the Consumer Protection Act (Original Service 2014). It must be noted that s 61(4)(b)(i) excludes liability of a particular person for harm caused by goods if the failure, defect or hazard 'did not exist in the goods at the time it was supplied by that person to another person alleged to be liable'.

3.4.1.2 Definition of ‘failure’

Failure is the inability of the goods to perform in the intended manner or to the intended effect.⁹³ Jacobs et al highlights that there is uncertainty as to whose intention the ‘intended manner’ or ‘intended effect’ refers to. It may refer to the consumer, the supplier, persons generally, persons in the supply chain (these are the producer, distributor, importer or retailer) or perhaps the joint intention of the consumer and the supplier in a given transaction.⁹⁴

My view is in line with the latter intention. A manufacturer/supplier creates/supplies a product to meet a specific purpose. This specific purpose is usually outlined on the label or packaging of the product. It is the responsibility of the consumer to familiarise himself with the product information on the label and base his decision of whether to purchase the product on the information given. That is, to decide whether, based on the information given, the product can/will meet the consumer’s intended purpose to his satisfaction. Where the product then fails to meet the indicated purpose, the manufacturer/supplier has also failed to meet the purpose. However, the consumer’s intended purpose must be reasonable – it must be in line with what persons generally would expect the product to achieve.

There is a view that the intention in question may be that of the producer or manufacturer of the goods, suggesting that it relates to manufacturing defects.⁹⁵ A manufacturing defect is said to exist if the product differs from the manufacturer’s intended result or from other units of the same product line.⁹⁶ Manufacturing defects are associated with the physical processes of manufacturing, assembling and packaging, inspecting and testing the goods. The failure would be the inability of the goods to conform to the intended specifications, quality, standard and performance of a good of the same description.⁹⁷ The view has been expressed that should a mistake occur in the manufacturing process, the placing of responsibility on the producer is justified on the basis that the producer bears responsibility to produce goods that conform to the intended design and standards.⁹⁸

⁹³ ‘Failure’ of S 53(1)(b) CPA.

⁹⁴ Jacobs, Stoop, van Niekerk (note 31) 364.

⁹⁵ Loubser and Reid (note 92) p53-7 para 15. See also M Loubser and E Reid *Product liability in South Africa* (2012) 60.

⁹⁶ Stated by the court in *In re Coordinated Latex Glove Litigation* 121 Cal Rptr 2d 301 (Cal App 2002) 669.

⁹⁷ Loubser and Reid (note 92) p53-8 para 18.

⁹⁸ A Grubb (Series Ed), G Howells (General Ed), *Butterworths Common Law Series: The Law of Product Liability* (2000) 7. See also Loubser and Reid (note 96) 61.

3.4.1.3 Definition of ‘hazard’

The CPA defines a hazard as a characteristic that has been identified as, or declared to be, a hazard by or in terms of any other law; or presents a significant risk of personal injury to any person or damage to property, when the goods are utilised.⁹⁹ The ‘reference to any other law’ relates to national, provincial, subordinate legislation, proclamations and notices in terms of legislation.¹⁰⁰ The definition could relate to risk in terms of design, quality or functionality of the goods.¹⁰¹

3.4.1.4 Definition of ‘unsafe’

Section 53(1)(d) indicates that unsafe means that particular goods pose an extreme risk of personal injury or property damage to consumers or to other persons owing to a characteristic, failure, defect or hazard. The word extreme is defined as utmost or exceedingly great in degree.¹⁰² The question will therefore be whether the inability of the goods to perform to the required standard created an extreme risk of personal injury or property damage.

3.4.2 Definition of service¹⁰³

It is important to distinguish whether a product falls within the definition of a ‘good’ or a ‘service’ as set out in the CPA because the remedies available to consumers differ depending on whether the transaction involved goods or services.¹⁰⁴ Where the transaction was for the supply of services in conjunction with goods section 61 will apply, while section 54 will apply if the performance of the services was substandard.

⁹⁹ ‘Hazard’ of s 53(1)(c) CPA. Dictionary.Com available at <http://www.dictionary.com/browse/hazard?s=t>, accessed on 05 November 2016 defines a hazard is often regarded as an unavoidable danger, peril, difficulty or risk, even though often foreseeable.

¹⁰⁰ Law is defined as any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law: Section 2 of the Interpretation Act 33 of 1957.

¹⁰¹ Loubser and Reid (note 92) p53-10 para 23.

¹⁰² Dictionary.Com available at <http://www.dictionary.com/browse/extreme?s=t>, accessed on 05 November 2016. The site goes on to describe extreme as exceeding the bounds of moderation, of a character or kind that is furthest removed from the ordinary or average.

¹⁰³ S 54 CPA.

¹⁰⁴ E De Stadler *Chapter 1: Interpretation, purpose and application* T Naudé & S Eiselen (eds) Commentary on the Consumer Protection Act (Original Service 2014) Page 5 – 5, Para 9; See also E De Stadler *Chapter 2: Fundamental Consumer Rights* T Naudé & S Eiselen (eds) Commentary on the Consumer Protection Act (Original Service 2014) Page 54 – 3, Para 5.

3.4.3 *The consumer's right to safe, good quality goods*¹⁰⁵

Section 55 and 56 of the Act are said to introduce minimum levels of quality – related undertakings expected of retailers, distributors, and manufacturers with respect to consumer transactions. Section 55, however, does not apply to goods bought at an auction, as provided in section 45.¹⁰⁶

Section 55(2) gives a list of standards to which goods sold to a consumer must conform. It provides that every consumer has a right to receive goods that:

- are reasonably suitable for the purposes for which they are generally intended;¹⁰⁷
- are of good quality, in good working order and free of *any*¹⁰⁸ defects;¹⁰⁹
- will be usable and durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply;¹¹⁰ and
- will comply with any applicable standards set under the Standards Act,¹¹¹ or any other public regulation.

Section 55(2)(a) illustrates the importance of suitability for purpose. Though the principal test used to determine whether goods are of the required standard is whether they are sufficiently fit for their particular purpose, De Stadler indicates that this test should not be relied on in isolation because though a product may be fit for purpose in every aspect, the consumer may have a grievance with regard to an issue that does not affect the functionality

¹⁰⁵ S 55 CPA.

¹⁰⁶ S 55(1) CPA.

¹⁰⁷ S 55(2)(a) CPA. The test used here is similar to that under common law of sale which requires that the goods be fit for purpose, failing which the consumer could rely on the aedilician remedies. There is a series of case law that can be relied on to give assistance as to the content of this requirement: *Wheeler v Woodhouse* (1900) 21 NLR 162 (the milk cows in this case did not give milk); *Hugo v Henwood* 1905 TS 578 (a mare was bought for racing, however it could not do so as it was pregnant at the time); *Goldblatt v Sweeney* 1918 CPD 320 (welded crankshaft in a motor vehicle); *Kroomer v Hess & Co* 1919 AD 204 (the monkey nuts purchased were mouldy and unfit for human consumption); *Dibley v Furter* 1951 (4) SA 73(C) (there was a graveyard discovered on the farm however it was found to not be a material impairment of the usefulness of the property); *Knight v Hemming* 1959 (1) SA 288 (FC) (a cracked wall in a building); *Curtaincrafts (Pty) Ltd v Wilson* 1969 (4) SA 221 (E) (susceptibility of carpet to staining from water impairs the usefulness of the carpet in relation to its decorative attributes); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) (part of the building could not be removed as it was a national monument); *De Vries v Wholesale Cars en 'n Ander* 1986 (2) SA 22 (O) (the car had serious latent defects that resulted in it being unsafe).

¹⁰⁸ Own emphasis. S 55(2)(b) refers to any defects and not to material ones alone.

¹⁰⁹ S 55(2)(b) CPA.

¹¹⁰ S 55(2)(c) CPA.

¹¹¹ 29 of 1993 (repealed by Act 8 of 2008). In terms of the 2008 Act, s 34(2)(b) states that all regulations made in terms of the 1993 Act in respect of any matter dealt with in that Act are deemed to have been made in terms of the 2008 Act.

of the product.¹¹² Where a consumer has specifically informed a supplier of the particular purpose for which he is acquiring the goods, or the intended use of the goods and the supplier offers to supply the particular goods or acts in a manner consistent with being knowledgeable about the use of such good, the consumer has the right to expect that the goods would be reasonably suitable for the intended purpose.¹¹³

Although fitness for purpose may be viewed as the principal test for establishing whether goods conform to the required standard, this should not be the only test. The reason for this is even where goods are still capable of being used; a consumer may be aggrieved by another short-coming which may not impair the fitness of the goods.¹¹⁴ Section 55(2)(b) requires the goods to be of good quality, in good working order and free of any defects. The standard applied to the requirements in section 55(2)(b) must be determined in line with the circumstances of supply as outlined in section 55(4).¹¹⁵

Subsection (2)(b) provides for ‘good quality’. The court in *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd*¹¹⁶ described ‘quality’¹¹⁷ as the degree of excellence possessed by a thing. Quality may also relate to the aesthetics of a product.¹¹⁸ ‘Good’ means pleasing, excellent or even proper. Therefore ‘good quality’ is not a fixed standard, but would be dependent upon the type of goods purchased.¹¹⁹ That is to say, the standard of good quality that is applied to a new product would be different from the standard applicable to a second hand product.

¹¹² E De Stadler *Chapter 2: Fundamental Consumer Rights* T Naudé & S Eiselen (eds) Commentary on the Consumer Protection Act (Original Service 2014) Page 55 – 7, Para 15. The defect may relate to the appearance of the good, the quality or the nature of the performance of the good, or any other defect which ordinarily does not affect the fitness of the good in achieving its purpose.

¹¹³ This right is set out in section 55(2)(a) CPA.

¹¹⁴ These may relate to appearance of the goods, quality or nature of the performance of the goods, for example – defects which will not necessarily affect the usefulness of the goods. De Stadler (note 112) Page 55 – 7, Para 15.

¹¹⁵ De Stadler (note 112) Page 55 – 8, Para 16.

¹¹⁶ 1981 (3) SA 216 (C) at 223F.

¹¹⁷ Business Dictionary available at <http://www.businessdictionary.com/definition/quality.html>, accessed on 15 November 2016 ‘Quality’ is defined as a measure of excellence or a state of being free from defects, deficiencies and significant variations. It is brought about by strict and consistent commitment to certain standards that achieve uniformity of a product in order to satisfy specific customer or user requirements.

¹¹⁸ It is said that the aesthetic appeal of a product may be linked to its general use. In *Curtaincrafts (Pty) Ltd v Wilson* (note 107) the court had to decide on whether the susceptibility of carpet to staining from water impaired the usefulness of the carpet in relation to its decorative attributes. In this case, the buyer was unsuccessful as he did not present evidence that the type of beige hair cord should not, or did not stain when water was applied to it under such circumstances.

¹¹⁹ De Stadler (note 112) Page 55 – 9, Para 18.

Good working order can be analysed by examining the term ‘working condition’ as illustrated in *Botha v Venter*.¹²⁰ It is defined in parts, first illustrating the word ‘working’ as meaning performance, execution or achievement and secondly, the words ‘in working’ as the point of being in operation or use.¹²¹ The term is also defined as the ability of the goods to fulfil a certain activity,¹²² such activity being the main purpose of the goods. Hanke J further pointed out that the nature and intention of the contract had to be taken into account so as to determine what the specific activity must be.¹²³

The definition of defect discussed above¹²⁴ is applicable here. Thus the consumer expectations test is important. The use of the word ‘any’ in this regard implies that this includes all defects without specification or identification and with no consideration for other factors such as materiality. In my view, this is incorrect. The Legislature needs to redraft this point so as to align it with the specification given where a defect is defined in section 53 – a *material*¹²⁵ imperfection. This will also aid in confining its application to a reasonable field of operation.

The consumer does not have to prove that the goods were defective at the time of conclusion of the contract,¹²⁶ but receives the right to quality of the goods at the time when he or she receives the goods.¹²⁷ This is quite different from the provisions of the common law which require the buyer to prove that the goods were defective when the contract was concluded in order to rely on the aedilician remedies.¹²⁸ The section will not apply to a transaction where the consumer has been expressly informed about a specific condition that the goods are offered in¹²⁹ and the consumer has expressly agreed to accept the goods in that condition, or knowingly acted in a manner that is consistent with acceptance of the goods in the said condition.¹³⁰

¹²⁰ 1999 (4) SA 1277 (O).

¹²¹ 1999 (4) SA 1277 (O) at 1281B.

¹²² At 1281C-E: The court held, with reference to the different dictionary definitions, that the words ‘in working order’ included the capacity to perform certain functions.

¹²³ At 1281B, C-E.

¹²⁴ This can be found in 3.4.1.1 above.

¹²⁵ Own emphasis.

¹²⁶ T Naudé, ‘The Consumer’s right to safe, good quality goods and the Implied warranty of quality under section 55 and 56 of the Consumer Protection Act 68 of 2008’ (2011) 23 (3) *SA Merc LJ* 339.

¹²⁷ S 55(2) CPA. This just means that the consumer does not have to prove that the goods were unfit for their purpose at the time the contract was concluded. See Naudé (note 126 above) 339; Sharrock (note 30) 609.

¹²⁸ *Seboko v Soll* 1949 (3) SA 337 (T) 350; *Lakier v Hager* 1958 (4) SA 180 (T). A summary of the seller’s warranty of fitness for purpose under the common law is given in Kerr *Law of Sale and Lease* 3 ed (2004) 205 – 215.

¹²⁹ Reference is made to s 55(6)(a) CPA. See van Eeden (note 5) 351.

¹³⁰ S 55(6)(b) CPA.

As with the subsection (2)(a), subsection (2)(b) will not apply to a transaction where the consumer has been expressly informed about a specific condition that the goods are offered in.¹³¹ Where a supplier and a consumer wish to enter into a transaction involving the supply of goods that are not of good quality, in good working order or defective (these are often referred to as voetstoets goods), it is advised that the consumer is made aware of and understands the true nature of the goods through particularity and descriptiveness and hence accepts the risk.¹³²

Subsection (2)(c) relates to the *ex lege* right to continued good quality. It has been described as radical because no such right existed previously under common law.¹³³ Barnard agrees with this point.¹³⁴ Naudé highlights that this is the first time this type of right has been granted in South African law to the consumer.¹³⁵ The right typically relates to factors such as conformity, durability and reliability. Presently, the list of standards that the product must meet in order to conform to section 55(2) are not sufficiently defined. Provision for these must be made. Secondly, there is no determination as to the length of time a product can be expected to properly function for. Naudé is of the opinion that it is likely that many disputes will arise over the length of time a particular product can be expected to properly function for.¹³⁶ This issue is not always easily determinable because the period will differ between different products.¹³⁷

Under Section 55(2)(d) the Act regulates the relationship between the CPA and existing public regulations relating to the standards to which goods must conform. It refers to the Standards Act.¹³⁸ The implication is that a supplier who does not comply with the Standards Act 8 of 2008 or any other public regulation will be liable in terms of that regulation, as well as liability to the consumer in terms of section 55 and 56.

Section 55(3) governs goods bought for a specific purpose. Where the goods are not suitable for the purpose the consumer has right of recourse and is entitled to the remedies given under section 56. In order for a consumer to have a claim against a supplier in respect of goods purchased for a specific purpose, the following must be established:

¹³¹ See section 55(6)(a) CPA

¹³² Van Eeden (note 5) 352. See also J Otto 'Verborgte gebreke, voetstoetsverkope, die Consumer Protection Act en die National Credit Act' 2011 74 *THRHR* 525.

¹³³ Naudé (note 126) 339.

¹³⁴ Barnard (note 85) 467.

¹³⁵ Naudé (note 126) 340.

¹³⁶ *Ibid* 340.

¹³⁷ There is a view that the wording 'surrounding circumstances' is restrictive and should be modified to 'all circumstances at the time of conclusion of the transaction.'

¹³⁸ 29 of 1993.

- The supplier must have been aware or specifically informed of the purpose;¹³⁹ and
- The supplier must have either ordinarily supplied the particular goods in question *or* the supplier should have acted ‘in a manner consistent with being knowledgeable about the use of the goods’.¹⁴⁰

At first glance, it appears that the supplier is not required to inquire about the consumer’s intention from the circumstances or inquire what exact purpose he or she intends to fulfil with the goods. However, section 55(4) states that when determining whether goods satisfy the requirements of section 55(3), “all circumstances of the supply” must be taken into account.¹⁴¹ The question arises whether the requirements of section 55(3) are satisfied where it is clear that the buyer is purchasing a good for a particular purpose but he or she does not expressly inform the supplier of this fact. De Stadler¹⁴² is of the opinion that one can argue that liability in terms of section 55(3) be extended to include such circumstances as those where the seller is unaware of the particular purpose for which the good(s) were intended, but ought to have been aware given the circumstances of supply. However, he goes on to indicate that such an argument would be futile as it would only render useless the phrase “specifically informed” which is taken to mean having or showing special, precise or particular knowledge, bearing or reference of a subject or situation.¹⁴³

The section sets out two alternative requirements and the consumer must ensure one of them is satisfied. One requirement is that the supplier must have ordinarily supplied the particular goods in question.¹⁴⁴ This is a question of fact and can be established by referring to relevant factors such as the type of transactions the supplier enters into; the frequency of transactions in relation to the particular goods in question; quality of the particular goods; experience in the market and current references to name a few.¹⁴⁵ Ultimately in order to meet the requirement, it must be concluded from the evidence that the supplier supplies the particular goods continuously or with some measure or regularity.¹⁴⁶

¹³⁹ This point is backed by s 55(4) of CPA which will be discussed below.

¹⁴⁰ Sections 55(3)(a) and (b) CPA.

¹⁴¹ Section 55(4) CPA.

¹⁴² (note 112 above) Page 55 – 13, .Para 30.

¹⁴³ Ibid.

¹⁴⁴ Section 55(3)(a).

¹⁴⁵ A few factors taken from Farrington – Smith, M. ‘5 Factors to consider when deciding on a supplier’ (14 February 2015) available at <https://www.procurious.com/blog/generation-procurement/5-factors-to-consider-when-deciding-on-a-supplier>, accessed on 05 January 2017.

¹⁴⁶ De Stadler (note 112) Page 55 – 14, Para 32.

The alternative requirement is that the supplier must act ‘in a manner consistent with being knowledgeable about the use of the goods’. The consumer does not have to prove that the seller had actual expertise; only that the seller created an impression of being well versed regarding the particular goods. Otto is of the opinion that this requirement should be interpreted with a narrower approach than that suggested by the wording: that the seller must act in a manner that is consistent with being knowledgeable about the use which the consumer has in mind.¹⁴⁷ The interpretation suggested by Otto would create an avenue for suppliers to escape liability if the purpose is unusual. De Stadler states that this would be unjustifiably restrictive and would defeat the purpose of the section in holding sellers accountable where they sell goods for unusual or special purposes.¹⁴⁸

This requirement is quite similar to that given in *Kroonstad Westelike Boere-Ko-operatiewe Vereniging v Botha and Another*¹⁴⁹ regarding liability of a merchant seller for consequential loss¹⁵⁰ where the merchant was unaware of the defect and he/she publicly professed to have attributes of skill and expert knowledge with regards to the type of goods sold. In this case, the following point was highlighted. Whether a seller fell into this category was a question of fact and was decided after consideration of all the circumstances of the case.¹⁵¹ The circumstances or factors that would be considered included the experience of the seller¹⁵² and whether the seller provided expert advice with regards to the product/good sold. In *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk*¹⁵³ a supplier of seed was held to be a merchant seller who had professed to having attributes of expert skill and knowledge and was held liable for consequential loss suffered by the purchaser as a result of a latent defect present in the seed.¹⁵⁴ The seller in this case sent his employees to the consumer to get information about the purchaser’s specific needs as well as to provide advice as to times that the seeds should be planted, the quantities of seed that would be required and the yield the

¹⁴⁷ See JM Otto ‘Koop van ’n saak vir sy normale of vir ’n bepaalde doel. En die een en ander oor winkeldochters’ (2013) 2013(1) *TSAR* 19.

¹⁴⁸ (note 112) Page 55 – 15, .Para 33.

¹⁴⁹ 1964 (3) SA 561 (A) 571H.

¹⁵⁰ In relation to consequential loss, the judgment was extremely criticised with respect to latent defects that the seller was not aware of. This was based on the reasoning that the test was notoriously difficult to apply and that the difficulty would be borne by the consumer. See also De Stadler (note 112 above) Page 55 – 15, footnote 4.

¹⁵¹ 571H.

¹⁵² This is measured in relation to the time the seller has spent trading in the particular industry or product as stated in De Stadler (note 112) Page 55 – 15, Para 33.

¹⁵³ 1996 (2) SA 565 (A) 570.

¹⁵⁴ 569B – 570B.

seeds would produce. The seller also gave additional information about planting methods, fertilisation and pest control.¹⁵⁵

Sellers and suppliers may be wary to give or provide information or advice in a bid to avoid liability at a later stage under section 55(3). But a supplier will not be able to escape liability in a situation where he chose to be quiet after being informed of the purpose for which the goods were being purchased. The CPA specifically provides that a supplier must not fail to disclose a material fact if that failure amounts to a deception.¹⁵⁶

3.4.4 *Voetstoets clause and the CPA*

At common law, an agreement of sale may incorporate a voetstoets clause. Where it does, the seller is not liable for any latent defects in the goods unless these defects were wilfully concealed. Section 55(5)(a) states that it is irrelevant whether the defect in a good is patent or latent in nature and that it is irrelevant whether the consumer could have detected the defect prior to delivery. This view is regarded as potentially problematic in the long run as it is seen as quite a major shift from the provisions of the common law and quite far - removed from international law practices.¹⁵⁷ This ultimately means that a consumer can knowingly purchase a visibly defective good and at a later stage decide to rescind the transaction due to the defect.¹⁵⁸

Otto remarks that the implication that a buyer would be protected regardless of the level of recklessness cannot be upheld simply because of poor legislative drafting and he argues that a court should not interpret section 55(5) in such a manner.¹⁵⁹ Sharrock seems to be of a similar opinion further presuming that a buyer that is aware of a relevant defect or failure should not be allowed to rely on section 56.¹⁶⁰ Until section 55(5)(a) is redrafted, De Stadler suggests that a consumer must be alerted of the defect or condition of the goods and his/her agreement sought to avoid liability.¹⁶¹

¹⁵⁵ Ibid.

¹⁵⁶ Section 41(1)(b). Consequently section 41(1)(c) also states that a supplier must not fail to correct an apparent misapprehension on the part of a consumer, amounting to false, misleading or deceptive representation. See also Otto (note 147) 19.

¹⁵⁷ More on international practices will be highlighted and discussed in Chapter 4.

¹⁵⁸ Sharrock (note 30) 610.

¹⁵⁹ Otto (note 147) 18.

¹⁶⁰ Sharrock (note 30) 610 with specific reference to the implied undertaking regarding suitability and quality. De Stadler shares the same sentiments.

¹⁶¹ De Stadler (note 112) Page 55 – 25.

Section 55(6) allows a supplier to limit liability for certain defects in a prescribed manner. It provides that section 55(2)(a) and (b) are not applicable to a transaction if:

- a) the consumer has been expressly *informed* that particular goods were offered in a *specific* condition; and
- b) the consumer has expressly agreed to accept the goods in that condition, or knowingly acted in a way compatible with accepting the goods in that condition.

The initial question here is what would be termed sufficient information to allow a supplier to escape liability in terms of section 55(2)(a) and (b). One opinion was given by the Department of Trade and Industry.¹⁶² It stated that in order to escape liability a supplier would have to describe every individual defect to a buyer and furthermore, the description had to be reduced to writing and placed in a contract. The Department essentially said the concept of voetstoets was no longer going to be applicable. It is highly improbable that this opinion will be followed as it is not practical. The use of the words ‘particular’, ‘specific’ and the phrase ‘in that condition’ suggests that a term or condition relating to the risk of a defect due to the nature of the goods will not have sufficient specification for the application of section 55(6).¹⁶³ Another opinion is that to comply with the Act the supplier must alert the consumer of the type of defects that he may possibly find in the goods.¹⁶⁴ Ultimately, the precise meaning of the phrase ‘offered in a specific condition’ will have to be left to the courts to determine.

This controversial subsection has had several writers question its effect on the voetstoets clause. Barnard¹⁶⁵ contends that the voetstoets clause survives the CPA. This implies that section 55(6) allows suppliers to sell goods voetstoets provided the above requirements have been met,¹⁶⁶ but also highlights that the clause must not be unfair, unreasonable or unjust and should be interpreted against the seller under the standard of what a reasonable person would

¹⁶² This was stated in a report delivered by Siphon Tleane. See M Solomon “‘Voetstoets’ will no longer protect sellers’ *Dispatch Online* 16 August 2010, available at <http://www.dispatch.co.za/article.aspx?id/425737>, accessed on 27 January 2017.

¹⁶³ Otto seems to be in agreement with this point as he gives a clear illustration of a house with a leaking roof stating that a term which provides that the seller does not warrant that the roof will not leak is insufficient in terms of section 55(6). Instead the term or condition would have to specifically state or provide that during heavy rains the roof leaks from time to time and the buyer should be aware that he buys the house with this defect. See Otto (note 147) 537.

¹⁶⁴ Sharrock (note 30) 611.

¹⁶⁵ (note 84) 471.

¹⁶⁶ *Ibid.*

expect.¹⁶⁷ Jacobs et al were of the view that the use of the voetstoets clause would be severely curbed after the commencement of the Act.¹⁶⁸ However, Morrissey and Coetzee further argue that a voetstoets clause forms part of the surrounding circumstances of the supply of goods which must be taken into account when determining whether the goods were usable and durable for a reasonable period of time.¹⁶⁹

Sharrock argues that the CPA allows a supplier to contract out of the liability for implied undertakings with respect to suitability and quality, but not in terms of durability and compliance with statutory standards.¹⁷⁰ Sharrock is also of the opinion that the conditions outlined in section 55(6)(a) and (b) imply that a defects disclaimer must be based on actual consensus and furthermore, because a defects disclaimer is an exemption clause, it must therefore comply with the requirements stated in section 49 of the CPA.¹⁷¹ Barnard further points out that the CPA does not prohibit the seller from including clauses that limit or exclude a seller's liability in consumer agreements.¹⁷²

The second possible outcome and the more preferred one is that though some provisions of the CPA seem to be in favour of the continual presence of the voetstoets clause, there are also provisions that support its exclusion where the CPA is applicable.¹⁷³ Section 2(10) provides that no provision of the Act (such as section 55(6)) must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law (such as the warranty against latent defects). Furthermore, section 56(4) states that the implied warranty of quality is an addition to any other warranty in terms of the common law.

Another section worth mentioning at this juncture is section 51(1)(b)(i) which provides that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act.¹⁷⁴ Hence a transaction or agreement, provision, term or condition of a transaction or agreement or notice which is in contravention of the above will be void.¹⁷⁵ Barnard states that selling

¹⁶⁷ Barnard (note 84) 472.

¹⁶⁸ (note 31) 368.

¹⁶⁹ Ibid. S 55(2)(c) CPA; C Morrissey, A Coetzee 'Does this mean voetsek voetstoets?' (2010) 10 (4) *Without Prejudice* 12.

¹⁷⁰ Sharrock (note 30) 611.

¹⁷¹ Ibid. Section 49(1)(a) CPA provides that any notice to consumers or provision of a consumer agreement that purports to limit in any way the risk or liability of the supplier or any other person must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

¹⁷² She relies on section 4(4)(b) and section 48(1)(c) of the CPA here. See Barnard (note 85) 472.

¹⁷³ Ibid.

¹⁷⁴ This is only applicable where provisions of s 55(6) are not satisfied. Where the provisions are satisfied, the consumer does not have a right in terms of the Act.

¹⁷⁵ S 51(3) CPA.

goods under a voetstoets clause is a clear deprivation of a consumer's right and therefore invalid.¹⁷⁶ One opinion for this reasoning is based on the warranties created by the CPA: s 54, 55(2), 55(3) and 56 clearly state how goods and services should be provided in different circumstances¹⁷⁷ and furthermore it provides remedies for situations where there is a failure to comply. This view limits the possibilities of the successful application of the voetstoets clause particularly because it is only viable in the case of the sale of defective goods, against which the above warranties attempt to protect, among other things.

3.4.4.1 The voetstoets clause and estate agents

There have been concerns as to the application of this section to transactions concerning immovable property. Estate agents are referred to as 'intermediaries' in the CPA. The Act states that a person whose activities as an intermediary are regulated in terms of any other national legislation is not included in the definition of an intermediary.¹⁷⁸ Despite the fact that estate agents are regulated by the Estate Agency Affairs Act¹⁷⁹ and the Estate Agents Board, estate agents are included under the definition of intermediaries in terms of the CPA.¹⁸⁰ It follows that an agreement of mandate¹⁸¹ falls within the ambit of the Act.¹⁸² The CPA applies to marketing practices of the agent and the agent is expected to be honest in dealings and take into consideration the consumer's rights of equality and privacy and ensure that there is full disclosure of prescribed information.¹⁸³

¹⁷⁶ Barnard (note 84) 472. See S Tennant, V Mbele, 'The Consumer Protection Act and five common law principles' (2013) 36 De Rebus 17, 3 available at <http://www.saflii.org/za/journals/DEREBUS/2013/17.html>, accessed on 23 March 2017.

¹⁷⁷ S Tennant, V Mbele (note 175) 3. Reference is made to 3.4.3 and 3.4.4 above for a more detailed explanation of the above mentioned sections.

¹⁷⁸ S 1 sv 'intermediary' is a person who, in the ordinary course of business and for remuneration or gain, engages in the business of –

- a) representing another person with respect to the actual or potential supply of any goods or services
- b) accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
- c) offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person,

but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation. Intermediary is also defined as a firm or person who acts as a mediator on a link between parties to a business deal, investment decision or negotiation; also referred to as a middleman: available at <http://www.businessdictionary.com/definition/intermediary.html>, accessed on 04 November 2016.

¹⁷⁹ 112 of 1976.

¹⁸⁰ Barnard (note 84) 474.

¹⁸¹ This is a contract entered into by an estate agency and its clients.

¹⁸² H Delpont 'Problematic aspects of the Consumer Protection Act 68 of 2008 in relation to property transactions: linked transactions, fixed-term contracts and unsigned sale agreements' (2014) 35(1) *Obiter* 64.

¹⁸³ S 27 and Reg 9 CPA.

The fact that an estate agent is involved in the sale of immovable property gives rise to two transactions, namely the mandate agreement, and the consequent sale agreement. The service the agent provides to the client (the true seller) is marketing and advertising of the property in the hope of procuring a willing and able purchaser for the property, for which the estate agent will then receive consideration.¹⁸⁴

Because uncertainty revolves around whether or not the property may still be sold *voetstoots* where an estate agent is involved in a once-off transaction, estate agents have started a practice where they have sellers forfeit their right to sell their property *voetstoots* and instead attach a copy of a document referred to as a “Property Condition Report” as a disclosure of the defects in the property including a warranty by the seller to the effect that these are in fact the only defects in the property.¹⁸⁵ This approach is viewed as being unfair towards their clients. However, there are reasons for such extreme actions.

Section 4(1)(1) of the Estate Agents Code of Conduct provides that an estate agent who has a mandate to sell a property shall convey to a prospective purchaser all facts concerning the property that are (or should reasonably be) within the agent’s personal knowledge and which could be material to the purchaser. Regulation 9(2)(m) of the CPA further states that an estate agent must disclose any other information which maybe relevant and which the estate agent may reasonably be expected to be aware of.

There is an opinion that an estate agent should not take over the responsibility of disclosing any patent or latent defects which are known to the seller.¹⁸⁶ It is common that disagreements will often arise between the estate agent and the seller in relation to what information was or was not disclosed by the seller to the agent. As a preventative measure, it has been suggested that there must be a record in the agreement of mandate that the seller accepts and acknowledges that it is his duty and responsibility to disclose any latent defects that he is aware of as well as any issue regarding the property which may be of relevance to the purchaser. Davey also warns that if an estate agent is going to take on the responsibility of

¹⁸⁴ P Snyman, IEASA National News “The Consumer Protection Act 68 of 2008” available at <http://bit.ly/MneOp9>, accessed on 24 March 2017.

¹⁸⁵ Barnard (note 84) 475.

¹⁸⁶ Davey, IEASA National – News: “Section 4.1.1 of the Code of Conduct + CPA= Questions about the appropriateness of the ‘Voetstoots’ clause = the ‘birth’ of the ‘Property Condition Report’ = CONFUSION” available at <http://bit.ly/RnMbV5>, accessed on 24 March 2017.

disclosing defects, he must be adequately informed of the nature and extent of the defect to avoid any disagreements in the future.¹⁸⁷

Where a transaction is exempt from the CPA, all transactions are subject to section 61 of CPA and a consumer would be entitled to hold a supplier/producer liable for damage arising from a defective product.¹⁸⁸ Naudé suggests that this issue be re-evaluated and resolved after careful consideration of international systems with similar provisions in place.¹⁸⁹

3.4.4.2 The voetstoots clause and second hand goods

The most common view with regards to second hand goods is that the application of section 55(6) should not be as strictly applied in relation to such goods.¹⁹⁰ Dealers of immovable property and second hand goods are advised to recommend that the purchaser consult an independent expert to inspect the goods prior to conclusion of the sale by the purchaser.¹⁹¹

Section 55 has serious implications on sellers of second-hand goods, including pawn or consignment stores. Barnard¹⁹² agrees with the opinion of Morrissey and Coetzee¹⁹³ that it would be nearly impossible for a second-hand car dealer to be in a position to point out to a customer the exact wear and tear of every car part as well as every other defect that might be present. She did not agree with the notion that such dealerships would still be able to sell second hand cars¹⁹⁴ voetstoots. Morrissey and Coetzee argue that a voetstoots sale could form part of the surrounding circumstances of the supply of the goods which must then be taken into account when determining whether the car was usable and durable for a reasonable period of time.¹⁹⁵ Barnard disagrees with this view and points out that it would be problematic to sell second-hand goods “as is” and a voetstoots clause would not be enforceable as part of the surrounding circumstances in the sale of the goods because a voetstoots clause is a clear exclusion of the supplier’s liability and cannot be assessed as a surrounding circumstance.¹⁹⁶

¹⁸⁷ Ibid.

¹⁸⁸ Gowar, C. ‘Product liability: A changing playing field?’ (2011) 32 (3) *Obiter* 526.

¹⁸⁹ Naudé (note 126) 347.

¹⁹⁰ Naudé (note 126) 344.

¹⁹¹ Ibid.

¹⁹² (note 84) 476.

¹⁹³ Morrissey & Coetzee (note 168) 12.

¹⁹⁴ Commonly known as pre-owned vehicles.

¹⁹⁵ (note 168) 13.

¹⁹⁶ Barnard (note 84) 476.

One possible exception to the above has been pointed out. It is common practice for second-hand car dealers to sell cars on behalf of owners as opposed to personally purchasing them for resale in their personal capacity. Hence, the second-hand car dealership could operate in much the same way as an estate agent and provide space for the second-hand car on its selling floor and conduct the sale on behalf of the seller.¹⁹⁷ In most cases the seller is usually a natural person. Where the seller mandates the dealership to sell second-hand cars in the ordinary course of the seller's business, the dealership will only act as an agent and section 55 will not be enforceable against the dealership.¹⁹⁸

The fact that goods being supplied are second hand will undoubtedly form part of the surrounding circumstances as described in section 55.¹⁹⁹ It is also generally known that the majority of second-hand car dealerships are exploiting consumers by using the condition of the car and wear and tear of the car as an excuse. Barnard²⁰⁰ is of the opinion that the relevant industries should be more cautious when dealing with vulnerable consumers²⁰¹ as provided for in terms of the CPA.

It is my view that it is advisable to follow the recommendation made that the purchaser should consult an independent expert to inspect the goods prior to conclusion of the sale so as to avoid exploitation by dealerships with regards to non-disclosure of the true condition of the vehicle. However, even with an expert it is possible to fail to identify every single defect. Therefore the existing code of conduct for the motor industry should be amended to include the future treatment of second-hand vehicle sales.²⁰²

3.4.5 The implied warranty of quality²⁰³

Section 56 has been highlighted by three different authors²⁰⁴ as controversial with substantial interpretational issues particularly in light of the possible effects it has on common law provisions. Section 56 is much broader than the common law implied warranties²⁰⁵ offering

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Barnard (note 84) 477.

²⁰⁰ Ibid.

²⁰¹ Outlined under s 3(1)(b) CPA: see 3.2.1 above.

²⁰² The Minister of Trade and Industry to publish Industry Codes in terms of s 82 CPA.

²⁰³ S 56 CPA.

²⁰⁴ Jacobs et al (note 31) 370.

²⁰⁵ These are the implied warranty against latent defects, the warranty of fitness for purpose, the warranty of reasonable merchantable quality and the warranty of the skill of art.

wider protection. Section 56(1) contains an implied warranty that protects the rights set out in section 55(2).²⁰⁶ It states the following:

- (1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control of the producer or importer, the distributor, or the retailer, as the case may be.

It is prudent to begin by defining the word warranty. A warranty in the strict legal sense is a contractual undertaking (guarantee) that a certain state of affairs exists or that a certain act will be performed or a state of affairs will exist in the future.²⁰⁷ Under section 56, where there is a breach of the warranty, the consumer may rely on the remedies in subsection (2).

Section 56(1) gives the supplier a defence where a claim arises. The supplier will not be held responsible where the goods were altered by the consumer contrary to the instructions given by the supplier. This means that the supplier will not be held responsible where the consumer opted to use the goods in an unusual or an unreasonable manner as compared to the use to which it would normally be put.²⁰⁸ Where the consumer or another party in the supply chain alters the goods after the goods have left the control of the supplier, the supplier may escape liability even if the alteration was not contrary to instructions. The only requirement is that it must have taken place after the goods had left the control of the supplier. The supplier's liability is excluded only to the extent of the alterations made, meaning that the supplier's liability is excluded only insofar as the breach of the warranty is attributable to the alterations.²⁰⁹ However, if the breach is attributable to an unaltered characteristic or a defect that is unrelated to the alterations then a supplier will not be able to escape liability.²¹⁰

It is important to note that when ascertaining whether the warranty given in section 56(1) has been complied with, it is necessary to consider whether compliance took place when the

²⁰⁶ Section 55 is outlined in 3.4.3 and 3.4.4 above.

²⁰⁷ Sharrock (note 30) 232.

²⁰⁸ See section 55(2)(c) and section 55(4)(b). It is important to note in this regard that if the consumer is found to have used the goods in a manner that is viewed as abnormal or unreasonable, then section 55 as well as section 56 will not apply.

²⁰⁹ De Stadler (note 112) Page 56 – 3, para 4.

²¹⁰ Ibid.

goods were delivered and not at the time the sale was concluded. Section 55(1) is expressly relied on here as it states that the consumer has a right to ‘receive’ goods that comply with the requirements and standards in section 55.

There is contention over the issue of liability where a retailer excludes the section 56 warranty from a transaction. Uncertainty surrounds the issue of whether the other parties in the supply chain are also exempted from liability to the consumer.²¹¹ An opinion highlighted that 55(2) (a) and (b) does not apply to a transaction if the consumer has expressly complied or agreed with the terms in section 55(6)(a) and (b). It follows that the term transaction may not include other transactions in the supply chain (unless they also contain a provision excluding the section 56 warranty).²¹² Although the opinion carries weight, it is still subject to more scrutiny.

3.4.6 Remedies available to the consumer in terms of section 56

As previously stated the warranty created by section 56 is radical and controversial due to its impact on the common law. Where there is a breach of the warranty, the consumer has much wider remedies than those available previously under common law. Section 56(2) provides the following remedies:

- (2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier’s risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either –
 - (a) repair or replace the failed, unsafe or defective goods; or
 - (b) refund the consumer the price paid by the consumer, for the goods.

Subsection (2) gives the consumer a choice as to whether to repair, refund or replace the goods if they fail to satisfy the requirements contemplated in section 55. The remedies provided here are much more extensive than those offered under the common law. Naudé is of the opinion that this choice given to the consumer is unfair on the supplier because it does not take any factors into account, and in particular, the seriousness of the defect.²¹³

²¹¹ Sharrock (note 30) 611.

²¹² Ibid.

²¹³ Naudé (note 126) 346.

Furthermore these remedies are available even to a consumer who examined the goods and detected the defect prior to delivery but still accepted delivery. This is an extremely wide interpretation of the section and is seen to offer much more protection to the consumer than the supplier.²¹⁴

No procedure has been created or put in place to manage the decision making process of the consumer when it comes to the selection and application of these remedies. The process has seemingly been left solely in the hands of the consumer without due consideration of issues such as the cost implication on the supplier or the reasonableness of solely granting the consumer this amount of power. The question, thus, becomes, whether the consumer can reasonably be expected to know what factors to consider when selecting a remedy and whether the consumer has, reasonably applied this knowledge in a fair and just manner to the decision making process, so that none of the parties is left prejudiced by the outcome. Such a decision cannot be left solely to the consumer. It is also incorrect to apply a blanket approach to the capabilities of a consumer regarding his knowledge or expertise in such a matter. The consumer cannot be expected to have sufficient knowledge in each case, and even so, to be able to reasonably apply this knowledge in a manner that will not result in either of the parties being prejudiced by the outcome.

An alternative interpretation is that subsection (2)(a) must be interpreted as giving the consumer the opportunity to choose between paragraph (a) and (b) of the options. If the consumer selects paragraph (a), the supplier must then choose whether to repair or replace the goods.²¹⁵ This interpretation slightly reduces the imbalance allowing the supplier to make the choice that may be more economical to himself in the circumstances. However, yet another issue arises where the most economical or effective remedy for one party is not desired by the other. For example where a supplier opts to repair the defect, but the consumer wishes to have it replaced or alternatively no longer has an interest in having the particular good and so wishes to receive a refund.

Neither party should be put in a situation where they are forced to rely on a remedy which is unwanted. It follows that certain considerations should be drawn up so as to come to a decision that would promote fairness and equity among the parties. In my view, a set of guiding considerations ought to be created with regards to the process of selection and

²¹⁴ Ibid.

²¹⁵ De Stadler (note 112) Page 56 -4, para 6.

application of the remedies for different circumstances. Factors such as the time that has lapsed between the date the product was purchased and the date the product has been returned,²¹⁶ the type of product in question,²¹⁷ the type of defect, if any,²¹⁸ the lifespan of a properly functional product and what caused the defect²¹⁹ can be taken into account as guiding considerations. After taking into consideration the above factors, the parties should negotiate and reach a compromise that is agreeable to them both. The considerations should aim to address the problems that have been identified and this should be done in a manner that is fair for all the parties involved.

Section 56(2) explicitly states that the goods are to be returned at the supplier's risk and expense, without penalty to the consumer. In my view, this is grossly unfair on the supplier particularly because the supplier bears the cost regardless of the circumstances that surround the return of the goods. It is suggested that the extent to which a supplier bears the cost be subject to factors such as the reason for return or the type of defect in the goods.²²⁰

The matter relating to the six month limitation has been surrounded by uncertainty mainly because it is unclear whether it refers to the life span of the implied warranty or whether it is with reference to the application of the remedies by the consumer within a specific time period.²²¹ Jacobs et al submit that the latter approach is more appropriate. The consumer must enforce the remedies within six months of delivery of the goods but the implied warranty of quality exists indefinitely, allowing the consumer to rely on his common law rights to damages where breach of the implied warranty of quality occurred six months or longer after the goods were delivered.²²²

²¹⁶ For example a new cell phone will be worth more in the initial weeks after its release, but the value and demand of the cell phone will decrease over time as newer and better models come into the market. Therefore if a consumer purchases a new cell phone and opts to return it for a refund, even where the product has not been used, the supplier will have to take into account the length of time between the purchase date and return date and make considerations with regards whether to accept return of the product and if so, whether to refund the consumer at the original purchase price or at the reduced current price due to the time value of the product especially where the product has a short product life cycle, or to replace it with an alternative which is similarly priced.

²¹⁷ Some products are ineligible for repair, replacement or refund, for example a supplier would decline a consumer any of the remedies where the product is intimate wear as that is unhygienic. Other product types such as non – perishables (groceries, stationary, clothing, shoes) are capable of being repaired, replaced or refunded.

²¹⁸ With regards to the type of defect, factors that should be considered are whether it can be repaired: if so, there would be no need for replacement or refund. If it cannot be repaired, then considerations can be made as to whether to replace the goods or refund the price, for example.

²¹⁹ This is important to ascertain as some defects may arise during proper use and enjoyment of the product while others could be as a result of using the product for the wrong purpose or in the wrong way.

²²⁰ Own suggestion.

²²¹ Jacobs et al (note 31) 373; Barnard (note 84) 467; Naudé (note 126) 347.

²²² Jacobs et al (note 31) 373.

This would somewhat alleviate the challenges raised by Naudé where a defect may have existed at the time of supply but only materialised after the six months had lapsed, or alternatively where a good was expected to be durable for a long period but subsequently gets damaged after the six months have lapsed but before a reasonable usable time has passed.²²³ Naturally it would follow that the normal period of prescription for the laying of the claim for damages would apply. Previously, the courts were largely silent about the application of remedies beyond the six-month limitation period, with some writers suggesting that the courts should develop a new remedy to provide for this type of scenario, and furthermore that such remedy could be based on the common law aedilician actions.²²⁴

The court in *Vousvoukis v Queen Ace CC t/a Ace Motors*²²⁵ was presented with the issue as to whether or not a court may extend the six-month limitation period specified in s 56(2). Pickering J stated that the legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in s 56(2). Therefore there is no question of s 56(2) being ambiguous in any way. In his view it is not open to a court, under the guise of making an 'innovative order', to extend this period. Any innovative order made under s 56(2) must be made within the constraints of the legislation and cannot afford consumers more rights than those specifically provided to them in terms of the Act.²²⁶ It seems that if the remedy is ever extended beyond the six-month limitation, it will be a decision made by the legislature. However, in my opinion, such an extension would not benefit all the parties in the supply chain, but instead would result in abuse of power by the consumer.

Section 56(3) goes further and provides for a likely scenario that may occur in certain circumstances. It states that if a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods²²⁷ or refund the consumer the price paid by the consumer for the goods.²²⁸

²²³ Naudé (note 126) 347.

²²⁴ Ibid. It was the author's opinion that this interpretation would indeed provide more protection to the consumer, however it was highlighted that wide interpretation would possibly result in abuse of the supplier. See Barnard (note 85) 468.

²²⁵ 2016 (3) SA 188 (ECG) at 206.

²²⁶ At 206F para 110.

²²⁷ S 56(3)(a) CPA.

²²⁸ S 56(3)(b) CPA.

3.4.7 *Consequences of failure*

It is uncertain at this stage what the consequences of failure to comply with s 55(3) are as there is a noticeable overlap with several sections, namely s 20(2)(d) and s 56(2). Section 20 details the consumer's right to return goods. Subsection (2)(d) specifically states that the consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered goods intended to satisfy a particular purpose communicated to the supplier,²²⁹ and within ten (10) business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose. Alternatively s 56 details the implied warranty of quality.²³⁰ Section 56(2) provides that within six months after delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in s 55, and the supplier must, at the direction of the consumer, either –

- a) Repair or replace the failed, unsafe or defective goods; or
- b) Refund the consumer the price paid by the consumer for the goods.

It is not clear whether s 20(2)(d) applies exclusively to goods in terms of s 55(3) or to any and all goods governed by the CPA. Another point that requires clarity is in the event that s 20(2)(d) applies exclusively to goods bought in terms of s 55(3), does s 56(2) offer a second option to the consumer? If both sections are taken to apply to all goods and transactions, then the next point of contention would be the fact that the timeframes for the exercise of the right of return are significantly different; s 20(2)(d) offering ten business days while s 56(2) avails six months.

Section 20 of the CPA contains the consumer's right to return goods. Section 20(5) states that the supplier must refund the consumer the price paid for the goods, but also gives the supplier the option to deduct a reasonable amount from the price the consumer paid, which may be charged in terms of subsection (6).²³¹ On the face of it, it seems that subsection (5) only

²²⁹ As contemplated in section 55(3) CPA.

²³⁰ This section was discussed in detail in 3.4.5 and 3.4.6 above.

²³¹ In determining the right of a supplier to impose a charge contemplated in subsection (5), if any goods returned to the supplier in terms of this section are –

- a) in the original unopened packaging, the supplier may not charge the consumer any amount in respect of the goods;
- b) in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for –

applies to goods returned in terms of section 20(2)(d) and not goods returned in terms of section 56(2). If these sections are to apply to all goods then an amendment would be required to ensure that a consumer has this right regardless of the section he may choose to rely on. One submission is that a failure to comply with s 55(3) would result in the application of s 20(2)(d) but not s 56, whereas a failure to comply with the rest of s 55 will result in the application of the remedies in s 56.²³²

Until the legislature clarifies and resolves the above issues, it may be assumed that the consumer is allowed an unfettered choice as to which provision to rely on when bringing forward his claim, thus allowing him to make his choice based on the section that would best cater for his needs at that specific point in time. It must also be borne in mind that s 20(1)(a) also provides that the right to return goods in terms of s 20 is in addition to and not in substitution for the right to return unsafe or defective goods as provided for in s 56. Remedies in terms of s 56 are in addition to remedies offered in common law²³³ so essentially this means the consumer can select a remedy in terms of s 20, s 56 or the common law.²³⁴

3.4.8 Applicability of common law remedies where the CPA is applicable

It is an issue of contention whether common law remedies would remain an option for a consumer where the CPA is applicable. Section 2(10) and 56(4) go some way in answering this. Section 2(10)²³⁵ provides that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. Section 56(4) continues with the same line of thought providing that the implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in

-
- i. use of the goods during the time they were in the consumer's possession, unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or
 - ii. any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer; or
 - c) in any other case, the supplier may charge the consumer a reasonable amount –
 - i. as contemplated in paragraph (b); and
 - ii. for necessary restoration costs to render the goods fit for re-stocking, unless, having regard to the nature of the goods, and the manner in which they were packaged, it was necessary for the consumer to destroy the packaging in order to determine whether the goods –
 - aa) conformed to the description or sample provided, in the case of goods that had not been examined by the consumer before delivery, as contemplated in subsection (2)(b); or
 - bb) were fit for the intended purpose, in a case contemplated in subsection (2)(d).

²³² S Tennant, V Mbele (note 175).

²³³ This is stated in s 2(10) as well as more specifically in section 56 (4) CPA.

²³⁴ This is based on section 20 (1)(b) and section 56 (4)(a) CPA.

²³⁵ Also refer to note 30 above.

addition to any other implied warranty or condition imposed by the common law, this Act or any other public regulation;²³⁶ and any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.²³⁷

From the above it is clear that the common law remedies will be available to a consumer even where the CPA is applicable and hence nothing would prevent a consumer from instituting an action,²³⁸ though it is the general opinion that exercising the remedies provided under section 56 would be much easier for the consumer.

3.5 CONCLUSION

The enactment of the CPA has been quite significant in addressing some of the major shortfalls that were present and often encouraged by the common law previously, particularly with regards to liability for defective products and available remedies, both which have since been provided for under Part H²³⁹ of the CPA. The codification of the law relating to manufacturer's liability as well as general liability in the various aspects regarding defective products is a welcome development that will see consumers receiving the protection that was greatly lacking previously. However, as seen above the remedies provided under s 56 are quite extensive and in some cases, it is evident that there are loopholes that require adjustment so as to ensure the balance that the legislature sought to achieve at the inception if this powerful piece of legislation is indeed maintained.

Issues surrounding the wide choice given to the consumer in selecting a remedy require attention. It has become clear that the decision cannot be left solely to the consumer to make without some measure or benchmark of suitable considerations outlined and taken into account in the process. It is suggested that a procedure that sets out possible factors that could be considered in the decision making process be drawn up. It is important that the procedure sets out reasonable guidelines for the selection of remedies such that the process is balanced to achieve fairness. Guidelines should be created to assist the consumer in the process and an independent assessment of how to incorporate both the supplier and the consumer in the decision making process should be conducted.

²³⁶ S 56(4)(a) CPA.

²³⁷ S 56(4)(b) CPA.

²³⁸ Jacobs et al previously argued that a consumer would only be able to rely on the common law remedies where the consumer discovers the defect or breach of implied warranty occurs six months or more after the delivery of goods – basing on the provisions of section 2(10) and 56(4), this interpretation was incorrect - Jacobs et al (note 31) 373.

²³⁹ S 53 to 61 CPA.

Effective and equitable alternatives need to be created for situations where the parties fail to agree on a particular remedy. Solutions should also be looked into and provided to assist the parties to reach consensus where they fail to do so by themselves. These solutions should seek to address the issue in a manner that leaves no party feeling disadvantaged. The difficulties in interpretation created by section 55 and 56 are grave and ought to be corrected by clearer redrafting. This can possibly be achieved by looking to countries with stronger and more clearly drafted legislation and by considering the manner in which they have previously provided for similar problems.

CHAPTER 4

A COMPARATIVE ANALYSIS OF FOREIGN AND INTERNATIONAL CONSUMER LEGISLATION

4.1 INTRODUCTION

The previous chapter addressed aspects of the consumer's right to good quality as well as specific remedies available to the consumer. This chapter will focus on the way in which the right to quality has been provided for in foreign and international consumer legislation. The chapter will include an analysis of the way in which foreign consumers are protected from abuse from defective products and the remedies provided to them. The main focus will be on the provisions of the United Kingdom, the United States of America and the European Community at large. Particular emphasis will be on whether the remedies are sufficient in their provision and what changes were implemented in order to achieve an acceptable level of protection. International organisations will also be considered.

4.2 CONSUMER PROTECTION IN THE UNITED KINGDOM

4.2.1 Overview of the Development of Consumer Legislation in the United Kingdom

The initial signs of consumer protection in the UK were mainly in contract law which gave purchasers of defective goods a claim for breach of either an express or implied term in the contract. The first piece of legislation that protected consumers came about as the Sale of Goods Act 1893. This Act was the first codification of common law principles that applied to contracts concerned with the sale of goods and it provided for the inclusion of certain implied terms¹ as well as remedies for breach, taking into account the gravity of the breach.² Over the years consumer activism grew in the UK and this led to various consumer protection laws being enacted.³ Among these was the Sale of Goods Act 1979,⁴ which will be referred to widely in this chapter, as well as the Consumer Protection Act 1987 which was enacted in

¹ For example fitness for purpose, quality.

² M Yu 'Consumer protection in the United Kingdom and Singapore' (20 April 2011) IN11/10-11 *Legislative Council Secretariat* 1, available at www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf, accessed on 26 March 2017.

³ Among these were the Consumer Credit Act 1974 enacted to regulate consumer credit agreements and hire agreements, the Unfair Contract Terms Act 1977 enacted to limit the use of exclusion clauses in contract agreements and the Supply of Goods and Services Act 1982 which was enacted to ensure that traders provided services with proper standard of workmanship.

⁴ Referred to as SoGA.

compliance with a European directive⁵ requiring Member States to introduce a system whereby manufacturers could be held liable to consumers for injury, loss or damage suffered as a result of supplying a defective product, whether or not they were negligent.⁶ This was seen as a step forward as previously the onus had been on the consumer to prove negligence on the part of the manufacturer before an action for damages could succeed.

Before the enactment of the SoGA, the courts relied on implied terms that had been developed in the common law to protect consumers from potential exploitation in the form of defective products.⁷ The SoGA regulated contract law and commercial law with respect to goods bought and sold. The implied terms were based on description, merchantability and fitness for purpose. Over time these implied terms formed part of the provisions of the Sale of Goods Act of 1979⁸ and the EC Directive on Unfair Terms in Consumer Contracts⁹ influenced the changes incorporated in the SoGA.

In 1997, due to globalization, there was an increased compulsion to introduce more efficient consumer regulation and increase consumer empowerment so as to make the UK more internationally competitive.¹⁰ The UK took bold steps in monitoring its present legislation as well as in making the necessary changes where it was falling short.¹¹ The EC Directive on Consumer Sales and Guarantees¹² (often referred to as the Consumer Sales Directive) was introduced in 1999 due to the gap in consumer legislation among the European Community. The CSD required the UK and other member states to significantly amend the provisions in

⁵ The European Union's Directive Concerning Liability for Defective Products (Product Liability Directive), 85/374/EEC. See the following article for more information on this directive: H Delaney and R van de Zande 'A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive)' [85/374/EEC] (October 2001) available at http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf, accessed on 13 July 2015.

⁶ Yu (note 2) 2.

⁷ G Howells *Comparative Product Liability* (1993) 53.

⁸ Ibid. Specifically section 12 – 14.

⁹ 93/13/EEC.

¹⁰ It identified the strengths and weaknesses present in its current regime in order to correct and modify it into one that could compete among the best worldwide.

¹¹ A study was conducted of the consumer policy regimes in the EU Member states and the Organization of Economic Co-operation and Development (OECD) countries which found that the UK had fallen short with regards to the lack of a general duty to trade fairly; a problem which was eliminated by the introduction of the Consumer Protection from Unfair Trading Regulations 2008; Yu (note 2) 3.

¹² 1999/44/EC L171 of 07.07.1999, referred to as 'the CSD' or as 'the directive'.

their sale of goods legislation so as to introduce a system that offered similar protection to all consumers in all member states, particularly with regards to cross-border shopping.¹³

Over the years there has been several statutory amendments incorporating international consumer law changes into the SoGA. One of these was the implementation of the Consumer Sales Directive in 2002. This was considered to be extremely significant due to the large impact it had on a number of day-to-day transactions that affected most consumers. In addition, the implementation of the Directive on Consumer Rights¹⁴ into English law by the Consumer Contracts Regulations 2013 brought with it a number of changes in consumer law.¹⁵ These included the harmonization of online selling rules across the EU. The Consumer Rights Act 2015 was enacted on 26 March 2015. This consolidates as well as reforms the myriad of UK consumer legislation into a single act. It was also used to update and simplify general UK consumer principles.¹⁶ Although it has since replaced the SoGA, the SoGA still remains the building block that saw to the early development of consumer law in the UK.

4.2.2 Statutory Implied Terms

As the UK developed and trade and industry expanded, it became necessary to develop implied conditions, initially not for the benefit of the consumer, but to tackle challenges that were being experienced due to industrialisation. Added impetus was given by the implementation of the Directive on Unfair Terms in Consumer Contracts.¹⁷ A specific instance that conditions were created for was sales by description where the buyer would not have the opportunity to inspect the goods. The implied condition created required the goods to conform to their description and be of merchantable quality.¹⁸ These implied conditions were the initial codification, and in some respects, an important extension of the rules that had been developed and had existed as common law in the past.¹⁹

¹³ C Scott & J Black *Cranston's Consumers and the Law* 3rd ed (2000) 147. The main justification for the CSD was that it was a minimum harmonisation directive setting minimum standards of protection. See also Scott and Black (note 13) 163: the CSD required these changes to be implemented by January 2002.

¹⁴ 2011/83/EU.

¹⁵ M Duncombe, 'UK Consumer Rights Act 2015: Seven key changes' (2 October 2015) available at <https://www.dlapiper.com/en/uk/insights/publications/2015/10/law-a-la-mode-issue-17/uk-consumer-rights-act-2015-seven-key-changes/>, accessed on 24 April 2017.

¹⁶ *Ibid.*

¹⁷ 93/13/EEC.

¹⁸ Section 13 and 14 of the Sale of Goods Act 1893 are referred to as they were the initial codification of the rules. See *Gardiner v Gray* (1815) 171 ER 46 and *Jones v Just* (1868) LR 3 QB 197.

¹⁹ Scott & Black (note 13) 154.

The development of the law brought about the enactment of the SoGA which made provision for conditions and warranties that offered protection to a consumer where he had purchased faulty²⁰ goods. These were referred to as implied terms. The implied terms related to goods which did not correspond to description (section 13), or did not meet the requirements of satisfactory quality (section 14 (2)) or fitness for a particular specified purpose (section 14(3)).

4.2.2.1 Implied term on description

Section 13(1) of the SoGA²¹ stated that a product must correspond with its description or specification. The test whether goods had been sold by description was a ‘broad, common sense test of mercantile character’.²² The description must constitute a substantial ingredient in the identity of the good being sold.²³ In some instances, the court interpreted the implied term in section 13 widely considering that it had relevance to the quality of a product.²⁴ The case that best illustrated this point was that of *Grant v Australian Knitting Mills Ltd*. Lord Wright said the following in respect of determining when a sale can be regarded as being by description:

‘It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing sold by description, though it is specific, so long it is sold as not merely as the specific thing but as a thing corresponding to that description...’²⁵

²⁰ Fault was defined as wrongful act or default under S 61(1) SoGA 1979. There was no specific definition relating to faulty goods.

²¹ Section 11(1) of the Consumer Rights Act 2015, referred to as the ‘CRA’.

²² *Ashington Piggeries Ltd and another v Christopher Hill Ltd: Christopher Hill Ltd v Norsildmel [Conjoined appeals]* [1971] 1 All ER 847 at 872, per Lord Wilberforce. The question whether that is what the buyer bargained for has to be answered according to such tests as men in the market would apply...’

²³ *Reardon Smith Line Ltd v Yngvar Hansen – Tangen: Hansen – Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 576.

²⁴ In the case of *Beale v Taylor* [1967] 3 All ER 253 at 255 – 256, Sellers LJ highlighted that the sale of a second hand car was a sale by description where the buyer had relied on a document which described what was purchased. See also *Alton House Garages (Bromley) Ltd v Monk* (1981) Unreported where the purchaser successfully claimed that the contract of sale was a sale by description (it was the sale of a second hand Rolls Royce and the advertisement claimed that a full service history on the vehicle was available) and by failing to supply such service history record the car did not correspond with its description. But it must be highlighted that the House of Lords pointed out that the implied condition in s 13 concerned more descriptions which allowed the product to be identified – Scott & Black (note 13) 157.

²⁵ *Grant v Australian Knitting Mills Ltd* [1936] AC 35 at 100.

In terms of section 13, the implied term on description was not confined to sellers acting in the course of a business but was to be complied with even in private sales.²⁶ Where the product was considered as a future good or unascertained good (that is, where the consumer did not see it prior to the sale but relies on an oral or written description of the good) it was possible for the goods to be sold by description in terms of section 13(3).

Previously it was common cause that where a consumer purchased a good as a specific thing based on his own assessment/judgement of its value, it was not considered a sale by description.²⁷ It was, however, considered an exception if the purchaser made the purpose for which the goods were required known to the seller so as to demonstrate reliance on the latter's skill and judgment: the implied term that the goods should be reasonably fit for purpose would then be applied.²⁸ The case of *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* explained this exception clearly. The matter concerned the sale to the plaintiff of a picture by a defendant, who was also an art dealer. It was then discovered that the picture was forged. The plaintiff raised the claim that the defendant had breached the implied term on description (based on s 13(1) of the SoGA) because the plaintiff had relied on his description when the contract of sale was concluded.²⁹ The Court of Appeal held that this implied term may only be breached if the buyer relied upon the description made by the seller as such a description 'is the natural index of a sale by description'.³⁰ The Court held further that, for section 13 to operate, the description had to be influential in the sale, thereby becoming an essential term of the contract. There must be a common intention on the part of both parties for the description to become a term.³¹ This point was reiterated in the case of *Couchman v Hill*³² by Scott LJ who said '...as a matter of law, I think every item in a description which constitutes a substantial ingredient in the "identity" of the thing sold is a condition...'

²⁶ D Oughton, J Lowry *Textbook on Consumer Law* 2 ed (2000) 169.

²⁷ Scott & Black (note 13) 156; See *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1990] 1 All ER 737

²⁸ *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* (note 27) at 740 - 741 per Nourse LJ; *Ashington Piggeries Ltd and another v Christopher Hill Ltd* (note 22) at 886; See *Gray v Cox* (1825) 107 ER 999.

²⁹ *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* (note 27) at 739.

³⁰ At 744.

³¹ At 751, Slade LJ said the following: If the court is to hold that a contract is one 'for the sale of goods by description', it must be able to impute to the parties a common intention that it shall be a term of the contract that the goods will correspond with the description, and not a mere warranty.

³² [1947] 1 All ER 103 at 105.

4.2.2.2 Implied term on satisfactory quality

Section 14(2) of the SoGA³³ provided that the goods sold must be of satisfactory quality, a modification of the term ‘merchantable’ quality³⁴ which was used prior to 1994. Quality was defined as the state or condition of goods.³⁵ The change from merchantable to satisfactory was a result of the Law Commission Final Report No 85 Sale and Supply of Goods³⁶ which recommended changes to some aspects of SoGA as well as related statutes (an amending Act, the Sale and Supply of Goods Act 1994).³⁷ It seemed to be welcomed as the word ‘merchantability’ was associated with commercial transactions rather than the needs of the consumer.³⁸ The remedies offered also seemed purely commercial as a buyer could only claim damages or reject the goods and receive a refund of the price and was unable to claim a cure of the goods or a replacement. Hence, it came as no surprise that there was pressure to move towards a more appropriate provision that would be capable of dealing with the needs of the modern consumer more effectively.³⁹

This implied term of satisfactory quality applied only to a seller acting in the course of a business.⁴⁰ Business is defined as profession and the activities of any government department, local or public authority.⁴¹ The phrase ‘in the course of a business’ received much judicial consideration.⁴² Sales in the course of business has been found to include those which are ancillary or loosely related to the main trade of a seller,⁴³ those by a seller who has not

³³ Amended in 1994. Section 9(1) of CRA.

³⁴ Section 14 of the SoGA 1979 provided that there was an implied condition that goods supplied under contract must be of merchantable quality. The requirement of merchantability was retained in most Commonwealth versions of the SoGA.

³⁵ S 61(1) SoGA 1979.

³⁶ (Law Com No 160) (Scot Law Com No 104), Cmnd 137, (1987) available at <https://www.scotlawcom.gov.uk/files/8612/7989/6602/rep104.pdf>, accessed on 18 April 2017.

³⁷ It came into effect in January 1995.

³⁸ Oughton, Lowry (note 26) 175.

³⁹ Ibid. This was done through a Law Commission Report No 160 Scottish Law Commission No 104 (Cmnd 137, 1987) in which a recommendation was made to introduce a new statutory standard of acceptable quality. These recommendations only reached the statute book in late 1994 thus taking effect in 1995. The new phrase was introduced as satisfactory quality which seemed to be more preferred.

⁴⁰ S 14(2) SoGA.

⁴¹ S 61(1) SoGA.

⁴² The two leading authorities were *Davies v Sumner* [1984] 3 All ER 831 at 832 – 833 per Lord Keith in relation to s 1(1) of the Trade Descriptions Act 1968 and *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party)* [1988] 1 All ER 847 at 854 – 855 per Dillon LJ with regards to s 12(1) of the Unfair Contract Terms Act 1977.

⁴³ *Stevenson and another v Rogers* [1999] 1 All ER 613 at 623.

previously dealt with a particular line, and those where the seller carries on the business on a mostly part-time basis.⁴⁴

Under the amended section 14(2A) goods are considered as being of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if it is relevant) and all other relevant circumstances.⁴⁵ The election of the standard of a reasonable person illustrates that it is not possible to set a minimum standard for quality.⁴⁶ It is important to note that reasonableness here relates to quality and not acceptability. Goods may have a defect, which is not serious enough to warrant rejection by the buyer. In such a case, the seller will not have breached s 14(2).⁴⁷

Section 14(2B) provided a list of factors that had to be taken into account when ascertaining the level of quality of goods.⁴⁸ The main factors were fitness for the purposes for which goods in question are commonly supplied; appearance and finish; freedom from minor defects; safety; and durability. The list supplied is not exhaustive and other factors may be relevant.

Fitness for purpose

Section 14(2B)(a)⁴⁹ started by listing fitness for the purpose for which the goods were commonly supplied as the first factor for consideration. Prior to the enactment of statutory legislation, the common law provided that it was sufficient that goods supplied were fit for any of the purposes for which the goods of that kind were commonly used.⁵⁰ The same view

⁴⁴ *Stevenson v Beverley Bentinck Ltd* [1976] 2 All ER 606 (here the court held that since Mr Stevenson was carrying on a business partly as a trade purchaser, he was not afforded the protection given to private purchasers); *Blakemore v Bellamy* (1982) 126 Sol Jo 852. See also Scott & Black (note 13) 158.

⁴⁵ S 14(2A) SoGA. S 9(2) of CRA. Other relevant circumstances are given under subsection (5).

⁴⁶ One opinion went as far as pointing out that satisfactory quality does not imply perfection hence the reasonable person should access it with this in mind – see Oughton, Lowry (note 26) 181. It was submitted that goods should be of a quality that a reasonable person would deem satisfactory and be prepared to accept. This satisfactory standard would be determined by taking into account all the factors.

⁴⁷ PN Atiyah, JN Adams *The Sale of Goods* (1995) 153 – 154. See also Oughton, Lowry (note 26) 183.

⁴⁸ S 9(3) of CRA.

⁴⁹ S 9(3)(a) of CRA.

⁵⁰ *Henry Kendall & Sons v William Lillico & Sons Ltd and Others Holland Colombo Trading Society v Grimsdale & Sons Ltd [Consolidated Appeals] Grimsdale & Sons v Suffolk Agricultural and Poultry Producers Association, Ltd* [1969] 2 All ER 444 at 451 – 452 per Lord Reid. See also V Cazacu ‘The implementation of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees into English law: brief considerations’ (no date) available at http://revcurentjur.ro/old/arhiva/attachments_200901/recjurid091_7F.pdf, accessed on 29 March 2017.

was applied in the interpretation of merchantable quality in s 14(6) of SoGA as the assumption was that ‘purpose or purposes’ meant that some goods may have been of a quality that might be expected to reach higher standards than other similar goods sold at a lower price.⁵¹

The new requirement of satisfactory quality requires the goods to be fit for all of the purposes for which the goods of that kind were commonly supplied.⁵² Writers have pointed out that the factors given in s 14(2B) are really indicators of the standard of quality that is required. Hence, if one of these elements is not complied with, it does not warrant an automatic declaration that the goods are of unsatisfactory quality.⁵³ Where the buyer intends to use the goods for an uncommon purpose, the implied condition of satisfactory quality cannot be relied on. Instead, the buyer must show that he informed the seller of the purpose for which he intended to use the goods and furthermore, that he relied on the seller’s skill and judgment (the buyer would then rely on s 14(3) discussed below for relief).

Appearance and finish⁵⁴

This factor could possibly have been included under freedom from minor defects due to the similarity between them. However, the legislature chose to separate the factors as minor defects often relate to functional aspects of the goods in question whereas appearance and finish relate to cosmetic defectiveness.⁵⁵ It was highlighted that cosmetic defects could also be so serious as to render the goods almost unusable, such as a dress that is torn and cannot be mended or that has a stain that cannot be removed. Reference is made to the case of *Jackson v Rotax Motor & Cycle Co. Ltd.*⁵⁶ The defendant sold motor vehicle horns, displayed on the outside of the car. The majority of the consignment had been very badly scratched, thus making the horns un-merchantable as no reasonable car manufacturer would purchase them for use.⁵⁷ It followed that most of the goods were unusable due to a cosmetic defect.

⁵¹ *Aswan Engineering Establishment Co. v Lupton Ltd and another (Thurgar Bolle Ltd, third party)* [1987] 1 All ER 135 at 146, Oughton, Lowry (note 26) 185.

⁵² S 14(2B)(a) SoGA 1994.

⁵³ Oughton, Lowry (note 26) 185.

⁵⁴ Section 14(2B)(b) SoGA. Section 9(3)(b) of CRA.

⁵⁵ Oughton, Lowry (note 26) 186.

⁵⁶ [1910] 2 KB 937.

⁵⁷ See *Jackson v Rotax Motor & Cycle Co. Ltd* (note 56). Oughton, Lowry (note 26) 186.

Freedom from minor defects⁵⁸

Oughton and Lowry⁵⁹ are of the opinion that the presence or absence of a minor defect is merely a consideration in determining whether the goods in question reach the required standard of quality. So in circumstances where the goods have minor defects, but meet the required standard of quality after taking into consideration the other factors, the seller is not in breach of section 14(2).

It also seems prudent, in the case of second hand or cheap goods, to evaluate the defects in the goods according to the price paid and how the goods are described.⁶⁰ The higher the price a buyer pays for the goods, the more he may expect from the goods in terms of quality. This is the approach that has been followed in the past. However, it seems that defects previously ignored would now be sufficient to result in a breach of s 14(2), particularly where the goods were placed at the top end of the market and described as new.⁶¹

Durability and safety⁶²

The inclusion of durability and safety, though these terms are quite vague in their interpretation, was viewed as a long overdue reform,⁶³ although there was evidence in case law that safety was already a relevant consideration⁶⁴ - in *Bartlett v Sidney Marcus Ltd*⁶⁵ the case involved the sale of a second hand car which turned out to have a lot of things wrong with it as well as a lot of worn parts.⁶⁶ The court held that a second hand car was 'reasonably fit for the purpose if it was in a roadworthy condition, fit to be driven along the road in safety, even though not as perfect as a new car'.⁶⁷

The Law Commission and The Scottish Law Commission Final Report No 85 Sale and Supply of Goods⁶⁸ rejected any attempts to specify a period for which goods should last in order to satisfy the durability requirement. The Commission accepted the argument that

⁵⁸ Section 14(2B)(c) SoGA. Section 9(3)(c) CRA.

⁵⁹ (note 26) 186. See also *Cazacu* (note 50) 5.

⁶⁰ *Ibid.*

⁶¹ Relied on the judgment given in *Rogers and Another v Parish (Scarborough) Ltd and others* [1987] 2 All ER 232 at 237 by Mustill LJ.

⁶² Section 14(2B)(d) and (e) SoGA. Section 9(3)(d) and (e) CRA.

⁶³ *Scott & Black* (note 13) 159.

⁶⁴ *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 at 226 as per Rougier J, the court held that a new car which cannot be safely used is not of merchantable quality.

⁶⁵ [1965] 2 All ER 753.

⁶⁶ *Bartlett v Sidney Marcus Ltd* (note 65) at 754.

⁶⁷ *Bartlett v Sidney Marcus Ltd* (note 65) at 755 per Lord Denning.

⁶⁸ (Law Com No 160) (Scot Law Com No 104), Cmnd 137, (1987) (note 36).

goods should last a reasonable time, and this could not be the same for all goods.⁶⁹ What is considered a reasonable time will depend on the circumstances of each case. The Consumer Sales Directive required that all member States give consumers the remedies under the Directive for a period of two years.⁷⁰ This effectively meant that durability would have a minimum period of two years.⁷¹ Suggestions were made that the durability provision should be extended further, in line with provisions in other common law countries and also as a mechanism to oblige manufacturers to maintain spare parts and repair facilities for a specified minimum period.⁷² However, the Law Commission did not believe that it was in a position to support these proposals for the UK.⁷³

4.2.2.3 Implied term on fitness for purpose

The SoGA⁷⁴ stated that goods must be fit for the purpose for which they have been acquired. Because of the similarity in the provisions of section 14(2B)(a) and section 14(3), there is often an overlap with regards to quality and fitness. In instances where a product fails to achieve its normal purpose, for example, the product will be deemed to not be of satisfactory quality and not be fit for the purpose for which it is intended.⁷⁵ There are also instances where there is no overlap: for example an animal feed may be fit for feeding animals generally, however, it may be unsuitable for feeding the specific animal the buyer has in mind when he purchases the feed.⁷⁶ Hence, in such a case there is a breach of section 14(3) but no breach of section 14(2).

Where goods can only be used for a single purpose, there is a breach of the requirement of fitness and purpose if the goods cannot achieve the purpose for which they are purchased. There are also situations where goods may be capable of performing a number of purposes; in such situations it is not advisable to make assumptions regarding whether the goods can

⁶⁹ Sale and Supply of Goods (Law Com no 160) (Scot Law Com 104) (1987) para 3.49.

⁷⁰ Directive 1999/44/EC, OJ L 171 07.07.99 p 0012 – 0016.

⁷¹ Ibid.

⁷² Academics often made reference to the New Zealand Consumer Guarantees Act 1993, specifically s 12, which was subject to an exception s 42 where a consumer was notified prior to purchase that the manufacturer did not undertake to supply repair facilities and spares. Also the Consumer Protection Act 1996 of Saskatchewan with regards to s 48 and 50(2).

⁷³ Sale and Supply of Goods (Law Com no 160) (Scot Law Com 104) (1987) para 3.66.

⁷⁴ S 14(3)

⁷⁵ An example would be where a catapult broke during normal use (*Godley v Perry* [1960] 1 WLR 9) or where hot water bottles burst when they were used according to the manufacturer's instructions (*Priest v Last* [1903] 2 KB 148).

⁷⁶ See *Ashington Piggeries Ltd v Christopher Hill Ltd* (note 22). The animal feed wasn't suitable for feeding mink as it contained a preservative that was toxic specifically to mink.

perform the particular purpose the buyer wishes to perform. In order to successfully rely on the implied term, the buyer has to have communicated to the seller the specific purpose that he wishes to achieve with the goods in question and thus must rely on the seller's skill and judgment when he purchases the goods.⁷⁷

In the case of *Griffiths v Peter Conway Ltd*⁷⁸ the buyer purchased a tweed coat but did not inform the seller that she had abnormally sensitive skin that was prone to dermatitis.⁷⁹ The plaintiff claimed that the coat was not fit for purpose and brought an action for damages on the grounds of breach of section 14(1) of the SoGA 1893.⁸⁰ The court found that section 14(1) was not applicable to the plaintiff and also pointed out that the warranty for purpose applies only in instances where the buyer has made known to the seller, either expressly or by implication, the purpose for which the goods are intended. It was held that the seller was not in breach as the buyer's abnormal sensitivity was an issue that should have been communicated to the seller prior to the sale for liability to attach.⁸¹ This was confirmed in the case of *Slater v Finning Ltd* [1996] 3 All ER 398 where the House of Lords held that if a failure of goods to serve the purpose required by the buyer is due to some abnormality of the buyer or his property which has not been made known to the seller, the buyer then cannot rely on section 14(3).

The next issue of contention was how to address the matter where it was unclear whether or not the buyer was aware of the abnormality. The buyer in *Slater* had a fishing vessel that had an unusual engine. The sellers provided the buyer with the fittings that went into a normal engine but because it was unusual, these fittings resulted in the engine malfunctioning. It was held that the sellers were correct to assume that the fittings they put in were used by a normal engine and if this was not the case, the onus was on the buyer to inform the sellers of this idiosyncrasy where it might affect their property. It followed that the seller of a standard part suitable for use on all boat engines of the same type was entitled to assume that the buyer's engine was normal with no abnormalities just as the seller in *Griffiths v Peter Conway Ltd* could assume that Mrs Griffiths was a normal person without unusually sensitive skin.⁸²

⁷⁷ *Grant v Australian Knitting Mills Ltd* (note 25) at 99. See *Summer Permain & Co v Webb* [1922] 1 KB 55.

⁷⁸ [1939] 1 All ER 685 at 686.

⁷⁹ *Griffiths v Peter Conway Ltd* (note 78) at 691.

⁸⁰ *Griffiths v Peter Conway Ltd* (note 78) at 690.

⁸¹ *Griffiths v Peter Conway Ltd* (note 78) at 691.

⁸² Oughton, Lowry (note 26) 189.

Where a buyer has informed the seller of the intended purpose of the goods, it does not follow that the condition of fitness for purpose automatically applies to the transaction. The buyer must have reasonably relied on the skill and judgment of the seller in purchasing the goods for the intended purpose.⁸³ The onus is on the supplier to show that the buyer did not rely on his skill and judgment.⁸⁴ The burden can be discharged by showing that the buyer did not rely on the supplier or that the buyer's reliance was unreasonable. Reliance will be assumed where goods are purchased for a single, normal purpose and the seller *knows*⁸⁵ the purpose for which the goods are intended.⁸⁶ Where the buyer relies on his own skill and judgment, he will not receive any protection through section 14(3). However, nothing prevents the buyer from claiming partial reliance on the seller's skill and judgment.⁸⁷ When determining whether a consumer reasonably relied on a supplier's skill and judgment, the following factors would be taken into account: the relative expertise of the parties,⁸⁸ whether instructions on use were supplied either before or after the conclusion of the contract,⁸⁹ and whether the supplier is also the manufacturer.⁹⁰

4.2.3 Traditional UK Remedies in terms of the Statutory Implied Terms

Before the introduction of statutory remedies, most consumers often received some sort of reprieve from sellers and retailers in instances where they made complaints about a faulty product.⁹¹ This reprieve comprised a refund or exchange. However, it was not uncommon to find sellers who were unwilling to provide any relief. The law now provides two actions where faulty products are the cause of the dispute: an action for misrepresentation where the product was mis-described, and an action for breach of the implied conditions present in a sale of goods contract. This provides that goods must be in line with the description given and, any sample shown must be of satisfactory quality and fit for the purpose specified by the purchaser.⁹² The law offers the buyer two options where he or she has made a purchase of faulty goods. If the buyer acts within a reasonable time, he has the option to reject the faulty goods, terminate the contract and claim a full refund. If more time has elapsed than what

⁸³ *Aswan Engineering Establishment Co. v Lupton Ltd and another* (note 51) at 149.

⁸⁴ *Ibid.*

⁸⁵ Own emphasis.

⁸⁶ In *Grant v Australian Knitting Mills Ltd* (note 25) at 90, Lord Wright confirmed that a consumer can assume that the seller has selected his stock with skill and judgment hence satisfying the requirement of reliance.

⁸⁷ Oughton, Lowry (note 26) 190.

⁸⁸ *Henry Kendall & Sons v William Lillico & Sons Ltd* (note 50).

⁸⁹ *Wormell v RHM Agriculture (East) Ltd* [1987] 3 All ER 75 at 77, 80.

⁹⁰ *Henry Kendall & Sons v William Lillico & Sons Ltd* (note 50) at 453 as per Lord Reid.

⁹¹ *Scott & Black* (note 13) 147.

⁹² *Ibid.*

would be considered reasonable, the right of return is lost and the buyer is deemed to have accepted the goods⁹³ and only has a right to damages. These remedies are still in existence and applicable although there have been some amendments through the years.

4.2.3.1 Rejection

According to the SoGA, the consumer has the right to examine the goods after delivery.⁹⁴ The consumer may request the seller to afford him a reasonable time to examine the goods.⁹⁵ Even where the consumer does not put in a request, he or she is effectively given a reasonable time to examine the goods as he/she is deemed not to have accepted the goods until a reasonable time has lapsed.⁹⁶ If upon examination the consumer discovers that the goods are faulty, he is entitled to reject the goods and terminate the contract, provided that he has not accepted the goods.⁹⁷ The right to reject is lost if the consumer is deemed to have accepted the goods. Section 35 of the SoGA specifies three methods of acceptance. These are:

- 1) where the buyer intimates to the seller that the goods have been accepted; (often referred to as express acceptance)
- 2) where the buyer does something with the goods that is inconsistent with the seller's ownership of the goods; or
- 3) where, after the lapse of a reasonable time, the buyer retains the goods without telling the seller that the goods have been rejected.

The most common method of acceptance is point (3). The general assumption is if a consumer wishes to exercise his right of rejection relying on reasonable time, he must do so quickly.⁹⁸ The SoGA does not define what amounts to a reasonable time and there is very little guidance regarding the matter. It follows that its determination is dependent on the facts of the case.⁹⁹ There is very little case law and the little that there is does not effectively illustrate how this principle is to be applied.

⁹³ S 35(4) SoGA.

⁹⁴ S 34 SoGA.

⁹⁵ S 34 SoGA.

⁹⁶ S 35 SoGA.

⁹⁷ *Consultation Paper on Consumer Remedies for Faulty Goods* (LAW COM No 317; SCOT LAW No 216) (November 2009) available at <https://www.scotlawcom.gov.uk/files/7912/7989/7475/rep216.pdf>, accessed on 20 April 2017. At para 2.7 pg 9.

⁹⁸ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.10 pg 10.

⁹⁹ *Ibid.*

Some earlier cases required the consumer to inspect goods immediately at the place of delivery, but the contract could be varied so as to make the time of inspection occur after delivery or have distinct places of inspection and delivery.¹⁰⁰ The seller was obligated to ensure that an adequate opportunity to inspect the goods was afforded and it was the responsibility of the buyer to ensure that he availed himself of the opportunity.¹⁰¹ However, the courts became more lenient and allowed consumers more time for examination.¹⁰² An example is set out in the case of *Manifatture Tessile Laniera Wooltex v J B Ashley Limited*¹⁰³ where the buyers purchased cloth from the seller in batches and sold it to sub-buyers without examining it first. Seven weeks after the initial delivery, the buyers received complaints from the sub-buyers about the quality of the cloth.¹⁰⁴ Several meetings took place with the sellers and eventually the buyers sought to reject the goods three and a half months after delivery. The Court of Appeal held, taking into consideration the Act that reasonable time had not lapsed even though three and a half months had passed after delivery.¹⁰⁵ Atiyah made an observation of the treatment of cases prior to the amendment of the rules on acceptance by the Sale and Supply of Goods Act 1994 and his opinion was as follows: “...there is no doubt that, in general, the tendency under the former provisions was to hold that the right of rejection is lost speedily where goods were in daily use...”¹⁰⁶

The following cases dealt with the time period in relation to rejection as a remedy. In the case of *Bernstein v Pamson Motors (Golders Green) Ltd*¹⁰⁷ the buyer wanted to rescind the contract after the discovery of a defect three weeks after purchasing a vehicle: the vehicle broke down on its first trip after travelling 140 miles.¹⁰⁸ The defect in the vehicle was quite serious,¹⁰⁹ hence the seller had breached the implied condition in section 14(2),¹¹⁰ but the

¹⁰⁰ JD Falconbridge ‘Handbook of the Law of Sale of Goods’ (1921) available at <http://chestofbooks.com/business/law/Handbook-Of-The-Law-Of-Sale-Of-Goods/66-Inspection-And-Acceptance.html>, accessed on 28 April 2017. Falconbridge also points out the case of *Perkins v Bell* [1893] 1 QB 193 as an example of this. The case was decided prior to the enactment of Sale of Goods Act 1893.

¹⁰¹ Ibid.

¹⁰² *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.11 pg 10.

¹⁰³ [1979] 2 Lloyd’s Rep 28.

¹⁰⁴ Sales Law Review Group ‘Report on the Legislation Governing the Sale of Goods and Supply of Services’ (2011) available at <https://dbei.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/Report-on-the-Legislation-Governing-the-Sale-of-Goods-and-Supply-of-Services.pdf>, accessed on 30 April 2017. See pg 304.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. See also footnote 762 which makes reference to Atiyah & Adams (note 47) 516.

¹⁰⁷ (note 64).

¹⁰⁸ *Bernstein v Pamson Motors (Golders Green) Ltd* (note 64) at 220.

¹⁰⁹ *Bernstein v Pamson Motors (Golders Green) Ltd* (note 64) at 220 – a piece of sealant came loose and would cut off the oil supply to the camshaft, causing the vehicle to stop.

¹¹⁰ Scott & Black (note 13) 166.

court held that the buyer had accepted the car and was only entitled to damages, even after consideration had been made where the buyer was ill during the period in question.¹¹¹ The notion that this decision was quite hard on the consumer and that the interpretation of reasonable time was too strict has been expressed,¹¹² particularly taking into consideration the fact that in other cases longer periods had passed between sale and rejection.¹¹³ In *Rogers v Parish (Scarborough) Ltd*¹¹⁴ the court held that the buyer of a car was entitled to reject it six months post delivery and after 5 500 miles of usage as it was not of merchantable quality.¹¹⁵ The court of appeal took into account specific factors listed in s 14(6) to identify what the relevant expectation was: namely the description applied to the goods, expectations likely to be generated by the description and the price.¹¹⁶ The court did not allow the defendants to argue that the goods had been accepted and the period for rejection had passed because this issue had not been raised in the initial proceedings.¹¹⁷ The buyer was thus entitled to reject the car.

In the matter of *Clegg v Andersson T/A Nordic Marine*¹¹⁸ Sir Andrew Morritt VC remarked that in his view, the decision passed was not a representation of the law as it stood currently.¹¹⁹ This was due to the 1994 amendments that had adjusted the SoGA to include section 35(6). It stated that time for examination of goods was just but one factor to be considered when ascertaining reasonable time for rejection of goods. The time period could include both the time required to carry out repairs and the time required to determine what repairs needed to be made.¹²⁰ The court held that the buyer was entitled to reject the goods (a yacht) six months post-delivery because ‘... a buyer does not accept the goods simply because he asks for or agrees to their repair: s 35(6).¹²¹ It follows that ‘if a buyer is seeking information which the seller has agreed to supply which will enable the buyer to make a properly informed choice between acceptance, rejection or cure, and if cure in what way, he

¹¹¹ *Bernstein v Pamson Motors (Golders Green) Ltd* (note 64) at 230-31 as per Rougier J.

¹¹² This was acknowledged in *Rogers v Parish (Scarborough) Ltd* (note 61).

¹¹³ Scott and Black (note 13) 166.

¹¹⁴ (note 61). The plaintiff purchased a range rover “as new” but after a few weeks it became apparent that it was unsatisfactory and was replaced. However, the replacement was equally unsatisfactory and attempts to repair a number of faults were unsuccessful.

¹¹⁵ In line with this, the court discussed the issue of deficiencies: Mustill LJ (at 237) pointed out that deficiencies which would ordinarily be acceptable in a second hand vehicle were not to be expected in one purchased as new

¹¹⁶ *Rogers v Parish (Scarborough) Ltd* (note 61) at 237.

¹¹⁷ *Rogers v Parish (Scarborough) Ltd* (note 61) at 238 per Mustill LJ.

¹¹⁸ [2003] 1 All ER (Comm) 721.

¹¹⁹ *Clegg v Andersson T/A Nordic Marine* (note 118) at [63].

¹²⁰ S 35(6) SoGA.

¹²¹ *Clegg v Andersson T/A Nordic Marine* (note 118) at [75] See also Sales Law Review Group (note 104) 306.

cannot have lost his right to reject.’¹²² The buyer only received information about the problems the yacht had six months after requesting it.

Another interesting case of note is that of *Truk (UK) Limited v Tokmakidis GmbH*.¹²³ The court held that the defendant (buyer) was entitled to reject a vehicle chassis purchased nine months after delivery.¹²⁴ Although the product was defective because the buyer did not comply with the seller’s guidelines for installation, it was highlighted that the buyer didn’t inspect the product upon redelivery (the defect was subsequently discovered after redelivery resulting in the buyer rejecting it).¹²⁵ The decision of the court was based on the fact that the vehicle had been bought with the intention of being resold, and not for the buyer’s own use and enjoyment. Therefore the reasonable time period could justifiably be extended to take into account the amount of time it was likely to take to find a sub-buyer as well as the period of time it would take the sub-buyer to test the vehicle and examine it.¹²⁶ Another important factor that was highlighted and taken into account was the prolonged period of negotiation over the correct course of action to be taken when the fault was discovered.¹²⁷

The consumer in *Bowes v Richardson & Son Ltd*¹²⁸ was entitled to reject a car seven months post-delivery as the court held that the buyer had not had the opportunity to fully assess the repairs that had been done on the vehicle by the seller and so it could not be said that he had accepted the goods.¹²⁹ The Court of Appeal in *Jones v Gallagher*¹³⁰ held that the buyer of a fitted kitchen was not entitled to reject the product five months after its installation. Notwithstanding the fact that the buyer had made complaints about several issues with the product and subsequent corrective measures had been taken, the court still held that the buyer had accepted the fitted kitchen.¹³¹ Emphasis was placed on section 59 of SoGA which states

¹²² *Clegg v Andersson T/A Nordic Marine* (note 118) at [75] per Hale LJ. See also Sales Law Review Group (note 104) 307 footnote 772.

¹²³ [2000] 2 All ER (Comm) 594.

¹²⁴ Sales Law Review Group (note 104) 307.

¹²⁵ S Hedley ‘Sale of Goods-Remedy of Rejection-How quickly is the right lost?’ in NH Andrews ‘Prerogative and Precedent: The Privy Council on Death Row’ (2001) 60 (1) *The Cambridge Law Journal* 1, 38-39.

¹²⁶ Sales Law Review Group (note 104) 307.

¹²⁷ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.14 pg 11.

¹²⁸ Rugby County Court, District Judge Sanghera, 28 January 2004 (Unreported). *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.15 pg 11.

¹²⁹ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.15 pg 11. The case highlights that there were several problems with the vehicle. Some had occurred immediately after the car was delivered and others a few months later. The seller had some repairs done but did not complete them. The court held that the buyer never had the opportunity to fully assess the repairs and therefore could not have accepted the goods.

¹³⁰ [2004] ECWA Civ at 36.

¹³¹ Sales Law Review Group (note 104) 307.

that “where a reference is made in this Act to a reasonable time the question what is a reasonable time is a question of fact.” Furthermore, Buxton LJ refused to acknowledge that a rule (regarding suspension of time of rejection while seeking repairs or administering repairs) had been established in the *Clegg* case.¹³²

In *Fiat Auto Financial Services v Connelly*¹³³ the buyer rejected a car nine months and 40 000 miles after the sale. The court held that the right to reject is not lost during any period where the purchaser is waiting for information to make an informed decision as to whether to accept or reject the goods and the actions of a seller in dealing with defects and attempts to cure defects may postpone deemed acceptance.¹³⁴ The buyer in *M & T Hurst Consultants Ltd v Grange Motors (Brentwood) Ltd*¹³⁵ rejected a second hand Rolls Royce three months post sale. The court held that this rejection was valid because the three months occurred between the time the purchase of the vehicle took place and the time the buyer became aware of the defect and its seriousness.¹³⁶ Therefore the buyer had not had the opportunity to examine the car and ascertain if it conformed to the contract – and so he had not accepted the goods.¹³⁷

In *J & H Ritchie Limited v Lloyd Limited*¹³⁸ the buyer purchased a combination seed drill and power harrow that revealed defects on its first use. The drill was returned to the sellers for repairs, who, in turn discovered a major defect, that the drill was missing two bearings.¹³⁹ After the repairs had been conducted, the seller refused to reveal to the buyer what had been done to the drill to repair it and further refused to provide an engineer’s report.¹⁴⁰ The buyer then rejected the goods. The House of Lords held that the buyers had been entitled to reject the goods – although the goods were in conformity with the contract at the time of rejection,

¹³² Buxton LJ said the following at 36, “there is no absolute rule that a situation in which information was sought cannot resolve the loss of a right to reject: because that would be inconsistent with the guiding principle that assessment of loss of right to reject is a matter of fact to be considered in all circumstances.” See also Sales Law Review Group (note 104) 307 footnote 777.

¹³³ 2007 SLT (Sh Ct) 111.

¹³⁴ The buyer had made frequent complaints to the seller concerning the poor quality of the vehicle and the buyer had also attempted to rectify and repair several faults but had failed. The court held that it was a reasonable time and Sheriff Deutsch gave the reasons stated. *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.16 pg 11.

¹³⁵ Manchester High Court, Judge Russell, October 1981 (unreported). *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.18 pg 12.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ [2007] 2 All ER 353.

¹³⁹ *J & H Ritchie Limited v Lloyd Limited* (note 138) at 356 para [4].

¹⁴⁰ *J & H Ritchie Limited v Lloyd Limited* (note 138) at 357 para [6].

the seller had breached an implied term of the ancillary repair contract of which he was obliged to inform the buyer of the nature of the repairs that had been carried out.¹⁴¹

In conclusion it is clear that reasonable time is not easy to ascertain. However, it is determined by the facts of each case, the nature of the goods concerned, the extent of the repairs required and the time necessary to conduct these repairs. It can also be extended where negotiations concerning repairs take place.¹⁴²

4.2.3.2 Damages

A consumer may elect to sue for damages where goods are found to be faulty. Damages are defined as a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.¹⁴³ The purpose of damages is to restore an injured party to the position the party was in before the harm occurred.¹⁴⁴ English law provides that it is the duty of the consumer to establish his damages.¹⁴⁵ The SoGA defines damages as the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of the implied terms of the contract.¹⁴⁶

There are normally two types of loss available under a claim for contractual damages: normal and consequential loss. Normal loss is described as 'the loss which every claimant in a like situation will suffer'.¹⁴⁷ It is generally measured by the difference in market value between what the claimant should have received under the contract and what he actually received.¹⁴⁸

¹⁴¹ *J & H Ritchie Limited v Lloyd Limited* (note 138) at 361 para [16].

¹⁴² Section 35(6) of SoGA stated that if a buyer asked for, or agreed to repairs being carried out by a seller, they were not deemed to have accepted the goods and could retain the right to reject the goods.

¹⁴³ The Law Dictionary (featuring Black's Law Dictionary Free Online Legal Dictionary 2nd ed) (no date) available at <https://thelawdictionary.org/damages/>, accessed on 15 January 2018.

¹⁴⁴ Legal Dictionary – The Free Dictionary available at <https://legal-dictionary.thefreedictionary.com/damages>, accessed on 15 January 2018.

¹⁴⁵ Scott and Black (note 13) 168.

¹⁴⁶ S 51(2) SoGA. See also *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673 at 689 per Viscount Haldane L.C. See also *Hadley v Baxendale* (1854) 9 Exch 341. Similarly, see *Farley v. Skinner* [2001] UKHL 49; [2002] 2 A.C. 732 at para 16 per Lord Steyn who said the 'general principle is that compensation is only awarded for financial loss resulting from the breach of contract'.

¹⁴⁷ D Pearce & R Halson 'Damages for breach of contract: compensation, restitution, and vindication' White Rose Research Online, (no date) available at <http://eprints.whiterose.ac.uk/3518/1/pearced1.pdf>, accessed on 29 April 2017.

¹⁴⁸ *Ibid.*

Consequential loss is that loss which is special to the circumstances of the claimant and can be anything beyond the normal measure.¹⁴⁹ According to the SoGA, a buyer is entitled to receive damages whether he has rejected the goods¹⁵⁰ or not.¹⁵¹ There are three situations in which the consumer may sue for damages. These are:

- a) where it is more advantageous to have the defect remedied as opposed to receiving the purchase price;
- b) where the consumer has suffered personal injury due to the defect and will also sue for consequential damages for the loss involved;¹⁵² and
- c) where the consumer has no choice but to sue for damages because he no longer has the right to reject because a reasonable time has lapsed.

The prima facie rule for loss in terms of breach of quality is determined by section 53(3). This provides that the buyer may recover the difference between the value that the product would have had without the defect (which is commonly equated with the contract price) and its actual value at the time of delivery. This rule also applies to goods which do not conform to the description or are not fit for purpose.¹⁵³ Latent defects are considered to only be discoverable some time after delivery. Hence, in these cases, the measure of damages is the difference between the contract price and the value when the defect manifests itself.¹⁵⁴ If the consumer delays in bringing the damages claim, this can result in the defect being assessed at the time of delivery instead of when it manifests itself.¹⁵⁵ Where the defect causes the product to become useless the rule is adjusted to ensure the consumer receives the return of the full

¹⁴⁹ Ibid. Examples of such are profits lost, personal injury, basically expenses incurred due to the breach which are recoverable.

¹⁵⁰ S 51(3) provides that a buyer can receive the difference between the contract price and the current market price in cases of non delivery. Where the buyer is entitled to reject the goods and does so on the ground of breach of condition as to quality or description, damages may be assessed on the basis of non-delivery.

¹⁵¹ S 53(4) states that the buyer, apart from being able receive a refund for the purchase price, is not precluded from maintaining an action for the same breach of warranty if he has suffered further damage: the buyer can also sue for compensatory damages.

¹⁵² See *Grant v Australian Knitting Mills* (note 25) where the buyer was awarded £2450 after contracting dermatitis from underwear and *Godley v Perry* where a young boy was awarded £2500 for the loss of his eye due to a faulty catapult.

¹⁵³ Scott and Black (note 13) 168. See also B Harvey and DL Parry *The law of Consumer Protection and Fair Trading* 6th ed (2000) 120.

¹⁵⁴ *Ashworth v Wells* (1898) 78 LT 136. See also Scott and Black (note 13) 168.

¹⁵⁵ Scott and Black (note 13) 168.

contract price.¹⁵⁶ A claim for damages can be brought for up to six years after the date on which the cause of action accrued¹⁵⁷ or three years from the starting date.¹⁵⁸

4.2.4 Directive on Consumer Sales and Guarantees (CSD) and its remedies

The Directive on Consumer Sales and Guarantees¹⁵⁹ (also known as the CSD) was formulated in 1999 with the purpose of ensuring uniform minimum standards of consumer protection throughout the member states as well as increase consumer confidence, which would in turn encourage consumers to conduct purchases of goods from any country in the EU.¹⁶⁰ The Directive applies to the sale of consumer goods by professional sellers to consumers and it also provides that consumer goods¹⁶¹ must conform to the contract,¹⁶² not

¹⁵⁶ Scott and Black (note 13) 168. There was also provision for situations where a defective good should be sold in its defective state as scrap. This value could then be used to calculate the difference to be given to the consumer. The cost of repair could also be used to calculate the difference in value as well.

¹⁵⁷ S 14A(4)(a) of Latent Damage Act 37 of 1986. *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 6.60 pg 67.

¹⁵⁸ S14A(4)(b) of Latent Damage Act 37 of 1986. For the purposes of understanding subsection (4)(b), subsection (5) is referred to. It reads: For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

¹⁵⁹ 1999/44/EC L171 of 07.07.1999 hereinafter referred to as 'the Directive'.

¹⁶⁰ Lord Davidson QC. 'Davidson Review, Final Report' (2006) available at http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/davidson_review/index.asp, accessed on 14 July 2015. At para 3.12. See also UK Department of Trade and Industry, *The Sale and Supply of Goods to Consumers Regulations 2002* (no date) available at http://www.secola.org/db/2_12/gb_noteslong.pdf, accessed on 25 April 2017.

¹⁶¹ This extended to tangible movable items, with the exception of goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in limited volume or quantity and electricity (Article 1(2)(b)).

¹⁶² Conformity with the contract was stipulated in Article 2 as follows:

1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.
2. Consumer goods are presumed to be in conformity with the contract if they:
 - (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
 - (b) are fit for any particular purpose for which the consumer requires them and which he has made known to the seller at the time of conclusion of the contract and which the seller has accepted;
 - (c) are fit for the purposes for which goods of the same type are normally used;
 - (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.
3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he: – shows that he was not, and could not reasonably have been, aware of the statement in question, – shows that by the time of conclusion of the contract the statement had been corrected, or – shows that the decision to buy the consumer goods could not have been influenced by the statement.
5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if

only satisfying any express terms in the contract but also meeting specific criteria relating to description, fitness, quality and performance.¹⁶³

Article 3 of the Directive outlines the rights available to a consumer where the goods fail to conform to the contract. The remedies provided are based on civil law systems in continental countries where consumers traditionally only had two remedies – a price reduction or setting aside of the contract due to the defect.¹⁶⁴ But the CSD makes provision for two additional remedies: the seller can either repair or replace the defective goods.¹⁶⁵ The common law provisions in the UK are quite different as the remedies that are presently available to consumers are rejection of the goods or an action for damages, although in some cases, the two remedies can be combined.¹⁶⁶

In 2002, the United Kingdom (UK) transposed the CSD which was implemented by the Sale and Supply of Goods to Consumers Regulations 2002.¹⁶⁷ The Regulations apply to a range of transactions between businesses and consumers, including sale, hire and hire-purchase.¹⁶⁸ The Regulations do not apply to services in general; neither do they apply to second-hand goods sold at auctions that the consumer has the opportunity of attending in person.¹⁶⁹ The regulations also amended the SoGA 1979 and the Supply of Goods and Services Act 1982, particularly in terms of consumer remedies, by implementing Part 5A of the SoGA.¹⁷⁰ This outlines four new remedies for consumers namely, repair or replacement as the first tier of rights and rescission or reduction of price as the second tier of rights.¹⁷¹

4.2.4.1 The Two Tiers

The first tier of remedies entitles the consumer to have the goods brought to conformity free of charge by repair or replacement.¹⁷² Theoretically, the decision between the two rests with

the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

¹⁶³ Ibid.

¹⁶⁴ Davidson Review (note 160) para 3.13.

¹⁶⁵ Ibid

¹⁶⁶ Ibid.

¹⁶⁷ SI No. 2002/3045.

¹⁶⁸ UK Department of Trade and Industry, *The Sale and Supply of Goods to Consumers Regulations 2002* (note 160) 1.

¹⁶⁹ Ibid.

¹⁷⁰ Davidson Review (note 160) para 3.18.

¹⁷¹ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.9. See also UK Department of Trade and Industry, *The Sale and Supply of Goods to Consumers Regulations 2002* (note 160) 1.

¹⁷² Article 3(3) of the CSD.

the consumer and the seller has no choice but to oblige. However, it seems that the choice is often made by the seller. This often takes place through the seller's refusal to carry out a chosen remedy on the grounds that it is impossible to fulfil or it is, in his view disproportionate in comparison with the other remedies in the CSD.¹⁷³

Where a consumer selects one of the remedies in the first tier and its' provision is possible and proportionate, then the seller is obliged to carry it out free of charge,¹⁷⁴ within a reasonable time, and without causing significant inconvenience to the buyer.¹⁷⁵ Where both the remedies are considered insufficient or disproportionate, then the consumer has to look to the second tier of remedies for relief.¹⁷⁶

The second tier of remedies comprises rescission and reduction in the purchase price.¹⁷⁷ Where the consumer chooses to rescind the contract, the contract comes to an end in a similar way as it does under the right to reject.¹⁷⁸ There is a possibility that the buyer may be required to give an estimated value for the use of the goods prior to rescission.¹⁷⁹ In considering whether a full or partial refund is to be given, neither the SoGA nor the CSD give a guideline as to how this amount should be calculated or what factors should be considered. The Sale and Supply Regulations do provide that the benefit provided by the goods to the consumer should be taken into account when determining compensation.¹⁸⁰ A reduction in purchase price has the effect of leaving the consumer with the goods. However, the consumer then receives a discount due to their reduced value. The reduction is not defined but the SoGA states that it should be an 'appropriate' amount.

¹⁷³ S 48B(3) SoGA. *Consultation on Consumer Remedies for Faulty Goods* (note 97) para 2.29 pg 14. See also UK Department of Trade and Industry, *The Sale and Supply of Goods to Consumers Regulations 2002* (note 160) 2.

¹⁷⁴ S 48B(3) SoGA.

¹⁷⁵ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 2.30 pg 14. See also J Stuyck 'The provisions on consumer sales' in H Schulte-Nölke and L Tichý (ed) *Perspectives for European Consumer Law* (2010) 25.

¹⁷⁶ Article 3(5) of the CSD. See also UK Department of Trade and Industry, *The Sale and Supply of Goods to Consumers Regulations 2002* (note 160) 10. Writers argue that this line of thought is flawed and is not in line with the Directive as it is too unfavourable to the consumer.

¹⁷⁷ S 48C SoGA.

¹⁷⁸ This is due to the fact that there is no statutory definition for the rescission in the SoGA. S 48C also gives very little guidance as to how it should be applied.

¹⁷⁹ S 48C SoGA.

¹⁸⁰ UK Department of Trade and Industry, *The Sale and Supply of Goods to Consumers Regulations 2002* (note 160) 10.

4.2.4.2 Issues arising from CSD

After implementation of the CSD, there was a lot of criticism regarding the remedies for faulty goods.¹⁸¹ The main complaint was that the law was too complex and difficult to understand.¹⁸² The responsibility for consumer policy rests with the Department for Business, Innovation and Skills (BIS)¹⁸³ which was created on 5 June 2009. The BIS is entrusted with several responsibilities, including consumer policy, productivity, enterprise, business relations, business law and competition.

Prior to the creation of the BIS, the department requested that a review be conducted in the area of consumer remedies for faulty goods. In 2006, the Davidson Review was conducted and it recommended to the Department of Trade and Industry¹⁸⁴ that a report be drafted to simplify the remedies available to consumers and address the complexities. This was particularly necessary because both the traditional remedies and the European remedies were now contained in the SoGA 1979, without being sufficiently merged so as to have a coherent flow of remedies.¹⁸⁵ The Davidson Review suggested that clarity and guidance was required as to how a particular remedy should be selected to suit a particular factual situation. This would reduce the high levels of litigation that had characterised this area of the law.¹⁸⁶

In 2008 a joint Consultation Paper was undertaken by the Law Commission and the Scottish Law Commission. This focused on the remedies available to a consumer in relation to non-conforming goods. By 2009, the two above-mentioned Law Commissions produced a report on Consumer Remedies for Faulty Goods. This made recommendations as to the remedies available and simplified and clarified the remedies as well as their use. It also considered the proposed directive that had been published by the European Commission in 2008 for new consumer rights.¹⁸⁷ Five major areas were identified which required clarification:

- 1) The length of a reasonable time to reject goods.¹⁸⁸

¹⁸¹ Davidson Review (note 160) para 3.11.

¹⁸² Ibid.

¹⁸³ Previously the Department for Business, Enterprise and Regulatory Reform.

¹⁸⁴ Hereinafter DTI but now called the BIS.

¹⁸⁵ The Davidson Report was very critical of this defining it as an example of double-banking; 'double banking is where European legislation covers similar ground to that covered in existing domestic legislation and the two regimes have not been coherently merged in the implementation process' (para 3.1).

¹⁸⁶ Davidson Review, Final Report (note 160) para 3.11 and 3.20.

¹⁸⁷ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.6.

¹⁸⁸ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 3.47 pg 30.

- 2) The different burdens of proof applied to the remedies (refund, repair, or replacement).
- 3) The different remedies applicable to supply of goods contracts, as opposed to pure sale of goods contracts.¹⁸⁹
- 4) The progression from first tier remedies to second tier remedies in the CSD.¹⁹⁰
- 5) The treatment of minor defects.

Only four of the five issues listed above will be discussed, namely the length of a reasonable time to reject goods, the different burdens of proof applied to the remedies (refund, repair, or replacement), the progression from first tier remedies to second tier remedies in the CSD and the treatment of minor defects.

4.2.4.3 Recommendations

The length of a reasonable time to reject goods

Among the challenges that were raised by the consumers, the uncertainty relating to the length of time the right to reject should exist for was raised. The Consultation Paper¹⁹¹ provisionally suggested that a normal period of 30 days be implemented.¹⁹² This period would commence from the date of purchase, delivery or completion of the contract, whichever occurred later.¹⁹³ This was viewed as a reasonable timeframe to allow a buyer to inspect and test the goods while the period of use would be minimal. In addition, it was in line with consumer expectations.

The drafters of the CP believed that the introduction of the 30 day period would simplify the law for the average consumer. This was in line with the objective that the law should be capable of being understood, remembered and asserted by the consumer.¹⁹⁴ The drafters of the CP were also of the opinion that setting a clear period would increase consumer confidence and reduce reliance on ambiguous case law which offered little guidance as to the

¹⁸⁹ This issue is outside the scope of the research and will not be considered in the discussion.

¹⁹⁰ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.21 pg 5.

¹⁹¹ Will be referred to as CP from hereon.

¹⁹² The suggestion was provisional because the general attitude was that there should be no absolute fixed timeframe due to the different types of goods that it would apply to. There would be times when the timeframe would be inappropriate and it was not feasible to have a timeframe for every single possible good. The view concurred with the one presented in the 1987 Sale and Supply of Goods Report (note 36).

¹⁹³ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.20 pg x, para 3.48 – 3.51 pg 30-31.

¹⁹⁴ *Ibid* para 1.21 pg x.

reasonableness of timeframes.¹⁹⁵ The drafters highlighted that the 30 day period should be applied with limited exceptions, so as to create a balance between flexibility and certainty.¹⁹⁶ A shorter period would be determined for perishable goods and a longer period where the goods would not be able to be tested sufficiently within 30 days.

The different burdens of proof applied to the remedies

When a consumer relies on the remedies given by the CSD, the consumer gains a six month reverse burden of proof. This essentially means that if a defect or fault arises within six months of delivery of the goods, there is a presumption that it existed at the time of delivery.¹⁹⁷ In the CP, the definition of delivery was stated as the point at which goods were first delivered to the customer. However, a question was raised as to whether the redelivery of replacement goods or repaired goods would qualify as a delivery.¹⁹⁸ The definition of delivery as given by the SoGA is the voluntary transfer of possession from one person to another¹⁹⁹ and this could include a redelivery as defined above. However, the writers were of the opinion that the term in Part 5A of the SoGA was inconsistent with the above suggested interpretation.²⁰⁰

Certain writers argued in favour of the interpretation that allows the six month burden of proof to restart, arguing that this interpretation was in line with the European approach. However, they recognised that problems could arise where different defects manifested themselves at different times.²⁰¹ The CP also recommended that the six month reverse burden of proof should restart after a defective good has been repaired or replaced and redelivered to the buyer.²⁰²

¹⁹⁵ See case law listed 4.2.4.1 where reasonable time was discussed with regards to right to reject under the traditional UK remedies. See also *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 3.39 pg 29.

¹⁹⁶ Para 1.23

¹⁹⁷ S 48A(3) SoGA.

¹⁹⁸ *Consultation Paper on Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 6.51 pg 66.

¹⁹⁹ S 61(1) SoGA.

²⁰⁰ Section 48B of SoGA (now repealed) provided that the buyer can require the seller to repair or replace the goods at the seller's expense. The seller is required to do so within a reasonable time. If the buyer makes this request they lose the right to reject the goods unless the seller does not comply within a reasonable time. The seller need not repair or replace the goods where this would be impossible or disproportionate to do so.

²⁰¹ R Bradgate and C Twigg-Flesner *Blackstone's Guide to Consumer Sales and Associated Guarantees* (2003) 97.

²⁰² *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 6.54 pg 66.

Another issue was that the six month presumption applied only to consumer contracts in respect of the remedies outlined in Part 5A of SoGA. The other previously existing remedies were not afforded the same protection and, hence, the consumer had to fulfil the burden of proof even during the six month period. No recommendations were made in this regard.

Another issue related to how to treat the time during which a good is being repaired and how this would affect the burden of proof after the repairs were complete. The recommendation in this regard was that the six month burden of proof would be suspended while the goods were being repaired and would then resume at the time the goods are redelivered post repair.²⁰³ Furthermore, it was recommended that the six month reverse burden should recommence where goods have been replaced.²⁰⁴

The progression from first tier remedies to second tier remedies in the CSD

It was highlighted that it was difficult to determine when a consumer could move to second tier remedies particularly after being subject to a number of replacements and repairs. The European Commission attempted to provide for this issue by recommending a new provision: a consumer would be able to make use of a second tier remedy where ‘the same defect has reappeared more than once within a short period of time’.²⁰⁵ However, another concern was raised that this would possibly encourage increased litigation where the issue would be whether the fault complained of was the same as the earlier fault. The report recommended that the consumer should be eligible for a second tier remedy after one failed repair or replacement.²⁰⁶

The drafters of the CP proposed that consumers should only have a right to remedies relating to faulty goods for a period of two years.²⁰⁷ However, there was a general concern expressed by the report (as well as interested parties)²⁰⁸ that this period would not sufficiently protect consumers who purchase goods with long life-spans where defects may take longer to

²⁰³ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 6.58 and 6.59 pg 67.

²⁰⁴ *Ibid.*

²⁰⁵ Commission on the European Communities, ‘Proposal for a Directive of the European Parliament and of the Council on consumer rights’ COM (2008) 614/4 (8 October 2008), available at [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2008\)0614_/com_com\(2008\)0614_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2008)0614_/com_com(2008)0614_en.pdf), accessed on 27 April 2017. At art 26(4)(d). Herein referred to as ‘the proposed directive’.

²⁰⁶ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.36 – 1.37 pg xii.

²⁰⁷ Proposal for directive on consumer rights, COM (2008) 614 final, art 28(1).

²⁰⁸ Many consultees including the Faculty of Advocates, the City of London Law Society, Gillian Black and others, and Consumer Focus.

manifest themselves.²⁰⁹ There was also a fear that introducing this time limit would encourage manufacturers to drop quality standards in their goods as they would be aware that goods are only expected to last for two years. It was accordingly recommended that the time lines in existence and applied to general contractual claims in England, Wales and Scotland should continue to be applied.²¹⁰ These were, six years in the case of England and Wales, and five years in the case of Scotland.

The Proposed Directive on Consumer Rights²¹¹ recommended major changes to the law on consumer remedies for goods which did not conform to contract. The European Commission proposed that it be a measure of maximum harmonisation.²¹² If the Directive was adopted as it was drafted, the UK would have had to repeal the right to reject.²¹³ The CP suggested that a short term right to reject should be maintained by the UK as it was easy to use, consumers associated it with higher standards of quality, and the drafters of the CP believed it boosted consumer confidence.²¹⁴ However it required better integration with the European remedies. It was suggested that it could be retained in three ways. First, the UK could be permitted to retain this right if the proposed directive was adopted as a measure of minimum harmonisation.²¹⁵ Secondly, the proposed directive could be incorporated as a measure of maximum harmonisation while incorporating the right to reject. The third alternative which seemed to be considered was differentiated harmonisation. This basically meant that the harmonisation would relate to areas of consensus and in this particular case, the right to reject would fall outside the scope of this type of harmonisation.

The CP also suggested that the right to reject could be modified to include three remedies that would be available at first instance: termination of the contract with full refund (where the remedy is exercised within the normal period of 30 days, subject to exceptions); repair; or replacement.²¹⁶

²⁰⁹ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 6.60 – 6.70 pg 67 – 69.

²¹⁰ *Ibid.*

²¹¹ Proposal for directive on consumer rights, COM (2008) 614 final.

²¹² Maximum harmonisation means that member states could not maintain or adopt measures diverging from those laid down by the directive.

²¹³ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.16 pg ix.

²¹⁴ These opinions were gathered from the consumers through market research.

²¹⁵ Minimum harmonisation means that the member states would be able to maintain or adopt measures which give greater rights than those in the directive.

²¹⁶ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.19; 1.46 – 1.48.

The treatment of minor defects

With regards to treatment of goods with minor defects, the directive proposed that the right to reject ought to be abolished and furthermore, the consumer would not be entitled to rescind the contract.²¹⁷ Instead the consumer would have the right to replace or repair, and on failure of these remedies, the consumer would have the right to a reduction in price.²¹⁸ The CP recommended against this view stating that the protection that was offered previously²¹⁹ to consumers should not be reduced as suggested by the proposed directive but maintained. This would prevent unnecessary disputes over what is considered minor or the risk of having all faults considered as minor by the seller.²²⁰

4.2.5 The Directive on Consumer Rights and the Consumer Rights Act 2015

The Consumer Rights Directive 2011²²¹ was implemented in the UK through the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.²²² The 2013 Regulations brought further rules relating to distance and online selling. These included extending the "cooling-off period" for consumers from 7 to 14 days, cutting the period for customer refunds from 30 to 14 days, making it a requirement that "pay" buttons on traders' websites clearly signpost the customer's obligation to pay, prohibiting pre-ticked boxes on traders' websites,²²³ imposing a maximum 30-day window for the delivery of goods and services, unless the customer agrees otherwise and banning premium rate help-lines.²²⁴

The reforms implemented by the 2013 Regulations have assisted in the harmonization of online selling rules across the EU. However, the UK Government has also been keen to update and simplify general UK consumer rules. This has been achieved through the enactment of the Consumer Rights Act 2015 (CRA). The CRA brought with it a number of instrumental changes. Only those affecting quality and remedies will be discussed.

²¹⁷ Article 26(3).

²¹⁸ *Consultation Paper on Consumer Remedies for Faulty Goods* (note 97) para 1.26; 3.98 – 3.110.

²¹⁹ The law that was in place at the time of the recommendations stated a consumer could exercise the right to reject where he had shown that one of the implied terms had been breached, and subsequently had not accepted the goods – this applied even where there were minor defects such as imperfections in the appearance of the goods or the finish or small malfunctions.

²²⁰ *Consultation Paper on Consumer Remedies for Fault Goods* (note 97) para 1.27 pg xi.

²²¹ 2011/83/EC.

²²² SI 2013/3134. Herein after referred to as the Consumer Contracts Regulations.

²²³ Meaning further up-sells must be actively agreed to.

²²⁴ Duncombe (note 15).

Quality standards relating to goods

Firstly, the requirements that goods must be of satisfactory quality, fit for purpose and meet the expectations of the consumer, currently implied into all trader-to-consumer contracts by existing legislation, remained statutory rights.²²⁵ This standard of quality applies to all goods that are bought on the basis of a description or a sample. Through the CRA, a further category of goods has been included: those purchased following the viewing or examination of a model of the final product.²²⁶ Sellers must be aware that sales of goods based on prototypes or models must meet this standard or the consumer will be entitled to a refund.²²⁷

Remedies available to the consumer

With regards to remedies, the CRA gives the consumer the right to reject goods that do not conform to the contract within the first 30 days of receiving them and is eligible to receive a full refund.²²⁸ The consumer also has the right to partial rejection.²²⁹ Where the consumer opts to have the goods repaired or replaced,²³⁰ the time limit for the right to a refund is 'paused' until the goods are returned to the consumer.²³¹ If, upon return, the goods still do not conform to the contract, then the consumer's right to reject is extended by a minimum of seven days.²³² Furthermore, if a fault is discovered after the 30-day rejection period, the consumer has the right to a repair or a replacement.²³³ The trader has one opportunity to provide the consumer with a product that conforms to the contract.

Where repair or replacement is impossible, or the attempt at repair fails or the replacement is also defective, the consumer has a final right to reject or a right to a reduction in price.²³⁴

The CRA enhances consumers' rights in this manner so as to give them a clear window for a refund, in contrast to the existing "reasonable" timeframe. This is in addition to the recent changes brought in by the 2013 Regulations: a 14 - day period for consumers to change their

²²⁵ Found under section 9 to 11 of the Consumer Rights Act.

²²⁶ Section 14 of Consumer Rights Act. See also Duncombe (note 15).

²²⁷ Ibid.

²²⁸ Section 20 CRA.

²²⁹ Section 21 CRA.

²³⁰ Section 23 CRA.

²³¹ Section 22(6) CRA. The consumer gains a short term right to reject. See also Duncombe (note 15).

²³² Section 22(7) CRA.

²³³ Section 23 CRA.

²³⁴ Section 24 CRA.

minds and the reduction from 30 to 14 days for the period in time in which traders must provide a refund.²³⁵

4.2.6 Conclusion

The SoGA developed greater protection for the consumer than the common law provisions. EU Directives played an important role in providing a benchmark for consumer legislation particularly being the motivation for the introduction of Part 5A of the Sale of Goods Act which brought out additional factors to be considered when assessing implied terms. However, it seems these developments still left a substantial amount of confusion particularly since it led to having two regimes that govern remedies for defective goods, namely section 15(b) of the sale of goods act 1979 and part 5A of the sale of goods act 1979.

After a few legislative amendments the Consumer Rights Act was enacted and it successfully set out a clearer application of the remedies. It also gave timeframes and considerations that should be taken into account regarding issues such as quality as well as how a consumer should pass from one remedy to another. This was essential in giving clarity to how consumers and sellers alike were to apply these remedies with the element of fairness being exercised to all the relevant parties.

An issue of particular interest is how the UK intends to handle the implications of Brexit on current and future consumer laws. Although there is no precedent for exiting the EU under the current treaty provisions, there is an exit procedure set out in Article 50 of the EU (Lisbon Treaty).²³⁶ However, the Article 50 provisions are untested and raise a considerable degree of uncertainty; hence it remains unknown on what terms the UK will leave. It will be interesting to note what the legal effect on UK law will be.

²³⁵ Duncombe (note 15).

²³⁶ The exit procedure is set out in Article 50 where, the UK will need to notify the Council of its intention to initiate the leave process. The Council will then negotiate and conclude an agreement with the UK for its withdrawal in accordance with certain guidelines it agrees on and subject to certain approvals. If the negotiations are not concluded within two years of the exit notification, the EU Treaties will cease to apply unless that two year period is extended by unanimous agreement of the Council and the UK. The exit agreement will need to be approved by the European Parliament and agreed both by the Council (by an enhanced qualified majority or 20 out of 27 Member States) as well as by the UK. As it stands it seems unlikely that the initial two year period will be sufficient. If the two year period were to expire without renewal before an exit agreement, it would trigger complex issues around conflict of laws. The situation would be made more uncertain because under Article 50(4) of the Treaty on the EU, "the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it". Therefore this effectively means much of the negotiation for the terms of the UK's withdrawal between the continuing EU Member States will take place without the UK's participation.

4.3 EUROPEAN MEMBER STATES AND CONSUMER PROTECTION

4.3.1 Introduction

As was commonly known, the European Economic Community, which was then called the European Community,²³⁷ was one of three²³⁸ communities established between 1951 and 1957. It comprised France, the German Federal Republic, Italy, Holland, Belgium and Luxembourg. The UK signed a Treaty of Accession in Brussels in 1972 to become part of this community, which was to take effect in January of 1973. Following this, Denmark, Ireland, Greece, Spain and Portugal as well as Sweden, Austria, and Finland became part of the EC.²³⁹ The original objectives of the EC eventually expanded over time to include social and financial factors, one of these being consumer protection measures. Two important treaties were formed in this regard. The Single European Act was adopted in 1987 and was concerned with creating European unity. The Maastricht Treaty, also referred to as the Treaty of European Union, was adopted in 1992 and effectively established the European Union²⁴⁰ governed by a European Council.²⁴¹

The EU is comprised of countries with different economic capabilities as well as varying consumer preferences. In order to sufficiently provide for each member, it is necessary to identify the problematic issues, evaluate possible solutions and adopt appropriate solutions into relevant consumer legislation which is then aimed at improving the consumer's overall position in the internal market.²⁴² The type of measure relied on by the EU is called the Directive. A directive does not apply directly, but has to be transposed into the national laws of each of the 28 EU Member States.²⁴³ It follows that each directive has a deadline by which each member state has to incorporate its provisions into national legislation.²⁴⁴ This process is commonly referred to as 'harmonisation',²⁴⁵ governed by Article 114²⁴⁶ of the Treaty on the

²³⁷ Referred to as EC.

²³⁸ The other two were the European Coal and Steel Community and the European Atomic Energy Community.

²³⁹ Harvey, Parry (note 153) 32.

²⁴⁰ Hereinafter referred to as EU.

²⁴¹ Harvey, Parry (note 153) 32.

²⁴² C Twigg-Flesner, H Micklitz 'Think Global – Towards International Consumer Law' (2010) 33 (3) *Journal of Consumer Policy* 201, 202.

²⁴³ European Commission website, (no date) available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en, accessed on 15 January 2018. C Twigg-Flesner *A Cross-Border-Only Regulation for Consumer Transactions in the EU* (2012) 1.

²⁴⁴ Ibid. Generally the given period is 2 years.

²⁴⁵ Twigg-Flesner points out that the terminology used in the EU Treaties is that of 'approximation' (note 243) 1.

²⁴⁶ It was subsequently Article 95 of the EC Treaty and before that Article 100a. Article 114 TFEU allows the European Union to "adopt the measures for the approximation of the provisions laid down by law, regulation or

Functioning of the European Union.²⁴⁷ More recently, the EU has adapted a full harmonisation approach from the previous minimal harmonisation as a means to curb member states from incorporating more protective consumer protection provisions within their national sphere than those offered in the directives.²⁴⁸ The justification for this move was centred on creating uniform rules to strengthen consumer confidence and avoid the fragmentation which resulted from minimal harmonisation.²⁴⁹

Most of the EU consumer law is mainly based on directives although they deal with specific areas of consumer protection,²⁵⁰ but there are some measures of more general application.²⁵¹ The EU has attempted to introduce a set of common consumer protection rules that requires member states to adjust national law rather than just adopting legislation that applies directly without any positive reinforcing behaviour on the part of the members.²⁵² This will be an analysis into the CSD and how effectively it has been applied in the different EU countries and their domestic law.

4.3.2 The EU Member States prior to the CSD

Prior to the passing of the CSD, all member states had legislation in place with regards to the sale of goods to consumers, although most of this legislation was made up of general rules.²⁵³ Several countries had adopted consumer-specific rules. However, the challenge came where the rules only provided a few additional provisions rather than a complete, detailed and separate framework on consumer sales.²⁵⁴

administrative action in Member States which have as their object the establishment and functioning of the internal market". See also S Weatherill *EU Consumer Law and Policy* (2013) 11.

²⁴⁷ Hereinafter referred to as TFEU.

²⁴⁸ N Reich 'From minimal to full to 'half' harmonisation' in J Devenney (ed) and M Kenny (ed) *European Consumer Protection Theory and Practice* (2012) 3.

²⁴⁹ Ibid.

²⁵⁰ For example, pre-contractual information, right to withdrawal from a contract where the circumstances in which it was made so justify, i.e. where it is made at a distance.

²⁵¹ Twigg-Flesner (note 243) 1.

²⁵² C Twigg-Flesner 'Comment: the future of EU consumer law-the end of harmonisation?' in J Devenney (ed) and M Kenny (ed) *European Consumer Protection Theory and Practice* (2012) 8.

²⁵³ C Twigg-Flesner 'Consumer Sales Directive (99/44)' in H Schulte-Nölke (ed), C Twigg-Flesner (ed) and M Ebers (ed) *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member State* (2008) 646-647. Twigg-Flesner states that Central and eastern European countries like the Czech Republic and Estonia, for example, only had general civil codes which did not contain specific consumer provisions. Estonian consumer sales rules were integrated with sales regulation in its Law of Obligations Act. Latvia had an early version of the Consumer Rights Protection Law of 1992 which had basic rules on consumer sales, but these fell short of the requirements of the Directive. Lithuania was in a similar position to the above as a 1994 law had introduced consumer protection provisions that supplemented its Civil Code of 1964.

²⁵⁴ Ibid. Austria implemented the Consumer Protection Law which restricted variations that could be made to the applicable legal rules by permitting an agreement whereby the seller could (i) avoid termination/price

Other Members had already adopted legislation that was similar to the rules that were subsequently introduced by Directive 99/44.²⁵⁵ The standard of conformity that was applied as well as the factors that were often considered in the application of the standard varied with the different member states, although there were some common aspects and requirements such as basic fitness for purpose.²⁵⁶ The remedies that were available for breach with regards to non-conformity varied. It was highlighted in the European Commission's Green Paper on Guarantees for Consumer Goods and after Sales Services²⁵⁷ that most EU member states²⁵⁸ had already made the provision for the 'right to reject' as a remedy available for defective goods while others had already made provision for repair and replacement in their domestic laws.²⁵⁹

reduction by providing conforming goods within a reasonable time; and (ii) avoid price reduction by repairing the fault. In Greece, a seller of new durable consumer goods was required to provide a written guarantee or a guarantee through other technical means to a consumer - see Sale of Consumer Goods and Guarantees: Article 5 of the Law 2251/1994 on Consumer Protection. See also Twigg-Flesner (note 253) 653 and IK Karakostas Consumer Protection Introduction (13.07.2016.) available at <http://www.greeklawdigest.gr/topics/consumer-protection/item/278-consumer-protection-introduction>, accessed on 13 May 2017. Such guarantees had to be consistent with the possible duration of the life expectancy of the product, and for which there were minimum standards. The law in Ireland, under section 53(2) of the Sale of Goods Act 1893, included a specific right for consumers to request a replacement for non-conforming goods. The same provision is found under section 21 of Sale of Goods and Supply of Services Act 16 of 1980. Portugal had a specific provision, Law 24/96 on Consumer Protection which offered some consumer-specific rules in addition to the civil code while Spain stipulated a general duty of safety for durable goods and stipulated the minimum content of the duty -Article 11 of the Law 26/1984 of July 19 for the Defense of Consumers and Users (*Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios*; "Law 26/1984"). Also the Spanish Civil Code had adopted the Roman law distinction between specific and generic goods. In Slovenia, the general sales law rules applied, with a few modifications made by the Consumer Protection Act of 1998. Apart from the seller's responsibility for material defects, provision was made for mandatory guarantees for the proper functioning of goods sold, product liability, contract of sale to mention a few (most of which was provided for by the general rules in the Obligations Code), and further specified in the Consumer Protection Act – see D Možina 'Harmonisation of Private Law in Europe and the Development of Private Law in Slovenia' *Juridica International* (2008) XIV 173 available at http://www.juridicainternational.eu/public/pdf/ji_2008_1_173.pdf, accessed on 13 May 2017. Sweden had also adopted a Consumer Purchase Act, which is a separate and complete piece of legislation – Twigg-Flesner (note 253) 653.

²⁵⁵ These were Denmark, Finland with the Consumer Protection Act 38/1978 taken from '38/1978 English' *Finlex* available at <http://www.finlex.fi/en/laki/kaannokset/1978/en19780038>, accessed on 13 May 2017; Netherlands Civil Code taken from MBM Loos Consumer sales in the Netherlands after implementation of the Consumer Rights Directive and with a view to the future Common European Sales Law (Legal studies research paper No. 2014-53, University of Amsterdam, 2014) 1; and Slovenia with the Consumer Protection Act 1998 taken from Možina (note 254) 176.

²⁵⁶ In Malta for example, legislation concerning sale of goods already existed, specifically provisions regarding to latent defects: Civil Code Art. 1424 – 1432 of (Chapter 16 of the Laws of Malta). Chapter 16 of the Laws of Malta, 1870 is available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580>, accessed on 22 May 2017.

²⁵⁷ COM(93) 509 final Brussels, 15 November 1993; Davidson Review (note 160) para 6.5.

²⁵⁸ These were Germany, France, the UK, Ireland, Belgium, Denmark, Spain, Greece, Portugal, Italy and Luxembourg. Twigg-Flesner (note 253) 675.

²⁵⁹ This included Denmark, Finland, Netherlands, Slovenia and Spain. Netherlands further made provision for reimbursement as a secondary option. Twigg-Flesner (note 253) 675.

Prior to the implementation of the CSD, there were significant differences between the laws of member states. Even after implementation, differences were present mainly because of the various modes of implementation that member states adopted.²⁶⁰ Some member states chose to apply these changes to their existing civil code or sales law, whereas others chose to adopt specific consumer protection provisions.²⁶¹ These specific rights built on those that already existed under the Civil Code, and were to prevail over all the provisions of any other law, to the extent that they were more favourable to the consumer.²⁶²

4.3.3 The Effects of the CSD on the Member States and their remedies

Most EU states found the implementation and interpretation of the CSD very challenging. It often overlapped with the domestic law for those states that had formulated a legal framework to cover aspects of consumer protection.²⁶³ However, the minimum harmonisation approach gave member states the freedom to increase or intensify consumer protection so long as effective implementation and enforcement of the minimum standards prescribed in the directive were guaranteed.²⁶⁴ The CSD applied to contracts for the sale of goods between a consumer and a seller. However, although some member states made no distinction between consumer and non-consumer sales, others chose to adopt a broader approach and covered business to business and consumer to consumer sales as well as business to consumer sales,²⁶⁵ and formulated separate rules to deal with consumer and non-consumer transactions.²⁶⁶

All the member states made provision for the remedies in Article 3 of the CSD. The provision of these remedies was transposed as required in many member states. However, there were some countries that applied this provision with variations.²⁶⁷ The CSD provided that the consumer would have a choice between two tiers of remedies. The first tier would grant the consumer a choice between repair and replacement while the second tier would

²⁶⁰ Twigg-Flesner (note 253) 654-655.

²⁶¹ Ibid. Italy adopted a new consumer code in 2005, Malta enacted specific rights in relation to consumer and trader transactions as part of the Consumer Affairs Act -Part VIII, IX and X (Chapter 378) Consumer Affairs Act.

²⁶² Twigg-Flesner (note 253) 655 Article 92.

²⁶³ Namely Belgium, Cyprus, France, Germany, Hungary, Ireland, Italy, Malta and the UK. See Twigg-Flesner (note 253) 652.

²⁶⁴ Reich (note 248) 3.

²⁶⁵ Such as Austria.

²⁶⁶ For example Hungary.

²⁶⁷ Twigg-Flesner (note 253) 652.

grant a price reduction or rescission of the contract. These remedies were adopted as per the CSD by a number of member states.²⁶⁸

Some members maintained the ‘right to reject’ separately,²⁶⁹ while others opted to maintain the right through giving the consumer the option to choose from all four remedies in the CSD.²⁷⁰ A number of countries²⁷¹ (with the exception of Finland, Germany, Netherlands, Poland and the UK) transposed the requirement on disproportionality²⁷² as it was given in the CSD. Cyprus, Germany and Czech Republic²⁷³ however, applied the test only between repair and replacement, with the initial two countries having inferred this from their domestic law.

²⁶⁸ Austria Laws at Section 9b of Consumer Protection Act KSchG available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1979_140/ERV_1979_140.pdf, accessed on 20 May 2017; Belgium (Article 1649 quater of the Act on the protection of consumers in respect of the sale of consumer goods) taken from Unofficial English Translation available at http://ec.europa.eu/justice/consumer-marketing/files/be_notification_art._33-csgd.pdf, accessed on 26 May 2017. Czech Republic at Section 2106 - 2107 of Act 89/2012 Coll: Civil Code available at https://is.muni.cz/el/1422/jaro2014/SOC038/um/NObcZ_anglicky_strojovy_preklad.pdf?lang=en, accessed on 27 May 2017; Denmark at Section 42 and 43(1) of Danish Sale of Goods Act of 28 March 2003 (amended on 6 June 2007) European Consumer Centre Denmark, available at <https://www.consumereurope.dk/menu/laws/danish-laws/danish-sale-of-goods-act/>, accessed on 26 May 2017; Finland at Chapter 5 Section 18 and 19 of the Consumer Protection Act 38/1978 amended (1258/2001) (note 255); Legifrance, France at Article L 211-9 and Article L 211-10 of the Consumer Code available at https://www.legifrance.gouv.fr/content/download/1960/13727/.../3/.../Code_29.pdf, accessed on 26 May 2017; Bundesministerium de Justiz und für Verbraucherschutz, Germany at Section 439-441 Civil Code available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1584, accessed on 27 May 2017; Hungary at Article 306(1) – (3) of Act IV of 1959 available at eu-soils.jrc.ec.europa.eu/Library/Themes/Contamination/.../HungaryCivilCode.doc, and Section 6: 157(2) of Act V of 2013 available at https://tdziegler.files.wordpress.com/2014/06/civil_code.pdf, accessed on 23 May 2017; Irish Statute Book Section 21 of ‘Sale of Goods and Supply of Services Act 1980’ available at <http://www.irishstatutebook.ie/eli/1980/act/16/enacted/en/html>, accessed on 13 May 2017; Autorita Garante Della Concorrenza E Del Mercato, Section 48 of the Legislative Decree no.206 of 6 September 2005 - Consumer Code (explanation of what constitutes a consumer guarantee is given in section 45) available at <http://www.agcm.it/en/list-consumer-protection/1725-legislative-decree-no-206-of-6-september-2005-consumer-code.html>, accessed on 22 May 2017; Malta at Section 74(2) (Chapter 378) Consumer Affairs Act; Dutch Civil Law, Section 7.1.3 Article 7:21, Dutch Civil Code Book 07 available at <http://www.dutchcivillaw.com/civilcodebook077.htm>, accessed on 24 May 2017; Sejm of the Republic of Poland, at Article 8 of the Act on specific terms and conditions of consumer sale and amendments to the Civil Code available at <https://www.uokik.gov.pl/download.php?plik=7630>, accessed on 23 May 2017; Official State Gazette, Spain at Article 118 -121 of the Revised text of the General Law for the Protection of Consumers and Users and other Supplementary Laws as approved in November 2007 which repealed Law 23/2003; IRACM, Section 2(m) of the 250 Act of 9 May 2007 Consumer Protection and Amendments to Act of the Slovak National Council No. 372/1990 Coll available at <http://www.iracm.com/wp-content/uploads/2013/01/act-on-consumer-protection-and-amendments-to-act-of-the-slovak-national-council-2007-4888.pdf>, accessed on 24 May 2017. The UK implemented the provisions of Article 3 through the introduction of Part 5A of the Sale of Goods Act 1979. The four remedies listed above operate together with the national law, thus granting the consumer more remedies. See Twigg-Flesner (note 253) 699.

²⁶⁹ Twigg-Flesner (note 253) 699-701. This included the UK, Ireland and France.

²⁷⁰ Ibid. This included Greece, Portugal, Latvia to mention a few.

²⁷¹ Ibid. These were Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, France, Hungary, Ireland, Italy, Malta, Slovakia, Spain and Sweden.

²⁷² This concerned assessing the proportionality element and considering whether a particular remedy was available to a consumer. Based on Article 3(3).

²⁷³ It did not include this provision in its domestic legislation. Twigg-Flesner (note 253) 699.

The Netherlands chose to apply a completely different approach²⁷⁴ from Article 3(3) while Finland adopted the term ‘unreasonable costs’ instead to refer to situations where a seller may prevent a consumer from requesting a particular remedy.²⁷⁵ Poland set out the criteria for determining disproportionality but did not mention the term itself.²⁷⁶

Latvia approached implementation slightly differently: a consumer had a choice between all four remedies initially. However, upon the lapsing of six months from the date of conclusion of the contract of sale, the provisions of Article 3 of the Directive became applicable.²⁷⁷ Germany disallowed the remedy of a price reduction where repair or replacement could be provided, unless it was certain that there would be significant inconvenience to the consumer.²⁷⁸ Greece, Lithuania and Portugal all gave the consumer free reign over the 4 remedies²⁷⁹ while Slovenia,²⁸⁰ though allowing the consumer the choice among all 4 remedies, imposed a restriction in that rescission was not available unless a seller had been given a reasonable time to attempt repair or replacement. No mention of the proportionality test is made in Latvia, Lithuania, Portugal or Slovenia.

The issue concerning the method that should be relied on for the calculation of price reduction is one that is yet to be successfully answered. There are different methods and approaches, all of which lead to different results. One method calculates the price reduction by multiplying the value of the non-conforming goods and the price, and dividing the result by the value which conforming goods would have had.²⁸¹ Another method applies a proportionate reduction of the purchase price.²⁸² A third method is the proportionate reduction approach; the relevant moment for comparison is the time of conclusion of the contract (the ratio is the relation between value of the goods without defect and goods with defect at the time of conclusion).²⁸³

²⁷⁴ Section 7.1.3 Article 7:21 para 1, Dutch Civil Code Book 07.

²⁷⁵ Refer to Chapter 5 and 18 of the Finnish Consumer Protection Act.

²⁷⁶ Twigg-Flesner (note 253) 699.

²⁷⁷ Article 28(1)-(3) of the Consumer Rights Protection Act.

²⁷⁸ Twigg-Flesner (note 253) 699: Section 439(3) Civil Code.

²⁷⁹ Ibid. Article 4 of the Decree Law 67/2003 Sale of Consumer Goods and Related Guarantees (Portugal).

²⁸⁰ Art. 37c of the Consumer Protection Act (ZVPot-A) amended in 2002.

²⁸¹ Germany relies on this method - Section 441(3) Civil Code.

²⁸² The Netherlands uses this method - Section 7.1.3 Article 7:22 para 1b Dutch Civil Code Book 07. Hungary also uses this method - Civil Code Section 306(1)(b) of Act IV of 1959 and Section 6: 159(2)(b) of Act V of 2013.

²⁸³ Slovenia as well as Spain make use of this method. Spain’s Article 8 of the Law 23/2003 on Guarantees in the Sale of Consumer Goods and more recently Article 122 of the revised text of the General Law for the

Article 3(6) of the CSD provides that a consumer is not entitled to have the contract rescinded if the lack of conformity is minor. Some member states have implemented this provision whilst others have chosen not to adopt it.²⁸⁴ Where the countries chose to exclude this provision, consumers still had the right to rescind the contract where the seller had not repaired or replaced the goods despite the lack of conformity being minor. Denmark adopted as a general rule that a consumer had no right of rescission if the lack of conformity was minor. However, it made an exception: the consumer was entitled to rescind the contract if the seller did not complete a repair or replacement within reasonable time, free of charge and without any significant inconvenience for the consumer.²⁸⁵

With regards to the two year time period, the CSD provided that a seller is liable for goods that lacked conformity if this arose within two years of the date of delivery.²⁸⁶ Finland, Ireland and the UK adopted different rules altogether with Ireland and the UK relying on the general prescription period for instituting a legal action for breach of contract. Spain introduced the two-year time period.²⁸⁷ However, there was a three- year prescription period that had been in place beyond which no action could be brought.²⁸⁸ The Netherlands did not implement this period, although there was a general two-year limitation period in place.

The CSD afforded member states the option to provide a consumer the opportunity to inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.²⁸⁹ Although Belgium neglected to implement this provision, it did, however, grant the option for parties to specify a notification period²⁹⁰ as

Protection of Consumers and Users and other Supplementary Laws as approved in November 2007 which repealed Law 23/2003.

²⁸⁴ These are Czech Republic, Estonia, Portugal, Slovenia and the UK. Twigg-Flesner (note 253) 684.

²⁸⁵ Section 78(1) and 78(4) of the Danish Consolidated Act on Sales of Goods (English). Danish Sale of Goods Act of 28 March 2003 (amended on 6 June 2007) European Consumer Centre Denmark, available at <https://www.consumereurope.dk/menu/laws/danish-laws/danish-sale-of-goods-act/>, accessed on 26 May 2017.

²⁸⁶ Article 5(1). The countries that transposed the requirement as per the CSD were Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania (Lithuania applied this time period except where a guaranteed quality term was specified) Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia and Sweden. See Twigg-Flesner (note 253) 682-683.

²⁸⁷ Article 9(1) of the Law 23/2003 on Guarantees in the Sale of Consumer Goods and Article 123(1) of the Revised text of the General Law for the Protection of Consumers and Users and other Supplementary Laws.

²⁸⁸ Article 9(3) of the Law 23/2003 on Guarantees in the Sale of Consumer Goods and Article 123(4) of the Revised text of the General Law for the Protection of Consumers and Users and other Supplementary Laws.

²⁸⁹ Article 5(2). It was implemented by Cyprus, Denmark, Estonia, Finland, Hungary, Italy, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. Members who chose not to implement were Austria, Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg and the UK. Twigg-Flesner (note 253) 680-682.

²⁹⁰ This period could not be less than two months. Twigg-Flesner (note 253) 680.

well as set out consequences where the agreed notification period was not adhered to.²⁹¹ Denmark stipulated that the period began when the consumer had actually discovered the lack of conformity. Finland provided that the consumer had to notify the trader within a reasonable time, which was considered to be at least two months.²⁹² This restriction, as in Denmark, did not apply where the seller had been grossly negligent or had not acted in good faith.²⁹³ Hungary required consumers to inform the seller within “the shortest time permitted by the prevailing circumstances” – this period was outlined to be within two months.²⁹⁴

Recital 18 outlined that member states could provide for a suspension of the two-year period in Article 5(1) and any other domestic limiting periods for the purpose of commencing the litigation process where the seller makes attempts to repair or replace non-conforming goods, or is in negotiations with a consumer over a settlement. Not many member states have adopted a specific rule with regards to Recital 18: Belgium provided that the period be suspended where negotiations over a remedy were under way or where repair or replacement was being conducted. In France, however, the period would only be suspended where a buyer used the extended guarantee,²⁹⁵ whereas in Hungary the period would be suspended while the goods were repaired and the consumer was unable to use them.²⁹⁶ The law in Malta outlined that the two-year period would be suspended for the duration of negotiations between the trader and the consumer with a view to reaching an amicable settlement.²⁹⁷

Article 5(3) implicitly stated that unless proved otherwise, any lack of conformity which became apparent within six months of delivery of the goods would be presumed to have existed at the time of delivery unless this presumption was incompatible with the nature of the goods or the nature of the lack of conformity. Most member states applied this rule effectively and correctly,²⁹⁸ while others chose to vary the rule or dispose of it completely.²⁹⁹

²⁹¹ CC Art.1649 quater of the Act on the protection of consumers in respect of the sale of consumer goods.

²⁹² Chapter 5 Section 16 of the Consumer Protection Act.

²⁹³ Chapter 5 Section 16(2) of the Consumer Protection Act.

²⁹⁴ CC Section 306(4) of Act IV of 1959 and Section 6: 162(1) and (2) of Act V of 2013.

²⁹⁵ Article L 211-16 of the Consumer Code.

²⁹⁶ CC Section 308(5) of Act IV of 1959 and section 6: 163(4) of Act V of 2013.

²⁹⁷ Section 78 of the Consumer Affairs Act.

²⁹⁸ Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Slovakia, Slovenia, Spain, Sweden and the UK. Finland for example amended the time that the period starts from the time of delivery to the point at which the passing of risk occurs (Chapter 5 Section 15(2) of the Consumer Protection Act). Twigg-Flesner (note 253) 682.

²⁹⁹ Lithuania did not adopt this rule while Luxembourg, Poland and Slovenia did not mention the restriction that the presumption would not apply where it would be incompatible with the nature of the goods or the nature of the lack of conformity. Twigg-Flesner (note 253) 682-683.

Portugal chose to apply a provision that would grant the consumer the reverse burden of proof for - year period from the time of delivery.³⁰⁰ The application of the reversed burden of proof was decided by the Federal Supreme Court in Germany. It was held that reversal would apply even where a lack of conformity was identifiable at the time of purchase, except where it was so obvious that a consumer not knowledgeable in respect of the particular subject matter would have discovered the defect.³⁰¹ Furthermore, the fact that a third party installed the goods did not negate the applicability of the reversed burden.³⁰²

The CSD allowed the member states the option to exclude second hand goods sold at public auction from the definition of ‘consumer goods’.³⁰³ A number of countries chose not to adopt this option.³⁰⁴ It followed that the CSD also provided for parties to a consumer contract to negotiate and agree on a shortened period of liability for second hand goods.³⁰⁵ Members all included the criterion of impossibility in their domestic legislation.³⁰⁶ With regards to the seller bearing the cost of the remedy inclusive of postage, labour and all relevant costs, most of the members applied this rule³⁰⁷ with a few exceptions.³⁰⁸

³⁰⁰ Article 3(2) of the Decree Law 67/2003.

³⁰¹ Twigg-Flesner (note 253) 434. See also BGH (DE) VIII ZR 363 / 04, 14 September 2005.

³⁰² Ibid. See also BGH (DE) VIII ZR 21 / 04, 22 November 2004.

³⁰³ Article 1(3). Countries that adopted this option were Spain (Spain opted for a limited exclusion referring to administrative auctions), UK, Finland, France, Germany, Greece and Hungary. Sweden was also included in this list although it had adopted this position prior to the CSD adding that auction sales were conducted ‘as is’ (voetstoots) where the consumer was present, meaning the obligation of conformity fell away.

³⁰⁴ Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Ireland, Italy (but Twigg – Flesner at 664 states that the above named countries provide that prior usage of the goods must be taken into account as well as faults resulting from normal use – wear and tear), Malta, Netherlands, Poland, Portugal, Slovakia and Slovenia.

³⁰⁵ This was applied in Austria (Article 9(1), sent. 1 and 2 of the Consumer Protection Act), Belgium (Article 1649 quater of the Act on the protection of consumers in respect of the sale of consumer goods), Czech Republic (Section 2168 of Act 89/2012 Coll: Civil Code), Cyprus (Article 13(2) of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law), Italy (Article 134(2) of the Consumer Code), Germany (Civil Code section 475(2)), Hungary (Civil Code Article 308(4) and Section 6:163(2) Civil Code 2013)), Luxembourg (Article 6(7) of the Consumer Sales Act), Poland (Article 10(1) of the Act on specific terms and conditions of consumer sale and amendments to the Civil Code), Portugal (Article 5(2) of the Decree Law 67 / 2003), Slovakia (Civil Code Section 620(2)), Slovenia (Article 37b(2) of the Consumer Protection Act), Spain (Article 9(1) of the Law on Guarantees in the Sale of Goods for Consumers) and Sweden (Article 17 of the Consumer Purchase Act - this provision flows indirectly from the provision concerning the sale of goods as is, which is restricted, but where second hand goods are purchased at auction the situation is different).

³⁰⁶ With the exception of Slovenia which did not restrict the right to any of the remedies on the basis of impossibility. Twigg-Flesner (note 253) 677.

³⁰⁷ These were Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta, Poland, Portugal, Slovakia, Spain, Sweden and the UK; excluding Lithuania. Twigg-Flesner (note 253) 677.

³⁰⁸ Czech Republic and the Netherlands (Section 7.1.3 Article 7:21 para 2 Dutch Civil Code simply worded it as the ‘costs of compliance’) were not specific as to what was entailed under the term ‘free of charge’. Greece and France preferred to use different phrases - Greece preferred ‘without any cost to the consumer’ taken from Civil Code Article 540 while France used ‘without any cost to the buyer’ as indicated in Article L. 211-11 of the Consumer Code.

4.3.4 Conclusion

Although the CSD has attempted to redress issues concerning consumer protection and remedies, there are still a few concerns in the structure of the directive and its application in the member states particularly because it is subject to application through the minimum harmonisation approach. The European Commission thus opted for the implementation of the full harmonisation approach so as to encourage a more aggressive internal market as well as to deter member states from adopting more protective consumer protection provisions than those provided by the Commission.³⁰⁹ The Commission justified this new position³¹⁰ with the argument that consumer confidence³¹¹ required a uniform set of rules, and minimum harmonisation had failed to provide this, and instead had led to a fragmentation of Member State laws which had created additional impediments to cross-border marketing, especially in e-commerce. This was followed by the introduction of the Consumer Rights Directive which made some notable changes such as the maximum harmonisation approach as well as aiming to provide a high level of consumer protection by attempting to address the issue of uneven consumer protection across the EU.³¹²

4.4 CONSUMER PROTECTION IN THE UNITED STATES OF AMERICA

4.4.1 Introduction

The United States has a large and complex economy which offers perhaps the broadest potential for products and services. With such opportunities comes the risk of scams, fraud, and outright theft. Consumer protection has been in existence for over a century with the introduction of freedom of contract and caveat emptor (let the buyer beware).³¹³ ‘The consumer protection movement followed in the 1960s mainly in response to a Consumer Bill of Rights by President Kennedy, the growth of the “Great Society” program of the Johnson

³⁰⁹ Reich (note 248) 3.

³¹⁰ This new strategy had been implemented in directives in the area of distance marketing of financial services, unfair commercial practices, consumer credit and timeshare agreements.

³¹¹ The consumer confidence argument was extensively criticised with requests for corroboration for this argument. Reich (note 248) 4.

³¹² Centre for Strategy & Evaluation Services, EPRD, Risk & Policy Analysts ‘Study on the application of the Consumer Rights Directive 2011/83/EU’ Final Report (2017) available at http://ec.europa.eu/newsroom/document.cfm?doc_id=44637, accessed on 18 March 2018. See also C Twigg-Flesner, ‘The Consumer Rights Directive, Consumer Sales and English Law – The Fear of Coherence?’ (2015) *Le Nuove Leggi Civili Commentate*, 1 - 21.

³¹³ SW Waller, JG Brady, RJ Acosta, J Fair, ‘Consumer Protection in the United States: An Overview’ (2011) *European Journal of Consumer Law*, 1, 1.

Administration, and the efforts of Ralph Nader and other consumer advocates to highlight the existence of unsafe products and the growing need for greater government regulation'.³¹⁴

Over the years, consumer protection has developed and consumer confidence has increased owing to the fact that, despite the challenges that they may face, there is some sort of governmental reprieve that will provide the buyers 'with a way to make things right'.³¹⁵ Consumer protection extends to unsafe products, fraud, deceptive advertising, and unfair business practices through a combination of national, state, and local governmental laws.³¹⁶ There are also several mechanisms in the form of common law and federal and state statutes in place to try and provide more protection, however of late businesses have proposed introducing limitations on consumer protection regulations to encourage global competitiveness.³¹⁷ However, the need to provide adequate protection to consumers still exists.

4.4.2 Mechanisms for Consumer Protection in the United States of America

4.4.2.1 Federal Trade Commission³¹⁸

The principal consumer protection agency at the federal level is the United States Federal Trade Commission (FTC).³¹⁹ The FTC was created in 1914 with the purpose of preventing unfair methods of competition in commerce as part of the battle to "bust the trusts." Over the years, it was given the mandate to police anticompetitive practices and administer a wide variety of other consumer protection laws, including the Telemarketing Sales Rule, the Pay-Per-Call Rule and the Equal Credit Opportunity Act.³²⁰ In 1975, Congress gave the FTC the authority to adopt industry-wide trade regulation rules. This was aimed at protecting consumers by enhancing informed consumer choice and public understanding of the competitive process, and accomplishing this without unduly burdening legitimate business activity.³²¹

³¹⁴ Ibid.

³¹⁵ J Fischer 'Consumer Protection in the United States and European Union: Are Protections most effective before or after a sale?' (2014) 32 (2) *Wisconsin International Law Journal* 308, 309.

³¹⁶ Waller et al (note 313) 2.

³¹⁷ Fischer (note 315) 309.

³¹⁸ These words are found on the website for FTC. It is found at <http://www.ftc.gov>.

³¹⁹ The United States Federal Trade Commission also jointly enforces U.S. federal civil competition law along with the Antitrust Division of the Justice Department. This information is found at <http://www.ftc.gov>.

³²⁰ 1974 (Codified at 15 United States Code Section 1691 et seq). FTC website, 'About FTC' available at <https://www.ftc.gov/about-ftc>, accessed on 19 May 2017.

³²¹ Ibid.

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy. It pursues vigorous and effective law enforcement; advances consumers' interests by sharing its expertise with federal and state legislatures and U.S. and international government agencies, develops policy and research tools through hearings, workshops, and conferences; and creates practical and plain-language educational programs for consumers and businesses in a global marketplace with constantly changing technologies.³²²

4.4.2.2 Consumer Product Safety Commission³²³

The U.S. Consumer Product Safety Commission (CPSC) is an independent federal agency with the mandate to regulate public health and safety in a bid to protect consumers from unreasonable risks of injury or death caused by consumer products. This is achieved through regulation of policy, compliance and enforcement.³²⁴ The CPSC was created in 1972 by the Consumer Product Safety Act (CPSA). Apart from the provisions of the CPSA, the Consumer Product Safety Improvement Act of 2008 (CPSIA) and Public Law No. 112-28 made amendments such that the CPSC also administers several other statutes.³²⁵ The CPSC has jurisdiction over thousands of types of consumer products used in and around the home, in recreation and schools.³²⁶ It is mandated to educate consumers on how to identify and address product safety hazards. The CPSC's regulatory purview is quite broad encompassing import surveillance, the development and strengthening of voluntary standards and developing mandatory regulations, public outreach, intergovernmental coordination and cooperation with foreign governments.³²⁷

4.4.2.3 Uniform Commercial Code

The Uniform Commercial Code (UCC) was initially published in 1952 and is one of numerous uniform demonstrations introduced with the motivation of synthesising the law of

³²² Ibid.

³²³ These words are found on the website for CPSC. It is found at <http://www.cpsc.gov>.

³²⁴ CPSC website 'About CPSC' available at <https://www.cpsc.gov/About-CPSC>, accessed on 20 May 2017.

³²⁵ These are the Federal Hazardous Substances Act (Codified at 15 United States Code Section 1261-1278), the Flammable Fabrics Act (Codified at 15 United States Code Section 1191-1204), the Poison Prevention Packaging Act of 1970, the Refrigerator Safety Act 1956 (Codified at 15 Section 1211-1214), the Virginia Graeme Baker Pool and Spa Safety Act 2007 (Public Law 110-140), and the Children's Gasoline Burn Prevention Act 2008 (Public Law 110-278)[H.R. 814].

³²⁶ CPSC website (note 324).

³²⁷ US Consumer Product Safety Commission, 'Strategic Plan 2016 – 2020' (no date) available at https://www.cpsc.gov/s3fs-public/CPSC_2016-2020_Strategic_Plan_0.pdf, accessed on 28 May 2017. At 7.

sales and commercial transactions within the United States.³²⁸ The objective was to introduce uniformity and standardisation in the processes and laws that surround commercial transactions in all the states from initiation to conclusion, and negotiation where applicable.³²⁹

It has eleven articles³³⁰ and has often been referred to as a collection of statutes intended as a model code that may be adopted by all U.S state legislatures.³³¹ Consequently, it was highlighted that the UCC would not be law in any particular state unless the legislature in the particular state adopted it as law.³³² It has generally been successful at achieving adoption.³³³ Some U.S. jurisdictions³³⁴ have adopted all of the articles contained in the UCC, while other U.S. jurisdictions³³⁵ have not adopted any articles in the UCC.³³⁶

The UCC is renowned for its flexible nature and its ability to bring about uniformity, while affording the different jurisdictions the freedom to adopt and adjust the articles to their specific needs and preferences.³³⁷ The legislative provisions vary from one jurisdiction to another. These variations may also stem from alternative language found in the official UCC itself; at other times, they may arise from different revisions to the official UCC being

³²⁸ Law Offices of Stimmel, Stimmel & Smith ‘The Uniform Commercial Code – The Basic Structure’ (no date) available at <https://www.stimmel-law.com/en/articles/uniform-commercial-code-basic-structure>, accessed on 21 January 2018.

³²⁹ GA Hisert ‘Uniform Commercial Code: Does one size fit all’ (1994) 28 *Loyola of Los Angeles Law Review* 219, 219.

³³⁰ Article 1: General Provisions, Article 2: Sales, Article 2A: Leases, Article 3: Commercial Paper, Article 4: Bank Deposits and Collections, Article 4A: Funds Transfers, Article 5: Letters of Credit, Article 6: Bulk Transfers, Article 7: Warehouse Receipts, Bills of Lading and Other Documents of Title, Article 8: Investment Securities, and Article 9: Secured Transactions; Sales of Accounts and Chattel Paper. See US Legal.Com ‘Articles of the UCC’ (no date) available at <https://uniformcommercialcode.uslegal.com/articles-of-the-ucc/>, accessed on 29 May 2017.

³³¹ Fullerton Law website ‘Uniform Commercial Code of Sale of Goods’ (no date) available at <http://www.fullertonlaw.com/construction-law-survival-manual/uniform-commercial-code-sale-of-goods.html#a>, accessed on 29 July 2015.

³³² Ibid.

³³³ Arizona, California, Georgia, Nebraska.

³³⁴ These are Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Idaho, Iowa, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin and Wyoming.

³³⁵ American Samoa.

³³⁶ Cornell Law School ‘Uniform Commercial Code Locator’ (no date) available at <https://www.law.cornell.edu/uniform/ucc>, accessed on 31 May 2017.

³³⁷ US Legal.Com website ‘Uniform Commercial Code’ available at <https://uniformcommercialcode.uslegal.com/>, accessed on 2 June 2017. Hisert (note 329) 232.

adopted.³³⁸ Lastly, even where identical language is adopted by two jurisdictions, there may nonetheless be subject to different statutory interpretation by the courts in each state.

The UCC has assisted with the protection of consumer interests particularly in the area of consumer sales. The article of importance is Article 2 – Sales, most notably Part 3. It provides the governing law with warranties that allow a consumer to be granted recourse where an economic loss or physical injury is unexpectedly incurred.³³⁹ The UCC (article 2) provides three qualitative warranties; an express warranty and implied warranties regarding the issue of quality. The concept of a warranty is perceived as an influential component existing in both commercial and consumer sales contracts, and is often regarded as the most critical issue in the contract negotiation.³⁴⁰ It is referred to as a statement or representation made by a seller of goods contemporaneously with, or as a part of the contract of sale. Although collateral to the expressed object of the contract, it has reference to the character, quality or title of the goods. The warrantor promises or undertakes to ensure that certain facts are or shall be as he then represents them.³⁴¹

Express Warranties

The express warranties by the seller are found under section 2-313 of the UCC. A seller can make an express warranty in three ways. Firstly, any affirmation of fact or promise made by the seller to the buyer relating to the goods becomes part of the basis of the bargain and creates an express warranty that the goods shall conform to the affirmation or promise.³⁴² The same principle applies with regards to any description³⁴³ and any sample or model³⁴⁴ made part of the bargain.³⁴⁵ It is not necessary to the creation of an express warranty that the seller uses formal words such as "warranty" or "guarantee" or that he has a specific intention to make a warranty. It must also be noted that an affirmation merely of the value of the goods or a

³³⁸ US Legal.Com website (note 337).

³³⁹ UCC section 2-715(1), (2)(a) and (2)(b).

³⁴⁰ K Chapman, MJ Meurer 'Efficient remedies for breach of warranty' (1989) 52 (1) *Law and Contemporary Problems* 107.

³⁴¹ AA Okharedia 'Consumer's reliance on warranties: A comparative study of the United States of America & South Africa' (2002) 27(2) *Journal for Juridical Science* 130.

³⁴² UCC section 2-313(1)(a). DT Smith 'The minority approach that could protect the majority of Kentucky consumers: relaxing the privity requirement for implied warranties of merchantability' (2014) 52 (3) *University of Louisville Law Review* 586.

³⁴³ The description creates an express warranty that the goods shall conform to the said description.

³⁴⁴ The same applies here: the sample or model creates an express warranty that the whole of the goods shall conform to the sample or model.

³⁴⁵ UCC section 2-313(1)(b) and (c) respectively.

statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.³⁴⁶

The seller breaches an express warranty where the goods fail to conform to a promise or an affirmation of fact, or the goods will not conform to a description, sample, or model.³⁴⁷ The case of *In re Scotts EZ Seed Litigation*,³⁴⁸ for example, involved a claim for breach of express warranties. The seller and manufacturer sold grass seed that was labelled with certain qualities.³⁴⁹ The buyers alleged that the seed did not grow as indicated when it was used as per the directions of the manufacturer. The court found that many of the labelled statements concerning the seed were only opinions and did not create express warranties.³⁵⁰

Implied Warranties

Implied warranties are quite different from express warranties because they do not require any writing or explicit statement by a seller to indicate that the warranty exists. There are two implied warranties found under section 2-314 and 315 of the UCC. These are merchantability, usage of trade and fitness for particular purpose, the most common being that of merchantability. Unless excluded or modified by section 2-316, goods are termed as merchantable where a warranty is implied in the contract of sale by a seller who is a merchant³⁵¹ with respect to goods of that kind.³⁵² The definition excludes occasional sellers. Goods would be said to have fulfilled the above requirement where they:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of *fair average quality*³⁵³ within the description; and
- (c) are *fit for the ordinary purposes for which such goods are used*,³⁵⁴ and

³⁴⁶ UCC section 2-313(2).

³⁴⁷ T Davis 'UCC Breach of Warranty and Contract Claims: Clarifying the Distinction' (2009) 61 *Baylor Law Review* 785.

³⁴⁸ *No. 12 CV 4727(VB)*, 2013 WL 2303727 (S.D.N.Y. May 22, 2013).

³⁴⁹ at 1.

³⁵⁰ This included statements like "WaterSmart," "Drought tolerant," "Grows Anywhere! Guaranteed!" "Makes the Most of Every Drop," to mention a few.

³⁵¹ UCC section 2-104(1) defines a merchant as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

³⁵² UCC section 2-314(1).

³⁵³ Own emphasis.

³⁵⁴ Own emphasis. In the case of *In re Scotts EZ Seed Litigation* (note 346) the court also held that the buyers could state a breach of implied warranty of merchantability claim against the sellers because grass seed that does not grow any grass is not fit for its ordinary purpose.

- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labelled as the agreement may require; and
- (f) conform to the promise or affirmations of fact made on the container or label if any.³⁵⁵

An implied warranty arises out the sale itself and covers what the buyer reasonably expects of the good in relation to the quality that is "comparable to what is generally acceptable in that line of trade under the description or other designation of the goods."³⁵⁶ It is therefore unnecessary for the buyer to show any express representations by the seller. However, where a buyer examined the goods as fully as he defines before entering into the contract of sale or refused to examine the goods, there is no implied warranty where defects arise which such examination would have revealed to him.³⁵⁷

Section 2-314 also describes the circumstances under which such a warranty is breached. If goods fail to comply with these standards at the time they are delivered, the implied warranty of merchantability has been breached.³⁵⁸ It has been highlighted that for quite some time the majority of courts tended to enforce strictly the vertical privity requirement where there was a breach of an implied warranty.³⁵⁹ Vertical privity is defined as the relationship between the parties to a contract, which allows the parties to sue each other but prevents a third party from doing so. A contractual relationship that effectively creates vertical privity between a seller and a purchaser can be created with the sale of goods for example. Where a state requires vertical privity, a consumer must prove the following to successfully prove a breach of implied warranty claim: (1) that the defendant created a warranty with no applicable disclaimer; (2) that defendant breached that warranty; and (3) that the consumer had a privity

³⁵⁵ UCC section 2-314(2).

³⁵⁶ Smith (note 342) 588.

³⁵⁷ Okharedia (note 341) 133.

³⁵⁸ In the case of *Seaside Resorts, Inc. v. Club Car, Inc.*, 416 S.E.2d 655, 659-60 (S.C. Ct. App. 1992) (applying North Carolina law), the court stated: to recover for breach of the implied warranty of merchantability, the plaintiff must establish: (1) a merchant sold goods, (2) the goods were not 'merchantable' at the time of sale, (3) the plaintiff or his property was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

³⁵⁹ Reference is made to the following cases - *Jenkins Brick Co. v. Waldrop*, 384 So. 2d 117, 118 (Ala. Civ. App. 1980); *Flory v. Silvercrest Indust. Inc.*, 633 P.2d 383, 388 (Ariz. 1981) where the court held that economic loss through implied warranty was not recoverable without privity of contract; *Koellmer v. Chrysler Motors*, 276 A.2d 807, 812 (Conn. Cir. Ct. 1970); *Mellander v. Kileen*, 407 N.E.2d 1137, 1138 (111. App. Ct. 1980); *Compex Int'l Co. V. Taylor*, 209 S.W.3d 462, 465 (Ky. 2006); *Herbstman v. Eastman Kodak Co.*, 342 A.2d 181, 185 (N.J. 1975).

relationship with the defendant.³⁶⁰ Thus, many consumers were unable to successfully file a breach of implied warranty claim against a manufacturer.

Recently, however, there has been a shift among the minority of courts. They have relaxed the requirement for privity under certain circumstances in order to achieve a more equitable result for consumers. States such as Texas, North Carolina, and Pennsylvania are among the jurisdictions that overturned years of precedential interpretation of their respective state's UCC statutes in order to abolish the privity requirement for a breach of implied warranty claim.³⁶¹

Remedies

The remedies afforded under the UCC for defective goods are rejection of the goods or cancellation of the contract and the receipt of substitute goods or cancellation of the contract and recovery of damages for non-delivery. UCC section 2-711 generally permits an aggrieved buyer to pursue specified remedies, including the recovery of payments to the breaching seller.³⁶² Where the seller repudiates or fails to deliver the goods, the buyer's damages amount to the difference between the contract price and the market price at the time that the buyer learned of the breach.³⁶³ Section 2-712 allows an aggrieved buyer to "cover" by making good faith, reasonable purchases of substitute goods. Therefore, recovery will be pursued under section 2-713, which provides that an aggrieved buyer's damages are measured at the time the buyer learned of the breach, if a seller fails to deliver or repudiates the contract.³⁶⁴

The appropriateness of a buyer's cover under section 2-712 was considered in *Man Industries (India), Ltd. v. Midcontinent Express Pipeline, LLC*.³⁶⁵ Midcontinent Express Pipeline, LLC ("Midcontinent") contracted to buy pipe from Man Industries (India), Ltd. ("Man"). After Man fell behind on the delivery of the pipe, Midcontinent refused Man's request to extend the

³⁶⁰ Smith (note 342) 585.

³⁶¹ Ibid 589-590. More on this issue can be found in the article referenced.

³⁶² See *Bennett v. CMH Homes, Inc.*, No. 3:08-01212, 2013 WL 146034, at *3, *7-8 (M.D. Tenn. Jan. 14, 2013).

³⁶³ UCC section 2-713(1). See also *A & G Coal Corp. v. Integrity Coal Sales, Inc.*, No. 12 Civ. 5293 (ALC), 2013 WL 2244311, at *6 (S.D.N.Y. May 21, 2013).

³⁶⁴ In *Santorini Cab Corp. v. Banco Popular N. Am.*, 999 N.E.2d 46 (Ill. App. Ct. 2013) the court held that the difference between the market price and the contract price was measured at the time the buyer learned of the breach, not at the time of trial.

³⁶⁵ 407 S.W.3d 342 (Tex. App. 2013).

time for performance and contracted a third party for cover.³⁶⁶ When Man nevertheless attempted to draw the entire amount on Midcontinent's letter of credit, Midcontinent brought suit. The Texas Court of Appeals affirmed the lower court's award of cover damages to Midcontinent under section 2-712. The court rejected the seller's argument that Midcontinent was not entitled to cover damages.³⁶⁷ The court held that the obligation of good faith in obtaining cover did not require Midcontinent to extend the delivery deadline for Man or risk delay in project completion.³⁶⁸

The UCC provides aggrieved buyers with a limited right to revoke acceptance of non-conforming goods.³⁶⁹ In order to exercise this right, the non-conformity must substantially impair the value of the goods, and the buyer must have accepted the goods either on the reasonable assumption that the non-conformity would be cured (repaired), or without discovering the non-conformity due to discovery being difficult or due to assurances made by the seller.³⁷⁰

In the case of *Trisler v. Carter*³⁷¹ the buyer instituted a claim of revocation of acceptance under section 2-608 with respect to furniture.³⁷² After the seller refused to refund the purchase price, the buyer sued for breach of contract, including a claim for revocation of acceptance under section 2-608. The trial court ruled in favour of the buyer, but the Indiana Court of Appeals reversed this decision.³⁷³ The appellate court held that, with respect to the chest of drawers, the defects substantially impaired the chest's value, however, also that the buyer was not entitled to revoke acceptance because the buyer was able to discover the defect at the time of sale and his acceptance was not made on the assumption of any cure by the seller. Furthermore, there was no allegation that the filing cabinet was non-conforming in any way, so the buyer could not revoke acceptance under section 2-608.³⁷⁴

³⁶⁶ At 347.

³⁶⁷ At 362.

³⁶⁸ Ibid.

³⁶⁹ UCC section 2-608.

³⁷⁰ UCC section 2-608(1). See also JS Martin 'Sales' (2014) 69 (4) *Business Lawyer*: under revocation and acceptance.

³⁷¹ 996 N.E.2d 354 (Ind. Ct. App. 2013).

³⁷² The furniture consisted of a chest of drawers and a filing cabinet -- which the seller sold to the buyer. The chest of drawers had nails protruding through the back, which the buyer discovered when he brought the chest home. The filing cabinet was too large for the buyer to transport and he did not take it.

³⁷³ At 358.

³⁷⁴ Ibid.

It is important to note that Article 2 requires that actions for breach be brought within four years of the accrual of the cause of action.³⁷⁵ Plaintiffs who delay filing a lawsuit and come up against the statute of limitations often make creative arguments to avoid the dismissal of their suits as time barred.³⁷⁶

4.4.3 State Level Investigation and Enforcement

In most of the fifty states, the State Attorney Generals have the mandate to enforce state consumer protection laws.³⁷⁷ They are considered consumer advocates for their state populations. Attorney Generals may file lawsuits on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, obtain restitution on behalf of consumers, bring criminal cases when authorized by law, and make rules to govern trade practices.³⁷⁸ The National Association of Attorneys General (NAAG) also facilitates cooperation among Attorney Generals to enhance their consumer protection effectiveness and support multi-state consumer protection activity and litigation.³⁷⁹ In larger cities, there may also be a consumer protection division or bureau handling criminal and civil investigations and cases under state or local law.³⁸⁰

4.4.4 Conclusion

Because the USA is so large, it has several mechanisms that it relies on to encourage and develop consumer protection, most notably being the UCC. In as much as the implementation of the UCC has been a great milestone for the development of consumer law, a challenge still remains. As previously stated, the UCC is mainly implemented through rules and case law. This becomes problematic as not all the states have chosen to adopt the UCC as state law, and those that have adopted it have not adopted all the articles contained in the UCC. This makes it difficult to ensure that all consumers are equally protected against the same or similar vices especially where one state has not implemented the particular article that offers relief.

³⁷⁵ UCC section 2-725(1), (2).

³⁷⁶ In *Belsky v. Field Imports, Inc.*, the purchaser of a BMW vehicle who brought the lawsuit more than four years after buying the car and unsuccessfully argued that the Article 2 statute of limitations did not apply at all, or that it did not begin to run until she noticed the defects. The court rejected both arguments and granted the defendant's motion to dismiss the case.

³⁷⁷ Waller et al (note 313) 17.

³⁷⁸ Ibid.

³⁷⁹ See Information about NAAG's consumer protection efforts available at http://www.naag.org/consumer_protection.php, accessed on 29 May 2017.

³⁸⁰ For example the City of Chicago Department of Business Affairs and Consumer Protection is one such bureau. The website is available at <http://www.cityofchicago.org/city/en/depts/bacp.html>.

Another issue is the fact that each state relies on its own state laws. It follows that where two states have conflicting provisions for a particular issue, the resulting case law of each state will also be conflicting. Hence, it will be difficult to try and apply the rules of an article as well as case law across states in an equitable manner if the laws of one or more states conflict with the provisions of the specific article. Perhaps a more suitable approach would be to only set rules as given in the articles and some guidelines, but overall allow the states to apply them as they see fit until such a time as a single, codified piece of legislation can be drafted and applied to all the states.

4.5 OTHER CONSUMER PROTECTION BODIES AND PROVISIONS

4.5.1 Introduction

Both international and regional bodies have played quite an important role in the development and overall prominence of consumer protection. The development of international consumer law has increased in importance and necessity resulting in a term called ‘internationalisation’. This refers to both the process of drafting consumer law at the international level, as well as the harmonisation of the consumer law of diverse countries through instruments such as the case law of supranational judicial bodies.³⁸¹

There are two reasons that are attributed to the development of internationalisation of consumer law. First, different national regulatory systems regarding consumer protection have presented an obstacle for international trade.³⁸² Globalisation has similarly advocated for a unified consumer policy that would align diverse regulatory regimes among different countries, encourage the development of cross-border trade and successfully facilitate business and commercial activities in the market.³⁸³

Secondly, consumer protection plays a fundamental role in the acquisition of sustainability and development of a country. It follows that a well-developed system of consumer protection is linked to the basic foundations of a democratic state grounded in the fundamental principle of the rule of law. Ironically, many underdeveloped and some developing countries either do not have consumer law regimes or do not have adequately developed regimes. International organisations go to great lengths to support the

³⁸¹ HW. Micklitz, M Durovic *Internationalization of Consumer Law: A game changer* (2017) 2.

³⁸² A Grainger, ‘Trade Facilitation: A Conceptual Review’ (2011) 45 *Journal of World Trade* 39.

³⁸³ Micklitz, Durovic (note 381) 2.

establishment and improvement of consumer law in these countries mainly by providing models of consumer laws as a guide and reference as well as offering different programmes and support for the implementation of these models.³⁸⁴

This section will examine the roles that different regional and international organisations play in the development of international consumer law. It is evident that regular adjustments and modifications are necessary to ensure that international consumer law remains in line with the current social, political, legal and economical spheres and, in turn, remains adequately versed to provide sufficient regulatory redress.

4.5.2 The United Nations and Consumer Protection

The United Nations has always had a keen interest in the area of consumer protection. Through its former Economic and Social Council (ECOSOC), it developed the instrument of the United Nations Guidelines for Consumer Protection (UNGCP),³⁸⁵ which was adopted in 1985 by a consensus resolution of the General Assembly.³⁸⁶ The UN Guidelines have been expanded twice: initially being updated in 1999 by the Department of Economic and Social Affairs to include provisions on sustainable consumption and thereafter in 2015 by the General Assembly so as to provide for innovative provisions with regards to good business practices in business-to-consumer relations, dispute resolution and consumer redress.³⁸⁷ The Guidelines are viewed as a benchmark and provide assistance to interested member states in the formulation and enforcement of domestic and regional laws, rules and regulations that are suitable to their economic, social and environmental circumstances.

Among the legitimate needs that the Guidelines intend to achieve is access of consumers to adequate information to enable them to make informed choices according to individual

³⁸⁴ Ibid.

³⁸⁵ The objectives of the guidelines were mainly to take into account the needs and interests of consumers in all countries, particularly those in developing countries. This group of consumers often suffered imbalances in economic and educational levels as well as in bargaining power. It was fundamental to encourage the development of adequate protection that would ensure, among other things, that the rights of consumers regarding issues such as access to non-hazardous products, curbing abusive business practices and promotion of just, equitable and sustainable economic, social and environmental protection would be realized and enforced. See Objectives in United Nations website 'United Nations Guidelines for Consumer Protection (as expanded in 1999)' (2003) available at http://www.un.org/esa/sustdev/publications/consumption_en.pdf, accessed on 26 September 2016. This will be referred to as the UN 1999 Guidelines for ease of reference.

³⁸⁶ United Nations website 'United Nations Guidelines on Consumer Protection' (no date) available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>, accessed on 23 May 2017.

³⁸⁷ Ibid.

wishes and needs.³⁸⁸ The UN 1999 Guidelines outline the importance of standards for the safety and quality of consumer goods and services.³⁸⁹ The same is reiterated in the UN 2016 Guidelines.³⁹⁰ Both Guidelines emphasise that it is fundamental for governments to formulate and promote the elaboration and implementation of standards, voluntary and other, at national and international levels for the safety and quality of goods and services and, furthermore, to give them appropriate publicity.³⁹¹

National standards and regulations for product safety and quality had to be reviewed regularly to ensure conformity to generally acceptable international standards. Where a standard is lower than that which is generally accepted as the international standard, and is being applied because of the local economic conditions, the guidelines indicate that efforts have to be made to raise that standard as soon as possible. Lastly, it is pointed out that governments had to encourage and ensure the availability of facilities to test and certify the safety, quality and performance of essential consumer goods and services.³⁹²

In a bid to take into account the needs of vulnerable consumers where redress is concerned, the UN 1999 Guidelines recommend that appropriate measures have to be established to enable consumers to obtain redress and resolve matters in a cost effective way.³⁹³ The UN 2016 Guidelines further added to this by stipulating that member states should provide consumers with access to remedies that do not impose a cost, delay or undue burden on the economic value at stake and at the same time do not impose excessive or undue burdens on society and businesses.³⁹⁴

³⁸⁸ UN 1999 Guidelines (note 385) 2. This guideline coincides with some of the basic consumer rights: the right to be informed and the right to choose.

³⁸⁹ Part c under heading II called Guidelines.

³⁹⁰ United Nations website 'United Nations Conference on Trade and Development – United Nations Guidelines for Consumer Protection (as expanded in 2016)' p.14 available at http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf, accessed on 23 May 2017. This will be referred to as the UN 2016 Guidelines for ease of reference.

³⁹¹ UN 1999 Guidelines (note 385) 5-6.

³⁹² Ibid.

³⁹³ UN 1999 Guidelines (note 385) 6.

³⁹⁴ UN 2016 Guidelines (note 390) 17.

4.5.2.1 United Nations Conference on Trade and Development

The UN Conference on Trade and Development (UNCTAD) was established in 1964 as a principal organ mandated with promoting development and integration of developing countries into the world economy, particularly in the areas of trade, investment and other development issues.³⁹⁵ It undertakes to perform its mandate in the following ways: ‘(i) as a forum for intergovernmental deliberations, supported by discussions with experts and exchanges of experience, aimed at consensus building; (ii) undertaking research, policy analysis and data collection; and (iii) providing technical assistance tailored to the specific requirements of developing countries, with special attention to the needs of the least developed countries (LDCs) and of economies in transition.’³⁹⁶

The UNCTAD recently compiled a report entitled ‘Manual on Consumer Protection’ which supplemented the Guidelines for Consumer Protection.³⁹⁷ Of particular interest is the section that discusses product safety and liability.³⁹⁸ This section starts by briefly discussing the guidelines relating to product health and safety as well as those relating to quality and safety.³⁹⁹ Although the Manual does not deal with the remedies of repair, replacement or refund which are the main focus of this dissertation, it does define a defect and it lists seven possible types of defects, namely:

- a) **manufacturing defect** – caused by an error in the manufacturing process (usually designed properly, but because of a problem in the process, it fails to meet the specifications and is substandard;
- b) **design defect** – occurs where the whole product line or every product of that particular model is dangerously defective;
- c) **warning defect** – where the product lacks adequate instructions concerning safe use or lacks adequate information regarding the dangers associated with the product;
- d) **instruction defect** – lacks sufficient information an inherent danger that may result from incorrect use of the product;

³⁹⁵ UNCTAD website ‘UN Civil Society Contact Points – UNCTAD’ (no date) available at <https://www.un-ngls.org/index.php/engage-with-the-un/un-civil-society-contact-points/127-united-nations-conference-on-trade-and-development-unctad>, accessed on 22 January 2018.

³⁹⁶ Ibid.

³⁹⁷ UNCTAD ‘Manual on Consumer Protection’ (2016) available at unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf, accessed on 23 May 2017.

³⁹⁸ UNCTAD (note 397) Chapter 9, 66-78.

³⁹⁹ Section V.B (Guidelines 16-19) as well as Section V.D (guidelines 33-35) respectively. UNCTAD (note 397) 66.

- e) **development risk defect** – these appear after the product has been marketed and are such that, had there been knowledge of them before, they would have been sufficient to prevent the product from being marketed;
- f) **state of the art defect** – these are products that are accepted in the market (because the type of defect is ‘ unknown at the time, within the given sector) but become less acceptable as industry practices improve; and
- g) **post - marketing defect** – these relate to the failure to timeously warn the consumer about possible dangers, or to fail to recall products or take remedial action when the danger has been detected.⁴⁰⁰

The Manual highlights four standards for determining defectiveness in the product(s):

- a) **consumer expectations** – provides that the imperfection, danger or defect in the product must not go beyond that which is contemplated by an ordinary consumer (children included);⁴⁰¹
- b) **presumed seller knowledge** – this standard attributes general knowledge about the product on the part of the seller;⁴⁰²
- c) **risk – benefit balancing** – the inquiry here is whether the cost of making a safer product is greater or less than the risk from the product in its current position⁴⁰³ – several factors are considered:

1. *the usefulness and desirability of the product;*
2. *the likelihood and probable seriousness of injury that would result from the product;*
3. *the availability of substitutes that would be able to meet the same need and are not unsafe;*
4. *the manufacturer’s ability to eliminate the danger without impairing usefulness or making the product too expensive;*
5. *the user’s ability to avoid the danger;*
6. *the user’s anticipated awareness of the danger; and*

⁴⁰⁰ UNCTAD (note 397) 72-73. See the manual for further information on each defect.

⁴⁰¹ This is the same standard applied in the CPA.

⁴⁰² UNCTAD (note 397) 73.

⁴⁰³ Ibid. The Manual highlights an important consideration. Where the cost of adopting the required change is higher than the risk created by not adopting the change, the benefit of keeping the product outweighs the risk and hence the product is not defective. However, where the cost is lower than the risk, the product is defective in its unchanged condition – at 73.

7. *the feasibility on the manufacturer of spreading the risk of loss through pricing or insurance*,⁴⁰⁴ and

- d) **unavoidably unsafe products** – works on the premise that there are specific products whereby, (because of the current state of human knowledge) the product is unfit for ordinary use.⁴⁰⁵

These were welcome progressions in the scope of product safety in the UN Consumer Guidelines as they provided information that would now be freely accessible to the consumer, and thus result in empowerment and enhanced capacity to shield himself from defective products. These guidelines could also be useful in providing updated types of defects and standards of determination to nations that are still developing consumer legislation.

4.5.2.2 UN Convention on Contracts for the International Sale of Goods (CISG)

The CISG drawn up by the UN Commission on International Trade Law (UNCITRAL) in 1980 was an innovative, modern framework far ahead of its time. It formed the backbone of international trade and was considered as one of the core international trade law conventions whose universal adoption was monumental.⁴⁰⁶ A number of regional organisations have placed wide reliance on its articles in the formulation of their own rules and regulations, the EU being among these as the CISG was the basis used to formulate the Consumer Sales Directive, among others.⁴⁰⁷

Of particular interest was the third part of the CISG which dealt with the obligations of the parties to the contract. These included the obligations of the sellers and highlighted the importance of delivery of goods in conformity with the quantity and quality stipulated in the

⁴⁰⁴ UNCTAD (note 397) 73.

⁴⁰⁵ Ibid. This particular standard is used with regards to medicine – at 74.

⁴⁰⁶ UNCITRAL website 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, accessed on 22 October 2016. See also United Nations Commission on International Trade Law, *United Nations Convention on Contracts for the International Sale of Goods* (2010).

⁴⁰⁷ See also GM Duhl 'International Sale of Goods' (2012) 67(4) *Business Lawyer* for the application of the CISG in the United States.

contract.⁴⁰⁸ Also included were rules relating to remedies⁴⁰⁹ for breach of the contract and their application in each case.

4.5.3 *Consumers International*

Consumers International⁴¹⁰ is a non-profit organisation that was founded in 1960 with the view of realising a fair, safe and sustainable future for all consumers where they can make informed choices on safe goods and services in a global market increasingly dominated by international corporations.⁴¹¹ It has over 240 member organisations and aims to build a powerful international movement to help protect and empower consumers. CI outlines eight consumer rights which define and determine consumer principles:

- **The right to satisfaction of basic needs** - To have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water and sanitation;
- **The right to safety** - To be protected against products, production processes and services that are hazardous to health or life;
- **The right to be informed** - To be given the facts required to make an informed choice, and to be protected against dishonest or misleading advertising and labelling;
- **The right to choose** - To be able to select from a range of products and services, offered at competitive prices with an *assurance of satisfactory quality*;⁴¹²
- **The right to be heard** - To have consumer interests represented in the making and execution of government policy, and in the development of products and services;
- **The right to redress** - To receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services;
- **The right to consumer education** - To acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them; and

⁴⁰⁸ Article 35(1) provided that the seller had to deliver goods which were of the quantity, quality and description required by the contract and which were contained or packaged in the manner required by the contract. It also indicated the terms that had to be upheld so as to satisfy the conformity requirement.

⁴⁰⁹ These were replacement, repair, rescission of contract and reduction in price.

⁴¹⁰ Hereinafter referred to as CI.

⁴¹¹ Consumers International 'About us' available at <http://www.consumersinternational.org/who-we-are/about-us/>, accessed on 21 May 2017.

⁴¹² Own emphasis.

- **The right to a healthy environment** -To live and work in an environment that is non-threatening to the well-being of present and future generations.⁴¹³

The right to choose incorporates assurance of satisfactory quality. Consumers have the right to a wide variety of options to choose from.⁴¹⁴ It is also a right that the environment in which the products and services are offered and supplied must be healthy and clean.⁴¹⁵

CI, through its president, Anwar Fazal, introduced a set of consumer responsibilities which remain crucial principles and are applied by many consumer organisations today.⁴¹⁶ These are:

- **Critical awareness** - consumers must be awakened to be more questioning about the provision of the quality of goods and services.
- **Involvement or action** - consumers must assert themselves and act to ensure that they get a fair deal.
- **Social responsibility** - consumers must act with social responsibility, with concern and sensitivity to the impact of their actions on other citizens, in particular, in relation to disadvantaged groups in the community and in relation to the economic and social realities prevailing.
- **Ecological responsibility** - there must be a heightened sensitivity to the impact of consumer decisions on the physical environment, which must be developed in a harmonious way, promoting conservation as the most critical factor in improving the real quality of life for the present and the future.
- **Solidarity** - the best and most effective action is through cooperative efforts through the formation of consumer/citizen groups who together can have the strength and influence to ensure that adequate attention is given to the consumer interest.⁴¹⁷

In 2011 the CI published a guide to developing consumer protection law as an instrument to assist national consumer protection associations and advocates for consumer rights in the

⁴¹³ Consumers International 'Consumer rights' available at <http://www.consumersinternational.org/who-we-are/consumer-rights/>, accessed on 21 May 2017.

⁴¹⁴ Consumers International available at <http://www.consumersinternational.org/who-we-are/faqs/#what-are-the-consumer-rights>, accessed on 18 March 2018.

⁴¹⁵ Ibid.

⁴¹⁶ Consumers International (note 413).

⁴¹⁷ Ibid.

Southern African Development Community (SADC).⁴¹⁸ It plays an active role in the development and promotion of consumer rights with a specific desire to ensure all consumers will have the opportunity to make informed choices on safe and sustainable goods and services while also maintaining that individual and collective consumer rights remain secure and respected.⁴¹⁹

4.5.4 Eight Dimensions of Product Quality Management

Product quality is defined as a group of features and characteristics that determine the capacity of a product to meet the specification requirements of a standard set or of a customer.⁴²⁰ Product quality management is made up of four important elements: quality planning, quality control, quality assurance and quality improvement.⁴²¹ Quality Planning is the process that involves identifying the relevant quality standards and customer requirements and assessing how well new products, adapted products and processes meet or exceed the customer's requirements.⁴²² Quality Control is an aspect of the quality assurance process, but are not the same. Quality control is where the supply management of the organization inspects deliveries on arrival to determine whether the stated quality requirements have been met.⁴²³ Quality Assurance is aimed at ensuring that the supplier produces acceptable quality⁴²⁴ while quality improvement relates to the systematic approach to reduction and/or elimination of waste, rework and losses in the production process.⁴²⁵

A specialist in the area of quality control, David A. Gavin formulated the eight dimensions of product quality management.⁴²⁶ These factors were formulated as guiding principles and can be used to assist in the analysis of quality characteristics. These factors can also be relied on

⁴¹⁸ Consumers International 'A guide to developing consumer protection law' (May 2011) available at <http://www.consumersinternational.org/media/715456/a-guide-to-developing-consumer-protection-law.pdf>, accessed on 18 September 2016.

⁴¹⁹ Consumers International (note 413).

⁴²⁰ Business Dictionary available at <http://www.businessdictionary.com/definition/product-quality.html>, accessed on 19 January 2018. Other definitions that have been associated with this term are, 'the ability to fulfil the customer's needs and expectations' and 'ability to meet specifications at the lowest possible cost'.

⁴²¹ Satyendra 'Components of Product Quality Management' (2016) available at <http://ispatguru.com/components-of-product-quality-management/>, accessed on 22 January 2018.

⁴²² WMJ Hugo, JA Badenhorst-Weiss, EHB van Biljon (ed), *Supply Chain Management: Logistics in Perspective* (2007) 181.

⁴²³ Hugo (note 422) 184. Business Dictionary available at <http://www.businessdictionary.com/definition/quality-control-QC.html>, accessed on 19 January 2018.

⁴²⁴ Hugo (note 422) 182.

⁴²⁵ Business Dictionary (no date) available at <http://www.businessdictionary.com/definition/quality-improvement.html>, accessed on 19 January 2018.

⁴²⁶ 'Competing on the Eight Dimensions of Quality' *Havard Business Review* available at <https://hbr.org/1987/11/competing-on-the-eight-dimensions-of-quality>, accessed on 17 July 2017.

to create a basis for factors to assess quality in legislation. Gavin's eight dimensions can be summarized as follows:

1. **Performance:** Performance refers to a product's primary operating characteristics. This dimension of quality involves measurable attributes;
2. **Features:** Features are additional characteristics that enhance the appeal of the product to the user/consumer;
3. **Reliability:** Reliability is the likelihood that a product will not fail within a specific time period. This is a key element for consumers who need the product to work without fail;
4. **Conformance:** Conformance is the precision with which the product meets the specified standards;
5. **Durability:** Durability measures the length of a product's life. When the product can be repaired, estimating durability is more complicated. The item will be used until it is no longer economical to operate it. This happens when the repair rate and the associated costs increase significantly;
6. **Serviceability:** Serviceability is the speed with which the product can be put into service when it breaks down, as well as the competence and the behaviour of the service-person;
7. **Aesthetics:** Aesthetics is the subjective dimension indicating the kind of response a consumer has to a product. It represents the individual's personal preference; and
8. **Perceived Quality:** Perceived Quality is the quality attributed to a product based on indirect measures.⁴²⁷

A consumer can assess quality by assessing the performance of a product. This would be done by assessing whether the product performs the desired action correctly and completely each time it is used. Factors such as features, aesthetics and perceived quality would be assessed based on the reasonable standard associated with the particular product as well as perhaps considerations of any information that the supplier advertised or publicly displayed with regards to the product. It would not be unreasonable to expect the product to display the attributes that the supplier/seller states it has.

⁴²⁷ Ibid.

4.5.5 Conclusion

Despite the developments that have taken place, much of the rules and guidelines that are in existence are merely advisory with the international organisations not having any authority to implement any of these rules on members, much less other nations. The challenge of not having substantial legislation that can be applied on an international platform governing sale of goods still remains.

4.6 CONCLUSION

After careful consideration of the remedies offered in several jurisdictions and their development over the years, one can clearly ascertain what methods have worked and those that have subsequently failed in their application. It is through this analysis that clear conclusions will be drawn and realistic recommendations submitted in order to develop South African legislation in a manner that best achieves the best interests of the consumer in a fair and justifiable manner.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The previous chapter analysed how the right to quality has been provided for in foreign and international consumer legislation, with particular focus on measures formulated or modified to protect the consumer against defective products. Although the CPA is groundbreaking and is a great development in the area of consumer protection in South Africa,¹ the study has revealed that the remedies provided for breach of warranty of quality and defective products are not sufficiently regulated.²

The study identifies several problems regarding the provision of remedies under the CPA. The central theme is the analysis of the implied warranty of quality created by section 55 and 56 of the CPA. In order to sufficiently assess this, focus is directed to the following issues:

- Whether the CPA sufficiently provides for the warranty of quality without any shortcomings;
- Identifying the shortcomings in the CPA provisions in light of section 55 and 56, in particular, the choice given to the consumer to select a remedy and the fact that this choice could be unbalanced to the detriment of the suppliers because it is not qualified by any consideration of any relevant factors;
- The treatment of minor defects;
- The position regarding the voetstoots clause;
- How these shortcomings could be resolved taking into account similar legislative provisions in other jurisdictions for guidance.³

This concluding chapter will make conclusions and recommendations relating to the provision of remedies under section 56. The recommendations will attempt to offer possible solutions to the weaknesses that were identified in the previous chapters and will rely on

¹ ML Du Preez 'The Consumer Protection Bill: A few preliminary comments' 2009 *TSAR* 58, 60; S Du Chenne 'Consumer Protection Act: finally a voice for consumers: legislation' (2011) 2011 (1) *Professional Accountant* 10.

² Own analysis.

³ Own analysis of issues to be addressed by the dissertation.

consumer law developments that have been made in other jurisdictions as well as considerations submitted by international writers, international organisations and consumer bodies and provisions.

5.2 QUALITY IN TERMS OF SECTION 55

5.2.1 Definition of a 'defect'

The word 'defect' has been defined in the CPA.⁴ However, the CPA requires that the defect be assessed according to the standard of what persons generally would be reasonably entitled to expect in the circumstances.⁵ This standard has been referred to as the 'consumer expectation test' or the 'legitimate expectations test'. Several writers argued around what standard should be used to assess defects and how it must be applied.⁶

It is submitted that the definition for what constitutes a defect should be widened to include the various types of defects that are now in existence within different industries. The UNCTAD Manual provides a comprehensive list of possible types of defects and how they present themselves in products.⁷ This would be a favourable development to the law and it is in line with international guidelines.

With regards to the assessment of defects, taking into account reasonable expectations, a list has been drawn up and submitted as a list of considerations for the consumer expectation assessment.⁸ It is submitted that this list should be relied on by the courts so as to come to prudent decisions. The list takes into consideration important factors such as the standard intended for the goods or their components by the producer or supplier. It also considers the risk, benefit, utility and cost of the goods or components that might reasonably be expected to be done with or in relation to the goods or their components and the time when the goods or their components were manufactured or supplied, to mention a few.

⁴ S 53 CPA

⁵ S 53(1)(a)(i) and (ii) CPA.

⁶ Loubser and Reid 'Liability for products in the Consumer Protection Bill 2006: A comparative critique' (2006) 17(3) *Stell LR* 431; Van Eeden *A guide to the Consumer Protection Act* (2009) 245; J Barnard 'The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoets clause and liability for damages' (2012) 45 (3) *De Jure* 455; W Jacobs, PN Stoops, R van Neikerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13 (3) *PELJ* 302, 363;

⁷ UNCTAD 'Manual on Consumer Protection' (2016) available at unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf, accessed on 23 May 2017. See pg 72-73. See the manual for further information on each defect.

⁸ The list is given in Chapter 3 under 4.1.1

It is also submitted that the consumer expectations test is not the only method of assessment of defects available. Other methods such as the presumed seller knowledge test, the risk-benefit balancing test and the unavoidably unsafe products test are methods which should be considered for assessing defects.⁹ Although the presumed seller knowledge test has elements of subjectivity, the risk-benefit balancing test and the unavoidably unsafe products test are quite objective in their function with the former containing factors to take into account for its determination.

5.2.2 Consumer's right to good quality goods

The term 'good quality'¹⁰ has no sufficient description or fixed standard. Under section 9(2) of CRA goods are considered as being of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if it is relevant) and all other relevant circumstances.¹¹ Section 9(3) of CRA further lists factors that are to be taken into account when ascertaining the level of quality of goods. These are fitness for the purposes for which goods in question are commonly supplied; appearance and finish; freedom from minor defects; safety; and durability.¹² These factors are not an exhaustive list, hence other factors can also be considered.

It is my submission that factors should be provided to assist both the consumer and the supplier to adequately assess the element of good quality. Reference is made to the eight dimensions of product quality management defined by David A. Gavin.¹³ It is suggested that Legislature should consider the eight dimensions with a view of incorporating them into the application and assessment of quality in sections 55 and 56. The factors can be modified to make them appropriate for use in subsection 2(b). Limits and levels can also be defined such that the factors can be applied effectively and in a manner that is fair by both the consumer and the supplier in assessing good quality.

⁹ UNCTAD (note 4) 73, 74.

¹⁰ S 55(2)(b) CPA

¹¹ Also stated under section 14(2A) of SoGA.

¹² Section 14(2B) of SoGA.

¹³ 'Competing on the Eight Dimensions of Quality' *Harvard Business Review* available at <https://hbr.org/1987/11/competing-on-the-eight-dimensions-of-quality>, accessed on 17 July 2017.

5.2.3 *The ex lege right to continued good quality*

The right given under section 55(2)(c) is quite radical¹⁴ and is featured for the first time in South African law. The legislature needs to provide some guidelines with regards to timelines or factors that can assist in the effective determination of standards for product conformity and the length of time a product can be expected to properly function.¹⁵

In the UK, the durability requirement is similar to the *ex lege* right to continued quality in South Africa. The CRA¹⁶ made provision for a short-term right to reject. This gives the consumer the right to a refund on any item that does not conform to the contract within the first 30 days of receiving it. The period is shorter for perishable goods.

With regards to conformity, the CSD afforded EU member states the option to provide a consumer the opportunity to inform the seller where a product does not conform to specified standards within a period of two months from the date on which he detected such lack of conformity.¹⁷ Belgium neglected to implement this provision, but it did, however, grant the option for parties to specify a notification period¹⁸ as well as set out consequences where the agreed notification period was not adhered to.¹⁹ Denmark modified the time from which the period would begin to apply to the stage when the consumer had actually discovered the lack of conformity.²⁰ Finland provided that the consumer had to notify the trader within a reasonable time, which was considered to be at least two months.²¹ Hungary required consumers to inform the seller within “the shortest time permitted by the prevailing circumstances” – this period was outlined to be within two months.²²

Legislature should consider the above countries and adjust provisions relating to the right to continued good quality. After considering international provisions, it is suggested that a

¹⁴ T Naudé, ‘The Consumer’s right to safe, good quality goods and the Implied warranty of quality under section 55 and 56 of the Consumer Protection Act 68 of 2008’ (2011) 23 (3) *SA Merc LJ* 336, 339. Barnard (note 6) 467.

¹⁵ Naudé (note 14) 340.

¹⁶ Section 22.

¹⁷ Article 5(2). It was implemented by Cyprus, Denmark, Estonia, Finland, Hungary, Italy, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. Members who chose not to implement were Austria, Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg and the UK.

¹⁸ This period could not be less than two months.

¹⁹ CC Art.1649 quater of the Act on the protection of consumers in respect of the sale of consumer goods.

²⁰ This restriction did not apply where the seller had been grossly negligent or had not acted in good faith. Chapter 5 Section 16(2) of the Consumer Protection Act.

²¹ Chapter 5 Section 16 of the Consumer Protection Act.

²² CC Section 306(4) of Act IV of 1959 and Section 6: 162(1) and (2) of Act V of 2013.

notification period would be successful as a measure against goods that lack conformity especially in situations where the consumer still wishes to have the product replaced. It is also submitted that drafters of legislation should take the following factors into account when attempting to create a suitable notice period for durability and conformity. These would be the type of product being considered, the function of the product, the cost of the product,²³ the time the product was manufactured or supplied and the length of time a product is expected to function taking into account the normal expected lifecycle of the product. This is by no means a closed list but these factors can be the point of departure and can be assessed to ultimately assist in creating sustainable notice periods or limits.

It is submitted that in order for notice periods to be efficient and effective, there must be different notice periods for specific types of goods. It is submitted that a standard 30 day short term right to reject would be reasonable as a base notice period and would be appropriate to adopt. This notice period would then be subject to variation in cases that involve perishable goods such as fruits and vegetables or where the product cannot be tested sufficiently within 30 days of purchase. In the former case, it is my opinion that the notice period should be reduced to between three to five days because of the nature of the products in question. In the latter case, it is my opinion that the notice period set out by the CSD should be adopted and should be increased to two months. This is in line with other developed international jurisdictions and is, in my view, an ideal variation for the products in question.

5.2.4 *Voetstoets*

It has previously been submitted by other writers that section 55(5) is a victim of poor legislative drafting.²⁴ In concurring with the above, it is submitted that a buyer that is aware of a relevant defect or failure should not receive protection under section 55(5) or be allowed to rely on section 56, particularly where it is evident that the consumer was reckless in his decision-making.²⁵ It is further submitted that section 55(5)(a) requires redrafting to ensure that it is clearly understood and it is in line with common law provisions as well as international provisions.

²³ It is submitted that the cost of the product could be an indicator of the quality of the parts used to manufacture the product: this is merely a submission by the writer.

²⁴ Otto (2013) 1 TSAR 1 18.

²⁵ Sharrock *Business Transactions law* (2011) 610 with specific reference to the implied undertaking regarding suitability and quality. De Stadler shares the same sentiments.

Another important issue is the effect of this controversial subsection on the voetstoets clause. The more preferred view is that despite the fact that there are provisions of the CPA that favour the continued presence of the voetstoets clause, there are also provisions that support its exclusion in instances where the CPA is applicable.²⁶ Some writers contend that the voetstoets clause survives the CPA²⁷ but also highlights that the clause must not be unfair, unreasonable or unjust, should be based on consensus between the parties²⁸ and should be interpreted against the seller under the standard of what a reasonable person would expect.²⁹ Jacobs et al were of the view that the use of the voetstoets clause would be severely curbed after the commencement of the Act.³⁰

There is also the view that supports the exclusion of the voetstoets clause where the CPA is applicable.³¹ It is my submission that the voetstoets is severely limited in its application by the CPA. It ought to be followed as it correctly applies provisions in the CPA for the benefit and protection of the consumer. It is also my submission that the provisions of the CPA be redrafted to allow the voetstoets clause more leg room in its application to second hand goods. A clearer interpretation and methodology of application would be appropriate to govern over how to apply the voetstoets clause in the sale of these goods since it was created for the purpose of defective sales.

5.3 REMEDIES IN TERMS OF SECTION 56

5.3.1 Choice of remedies

Section 56(2) provides the consumer with a choice of remedies where the goods fail to satisfy the requirements contemplated in section 55. The choice given to the consumer to select a remedy without any considerations is unfair on the supplier.³² As previously stated, no procedure has been set up to assist in the decision making process of the consumer when it comes to the selection and application of these remedies. It is my submission that a consumer cannot be reasonably expected to know what factors to consider when selecting a remedy. As such, it is the responsibility of Legislature to draft a suitable procedure.

²⁶ Section 2(10) and section 56(4) CPA.

²⁷ Barnard (note 6) 471;

²⁸ Sharrock (note 25) 611.

²⁹ Barnard (note 6) 472; C Morrissey, A Coetzee 'Does this mean voetsek voetstoets?' (2010) 10 (4) *Without Prejudice* 12.

³⁰ (note 6) 368.

³¹ Barnard (note 6) 472.

³² Naudé (note 14) 346.

Reference is made to the CRA in the UK with regards to a possible procedure for application of the remedies. Where goods do not conform to the contract, the CRA gives the consumer the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject. The consumer has a short-term right to reject goods that lack conformity within the first 30 days of delivery³³ as well as receive a full refund.³⁴ The consumer also receives the right to partial rejection.³⁵ This means that the consumer does not reject all of the goods and does not treat the contract as at an end, but instead may reject some or all of the goods that do not conform to the contract, but may not reject any of the goods that do conform to the contract.³⁶ If a fault is discovered after the 30-day rejection period, the consumer has the right only to a repair or a replacement.³⁷

Where the consumer opts to have the goods repaired or replaced,³⁸ the time limit for the right to a refund is 'paused' until the goods are returned to the consumer.³⁹ The seller must perform the chosen remedy within a reasonable time and without significant inconvenience to the consumer,⁴⁰ as well as bear any necessary costs incurred in doing so.⁴¹ The consumer cannot request repair or replacement where it is impossible or disproportionate to do so.⁴² If, upon return, the goods still do not conform to the contract, then the consumer's right to reject is extended by a minimum of seven days.⁴³

³³ Section 22(4) CRA makes provision for goods that perish in a shorter period of time than 30 days. It states that if any of the goods are of a kind that can reasonably be expected to perish after a shorter period, the time limit for exercising the short-term right to reject in relation to those goods is the end of that shorter period (but without affecting the time limit in relation to goods that are not of that kind).

³⁴ Section 20 CRA. Subsection (15) states that the refund must be given without undue delay within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund.

³⁵ Section 21(1) CRA.

³⁶ Section 21(1)(a) and (b) CRA.

³⁷ Section 23 CRA.

³⁸ Section 23 CRA.

³⁹ Section 22(6) CRA. The consumer gains a short term right to reject. See also M Duncombe, 'UK Consumer Rights Act 2015: Seven key changes' (2 October 2015) available at <https://www.dlapiper.com/en/uk/insights/publications/2015/10/law-a-la-mode-issue-17/uk-consumer-rights-act-2015-seven-key-changes/>, accessed on 24 April 2017.

⁴⁰ What is considered as reasonable time or significant inconvenience is determined by taking account of the nature of the goods, and the purpose for which the goods were acquired – subsection (5).

⁴¹ Section 23(2)(a) and (b) CRA. It is worth mentioning that the requirement of reasonable time was applied in Slovenia as well. Slovenia allowed the consumer the choice between all 4 CSD remedies, but imposed a restriction in that rescission was not available unless a seller had been given a reasonable time to attempt repair or replacement.

⁴² (4) - Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, are unreasonable, taking into account the value which the goods would have if they conformed to the contract, the significance of the lack of conformity, and whether the other remedy could be effected without significant inconvenience to the consumer.

⁴³ Section 22(7) CRA.

The right to price reduction or final right to reject is afforded to the consumer where after one repair or one replacement, the goods do not conform to the contract; or the consumer does not have the option to require repair or replacement of goods;⁴⁴ or where the consumer did request repair or replacement but the trader is in breach of the requirement of section 23(2)(a) to do so within a reasonable time and without significant inconvenience to the consumer. With regards to the application of CSD remedies, Germany disallowed the remedy of a price reduction where repair or replacement could be provided, unless it was certain that there would be significant inconvenience to the consumer.⁴⁵ Greece, Lithuania and Portugal all gave the consumer free reign over the 4 remedies.⁴⁶ It is my submission that the provisions of the CRA should be referred to for guidance when redrafting a possible selection process for the remedies under section 56. The provisions are clear and provide for issues that our current legislation has not addressed. The CRA would provide an adequate starting point with regards to clarity and guidance.

It is important to ensure that neither party is subjected to a remedy which is unwanted. Appropriate considerations should be created to facilitate a decision that would promote fairness and equity among the parties. In my view, a set of guiding factors should be created to address the process of selection and application of remedies for different circumstances. Factors such as the time that has lapsed between the date the product was purchased and the date the product has been returned, the type of product in question, the type of defect, if any,⁴⁷ the lifespan of a properly functional product and what caused the defect⁴⁸ can be taken into account as a guide.

5.3.2 Suggested remedy of price reduction

The remedy of a price reduction is defined as the point at which the seller reduces by an appropriate amount the price the consumer is required to pay under the contract, or anything else the consumer is required to transfer under the contract, and receives a refund from the

⁴⁴ Section 23(3) CRA.

⁴⁵ C Twigg-Flesner 'Consumer Sales Directive (99/44)' in H Schulte-Nölke (ed), CTwigg-Flesner (ed) and M Ebers (ed) *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member State* (2008) 427: Section 439(3) Civil Code.

⁴⁶ Ibid. Article 4 of the Decree Law 67/2003 Sale of Consumer Goods and Related Guarantees (Portugal).

⁴⁷ With regards to the type of defect, factors that should be considered are whether it can be repaired: if so, there would be no need for replacement or refund. If it cannot be repaired, then considerations can be made as to whether to replace the goods or refund the price, for example.

⁴⁸ This is important to ascertain as some defects may arise during proper use and enjoyment of the product while others could be as a result of using the product for the wrong purpose or in the wrong way.

seller for anything already paid or otherwise transferred by the consumer above the reduced amount where the goods lacked conformity. This remedy is useful in situations where the consumer wishes to retain the defective goods and not rescind the contract. This is considered a fair way of allocating a price to the defective goods.

The main issue that plagues this remedy is the method that should be relied on for the calculation of price reduction. There are different methods and approaches, all of which lead to different results. Germany calculates the price reduction by multiplying the value of the non-conforming goods and the price, and dividing the result by the value which conforming goods would have had.⁴⁹ The Netherlands simply applies a proportionate reduction of the purchase price,⁵⁰ and Hungary follows suit in its approach.⁵¹ Slovenia as well as Spain⁵² makes use of the proportionate reduction approach; the relevant moment for comparison is the time of conclusion of the contract (the ratio is the relation between value of the goods without defect and goods with defect at the time of conclusion). It is my submission that the method used by Germany is clear and has ease of application.

5.3.3 Treatment of minor defects

Article 3(6) of the CSD provides that a consumer is not entitled to have the contract rescinded if the lack of conformity is minor. The countries that chose to exclude this provision had the effect that a consumer could rescind the contract where the seller had not repaired or replaced the goods despite the lack of conformity being minor. Denmark, however, adopted as a general rule that a consumer had no right of rescission if the lack of conformity was minor. However, it made an exception: the consumer was entitled to rescind the contract if the seller did not complete a repair or replacement within reasonable time, free of charge and without any significant inconvenience for the consumer.⁵³ It is my submission that the adoption by Denmark is worth some consideration. It stipulates a standard treatment for goods with minor defects and allows a reasonable time for repair or replacement to occur before a consumer can opt for rescission of the contract. This is a fair implementation for goods with minor defects on all parties concerned.

⁴⁹ Section 441(3) Civil Code.

⁵⁰ Section 7.1.3 Article 7:22 para 1b Dutch Civil Code Book 07.

⁵¹ Civil Code Section 306(1)(b) of Act IV of 1959 and Section 6: 159(2)(b) of Act V of 2013.

⁵² Article 8 of the Law 23/2003 on Guarantees in the Sale of Consumer Goods and more recently Article 122 of the Revised text of the General Law for the Protection of Consumers and Users and other Supplementary Laws as approved in November 2007 which repealed Law 23/2003.

⁵³ Section 78(1) and 78(4) of the Danish Consolidated Act on Sales of Goods.

5.3.4 Supplier's risk and expense

Section 56(2) states that the goods are to be returned at the supplier's risk and expense, without penalty to the consumer. Section 56 presupposes that the goods in question are defective. In my view, it is fair for the supplier to bear the cost as it will make the supplier more meticulous in checking for defects prior to sale of goods as well as ensuring that repairs are conducted effectively and efficiently. It is suggested that the extent to which a supplier bears the cost be subject to factors such as the reason for return or the type of defect in the goods.⁵⁴ Where a consumer returns the goods due to a lack of conformity or a failed repair then the supplier may be expected to bear the cost of the return. This will balance the scale by ensuring that the supplier only bears the expense of returning goods where the supplier is responsible for the problem (that is, failed repairs, or defective products) and this will also encourage higher levels of attentiveness and more meticulous repairs to be conducted.

5.3.5 Six month limitation

It remains unclear if the six month limitation relates to the life span of the implied warranty or whether it is with reference to the application of the remedies by the consumer within a specific time period.⁵⁵ It has been submitted that the latter approach is more appropriate.⁵⁶ The consumer must enforce the remedies within six months of delivery of the goods but the implied warranty of quality exists indefinitely, allowing the consumer to rely on his common law rights to damages where breach of the implied warranty of quality occurred six months or longer after the goods were delivered.⁵⁷

The question relating to the application of remedies beyond the six-month limitation period was clearly dealt with in *Vousvoukis v Queen Ace CC t/a Ace Motors*.⁵⁸ The court also mentioned that if the remedy is ever extended beyond the six-month limitation, it will be a decision made by the legislature.⁵⁹ Should the legislature wish to extend this period, reference can be made to the Consumer Sales Directive.⁶⁰ It required that all member states give consumers the remedies under the Directive for a period of two years.⁶¹ It then followed that

⁵⁴ Own suggestion.

⁵⁵ Jacobs et al (note 6) 373; Barnard (note 6) 467; Naudé (note 14) 347.

⁵⁶ Jacobs et al (note 6) 373.

⁵⁷ Ibid.

⁵⁸ 2016 (3) SA 188 (ECG) at 206.

⁵⁹ Ibid.

⁶⁰ Directive 1999/44/EC, OJ L 171 07.07.99 p 0012 – 0016.

⁶¹ Ibid. Twigg-Flesner (note 44) 678.

durability had a minimum period of two years.⁶² This could be used as a mechanism to ensure that suppliers produce quality goods that will be durable for a specific period of time. However, such an extension could also be detrimental as it would not benefit all the parties in the supply chain, but instead would result in potential abuse of power by the consumer.

An alternative approach that could be adopted where legislature wishes to extend the time in which remedies can be relied on is that of Latvia with regards to the CSD remedies: a consumer had a choice between all four remedies initially however, upon the lapsing of six months from the date of conclusion of the contract of sale, the provisions of Article 3 of the Directive became applicable.⁶³ That is, the application of first and second tier remedies. This could be a possible option to implement in South Africa.

5.3.6 Consequences of failure

It is not clear whether s 20(2)(d)⁶⁴ applies exclusively to goods in terms of s 55(3) or to any and all goods governed by the CPA. In the event that s 20(2)(d) applies exclusively to goods bought in terms of s 55(3), it must be clarified whether or not s 56(2)⁶⁵ offers a second option to the consumer. If both sections do apply to all goods and transactions, then legislature would have to clarify why the timeframes for the exercise of the right of return are significantly different; s 20(2)(d) while s 56(2), as well as how the provisions are to operate.

5.4 LIMITATIONS OF THE STUDY

This section deals with the limitations of the study. Whilst the study addresses the research question and problems, the following limitations must be noted. For the purpose of this study, a limited number of countries viewed as leaders in the development of consumer law were considered. However, there may be more countries which were not considered that may be more aligned to South Africa and its historical background.⁶⁶ Therefore the study is limited in scope.

⁶² Ibid.

⁶³ Article 28(1)-(3) of the Consumer Rights Protection Act.

⁶⁴ This section gives a consumer ten business days to exercise the right of return.

⁶⁵ This section gives a consumer six months to exercise the right of return.

⁶⁶ Own analysis.

Whilst benchmarking is the general accepted method of comparison,⁶⁷ it is not without its shortcomings particularly in this case. Each country has its own motivation for the development of its consumer legislation. It is this motivation that provides either an impetus or a hindrance.⁶⁸ For instance, the UK has steadily developed its consumer legislation from the eighteenth century whereas the development of similar legislation in South Africa was hindered by the complications of Apartheid.

Because the process of compiling this study did not include any of the lawmakers involved in the formulation and enactment of this legislation, the study does not take cognisance of the processes, difficulties and considerations taken into account by the legislature during the structuring of the CPA.

The CPA was enacted to protect, promote and advance the social and economic welfare of all consumers in South Africa. While the study critically analyses specific sections of the CPA, it does not include direct input from the consumers themselves to ascertain the exact functionality or lack thereof of the Act. The lack of a standard quantitative measure of the effectiveness of legislation means that without a proper study, any assessment is purely subjective in nature.

5.5 AREAS OF FURTHER STUDY

The study exposes a blatant bias towards consumers in the consumer-supplier relationship.⁶⁹ Future research can be done to try and establish a future balance in this relationship. Another potential area of study is the voetstoets clause. Research can be done to clarify the application of the voetstoets clause and possibly how the Act can be extended to regulate prior used goods (second/third hand goods) and voetstoets in this regard.

5.6 CONCLUSION

Section 55 and 56 were first implemented in 2008 with the initial introduction of the CPA. These provisions were the legislature's initial attempt at providing the consumer with adequate redress in relation to quality of goods. It is common knowledge that the process of

⁶⁷ D Elmuti, Y Kathawala 'An Overview of Benchmarking Process: a tool for continuous improvement and competitive advantage' (1997) available at <https://pdfs.semanticscholar.org/8748/092dcb7f88ab1e1f09d7826f8c07402918ce.pdf>, accessed on 19 March 2018.

⁶⁸ Own analysis.

⁶⁹ Own analysis.

drafting and enacting legislation is not easy. As an initial piece of legislation, the CPA is indeed groundbreaking and quite impressive as it attempts to provide for most consumer related issues. However, the Act needs to be adjusted so as to adequately provide sufficient and clear provisions for the ease of application such that it can be implemented in a manner that is just on all parties.

Certain considerations should be made where quality management is concerned. Section 56 is centred around quality management. Although there are several applicable quality management systems, it is my submission that these systems should be evaluated with the view of ascertaining which one is the most suitable one for general application. Once this has been determined, the chosen system can be firmly introduced into legislation, particularly in the manufacturing and retail industries. When the system and its provisions become mandatory, it will encourage compliance and eventually reduce the amount of potential defective products. It will cultivate a culture of accountability and responsibility. The introduction of more definitive methods of assessment of quality in products will provide certainty and clarity when attempting to assess the degree of non-compliance of goods and also the level of recourse required.

It is common knowledge that consumer law is not stagnant and is constantly evolving with new areas of study such as supply chain management and quality control management coming to the fore front. All these areas of law require proper regulation that is relevant and applicable to the times. It is my submission that a committee be set up to continuously evaluate the CPA and its provisions with the mandate of modifying it, taking into consideration international laws and guidelines to ensure that the CPA adequately provides for the consumer and the seller as well as all the parties in between. In order to improve the protections provided by the law, the law has to be constantly changing so as to meet the ever evolving needs of society.

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