Amendments to the Sale of Goods Act: A Critical Analysis

Chua Bor Jern
Low Fatt Kin, Kelvin*

I. INTRODUCTION

Two sets of rules apply to contracts for the sale of goods. The first set is the general rules of contract law which apply to all contracts, *eg* offer and *acceptance.* The second set is the specialized rules which specifically govern contracts for the sale of goods, which includes the provisions of the Sale of Goods Act ('SGA').

The first version of the SGA was the UK Sale of Goods Act 1893. This was a codification of the common law on the sale of goods. Subsequent to 1893, a series of legislation was passed in the UK. This included the UK Consumer Credits Act 1974 and the UK Unfair Contract Terms Act 1977. In 1979, all the amendments were consolidated into the Sale of Goods Act 1979, the locally adopted version.

Before November 1993, the SGA was not part of the local legislation. It applied, in certain circumstances, through the then s 5 of the Civil Law Act[1]. In November 1993, the Application of English Law Act[2] was passed. Besides repealing s 5 of the Civil Law Act, it also lists the English Acts that apply locally, including the Sale of Goods Act 1979,[3] and authorizes the publication of the revised editions of the listed English Acts. In addition, the reception of UK statutes was frozen. As a result, the UK Sale and Supply of Goods Act 1994[4] and the UK Sale of Goods (Amendment) Act 1995,[5] which modified the UK Sale of Goods Act 1979, do not have any effect locally.[6]

Chua Bor Jern and Low Fatt Kin, Kelvin are second year students, Faculty of Law, National University of Singapore, Academic Year 1996-7.

* The authors would like to express their appreciation to Mr Ho Hock Lai, Lecturer, Faculty of Law, National University of Singapore, for all his helpful comments and suggestions on an earlier draft of this article. All errors, however, remain the authors.

1 Cap 43, 1985 Rev Ed.

2 Cap 7A, 1994 Rev Ed.

3 Note, however, that ss 22 and 25(2) were not received.

4 This Act related to amendments concerning the implied term as to quality, acceptance of goods, right of partial rejection and the modification of remedies in non-consumer cases. It came into force on 3 November 1994 in the United Kingdom.

5 This Act related to amendments concerning the sale of unascertained goods forming part of an identified bulk and the sale of undivided shares in goods. It came into force on 19 July 1995 in the United Kingdom.

6 Section 4(3) Application of English Law Act.

On 7 November 1996, Parliament passed the Sale of Goods (Amendment) Act,[7] making certain changes to the SGA. The changes include most of the amendments which had already been made to the UK Sale of Goods Act 1979.[8] The implications of these amendments will be examined in this article.

II. IMPLICATIONS

The amendments made to the SGA are relatively new, and as such, there has been no case law, either locally or in the UK, which either interprets or applies them. As such, in seeking to clarify their effects, reference to extrinsic aids will be made, as allowed under s 9A of the Interpretation Act.[9] This would include the explanatory statement to the Bill[10] and reports of Parliamentary debates.[11] As the local amendments are also *in pan materia* with the relevant United Kingdom amendments, it is submitted that reference may also be made to the various Law Commission Reports and Working Papers on the amendments,[12] as well as the Hansards of both the House of Commons and the House of Lords in the United Kingdom. As such, relevant portions of the above documents will also be examined in this article.

To aid analysis, the amendments will be categorized into eight sections:

A. Test of 'satisfactory quality';
B. Remedies for breach of implied terms;
C. Acceptance of goods;
D. Remedies in respect of deliveries of wrong quantities;
E. Partial rejection of goods;
F. Sale of undivided shares in goods;
G. Sale of goods in bulk; and
H. Ascertainment by exhaustion.

---

7 Act No 43 of 1996. The amendments came into force on 1 January 1997 via Gazette Notification No S 551/96.

8 The changes in the SGA that were left out of the local Amendment Act related to changes in the law of sales in Scotland.

9 Cap 1,1985 Rev Ed.

10 Section 9A(3Xb) Interpretation Act.

11 Section 9A(3Xc) and (d) Interpretation Act.

12 *Eg* The Law Commission Working Paper No 112, *Rights to Goods in Bulk,* The Law Commission No 215 and the Scottish Law Commission No 145, *Sale of Goods Forming Pan of a Bulk,* The Law Commission Working Paper No 85 and the Scottish Law Commission Consultative Memorandum No 58, *Sale and Supply of Goods;* and The Law Commission No 160 and the Scottish Law Commission No 104, *Sale and Supply of Goods.*

Each amendment will be explored in the following manner, with slight modifications where appropriate:

1. The pre-amendment position;
2. Problems with the pre-amendment position;
3. The amendment; and
4. Critique of the amendment (where appropriate).

A. *Test of 'satisfactory quality'*

1. *The pre-amendment position*

Before the Amendment Act was passed, s 14(2) of the SGA provided that:

> Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of *merchantable quality,* except that there is no such condition—
>
> (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or
> (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal. [Emphasis added.]

Before 1973, as noted by the English Law Commission in its Working Paper, *Sale and Supply of Goods,*[13] there were two main approaches to the question of what was meant by merchantable quality.

The first was the 'acceptability test' derived from the statement of Dixon J *in Australian Knitting Mills v Grant.*[14] This test stated that for the goods to be of 'merchantable quality', they 'should be in such an actual state that a buyer fully acquainted with the facts, and therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.'

The second was the 'usability test'. This test, as set out by Lord Reid in *Kendall (Henry) & Sons v Lillico & Sons Ltd,*[15] concentrated on fitness for purpose and stated that goods were not of merchantable quality if 'the goods in the form which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description.'

The distinction between the two of them, however, was not clear and in

---

[13] The Law Commission Working Paper No 85 and The Scottish Law Commission Consultative Memorandum No 58, *Sale and Supply of Goods.*

[14] (1933) 50 CLR 387 at 418. The Privy Council reversed this decision on the facts.

[15] [1969] 2 AC 31.

several judgments both were referred to with approval.[16] According to the English Law Commission, at any rate in relation to goods bought for business purposes, it seems that the 'usability' test tended to be applied.

The statutory definition of the term 'merchantable quality' found in s 14(6) was introduced in 1973 and it stated that:

> Goods of any kind are of merchantable quality within the meaning of subsection (2) if they are fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

Also, s 61(1) of the SGA stated that, 'quality, in relation to goods, includes their state or condition'.

2. *Problems with the pre-amendment position*

(1) *Inappropriateness of 'merchantable quality':* The expression merchantable quality' has been criticized as being 'outmoded'[17] and being 'inappropriate' to consumer transactions.[18] The expression has always been a commercial man's notion. Furthermore, the definition reflects its commercial basis by making the assumption that goods which are not satisfactory for one purpose may generally be sold or used for another. Case law reflects such a stand as well.

In the cases *of Kendall v Lillico* and *Brown v Craiks*,[19] goods were held to be of merchantable quality on the ground that they were saleable or usable for some purpose, albeit not for the primary purpose for which they had been bought. In *Kendall v Lillico,* groundnut extractions, although unfit for poultry, were held to be merchantable because they were usable as cattle feed. In *Brown v Craiks,* cloth unfit for dress material was held to be merchantable because it was usable for industrial purposes.

'[F]rom the consumer's point of view ... the very starting point is wrong and needs to be considered.'[20] If goods are bought for the purposes of resale, it does not matter if they are unfit for one purpose, as long as they are fit for other purposes which meet the needs of its purchasers. For the end-user, however, he

---

16 *Ibid* at 77 and 78, *per* Lord Morris of Borth-y-Gest at 97 and 98 and *per* Lord Guest at 107 and 108 (though he preferred the former definition because it referred to the price); see also *Brown v Craiks* 1970 SC (HL) 51, [1970] 1 WLR 752, *per* Viscount Dilhorne at 78 and 79 and at 760 respectively; and *Cehave v Bremer* [1976] QB 44 (CA) *per* Roskill LJ at 74 to 76 and *per* Ormrod LJ at 79. In *Bartlett v Sidney Marcus* [1965] 1 WLR 1013 at 1018, Salmon LJ thought that there was really nothing between the two tests other than semantics.

17 The Law Commission No 160 and The Scottish Law Commission No 104, *Sale and Supply of Goods* at para 2.9.

18 Ibid at para 2.10.

19 [1970] 1 All ER 823.

20 *Supra,* n 13 at para 2.6.

does not care if the goods can be used for other purposes if the goods do not meet his needs at all.

It has also been commented that it is 'more appropriate ... to natural products, such as grain, wool or flour, than to a complicated machine'.[21] In fact, the Law Commission concluded that '[f]or all ordinary purposes, the word "merchantable" is largely obsolete today.'[22]

The difficulties surrounding the phrase since its inception in 1893 have also been pointed out by Ormrod LJ in *Cehave NV v Bremer Handelsgesellschaft mbH*:[23]

> [I]n the intervening period the word [merchantability] has fallen out of general use and largely lost its meaning except to merchants and traders in some branches of commerce. Hence the difficulty today of finding a satisfactory formulation for a test of merchantability. No doubt people who are experienced in a particular trade can still look at a parcel of goods and say 'those goods are not merchantable' or 'those goods are merchantable but at a lower price', distinguishing them from 'job lots' or 'seconds'. But in the absence of expert evidence of this kind it will often be very difficult for a judge or jury to make the decision except in obvious cases.[24]

(2) *Minor defects:* Furthermore, the use of such a term also leads to uncertainty as to whether minor defects are covered by the definition.

In the case *of Jackson v Rotax Motors and Cycle* Co,[25] which was decided before the introduction of the statutory definition, it was held that minor defects, provided that they were not utterly trivial, rendered goods unmerchantable and it was irrelevant that the defects could have been rectified at trifling cost.

This view, however, is difficult to reconcile with the more recent case of *Cehave v Bremer,* concerning a contract made before the statutory definition was introduced, where the Court of Appeal held that a consignment of citrus pulp pellets was merchantable although part of it was damaged and could only be used as an admixture in cattle feed in a smaller proportion than if it had been undamaged. However, there were special factors involved in the case: first, there was an express term entitling the buyer to an allowance off the price if the condition of the pellets was impaired, and second, the buyer, having rejected the goods, repurchased them at a lower price due to a fall in the market and then used them for their originally intended purpose. The court seemed to have wanted to avoid a result which would have enabled the buyer to make a profit.

Even after the introduction of the statutory definition, arguments have been made that the definition of 'merchantable quality' in s 14(6) of the Act is unsatisfactory because it can lead to the result that relatively minor defects, not

---

21 *Bristol Tramways v Fiat Motors Ltd* [1910] 2 KB 831 at 840, *per* Farwell LJ.

22 *Supra,* n 17 at para 2.10.

23 [1976]QB44.

24 *Ibid* at 80.

25 [1910] 2 KB 937.

so trivial as to fall within the *de minimis* principle, may not amount to a breach of contract at all.[26] It has been said[27] that the definition concentrates excessively on the fitness of the goods for the purpose or purposes for which goods of that kind are commonly bought. A small dent in the bodywork of a new car does not mean that the car is not fit for performing its primary function—that of being driven. The 'usability' test seems only to cover those defects which interfere with the use or uses of the article and no other defects. It might also be argued that the test only covers those defects which interfere with the main use or uses of the article and not defects of lesser importance which do not impede the main use or uses.

Furthermore, as the Law Commission has pointed out,[28] the buyer is in a most unfortunate position if the implied term as to quality does not cover freedom from minor defects. Not only is he unable to reject the goods and claim the return of the price, which might well be regarded as unreasonable in certain cases, he is also unable to claim damages, however modest, while retaining the goods. The reason is that the seller is not regarded as being in breach of contract at all. Although the courts are still free to construe the present definition so as to cover freedom from minor or cosmetic defects, the Law Commissioners felt that it was highly undesirable that there should be any uncertainty on this point.

(3) *Lowering of manufacturing standard:* Another argument[29] is that by defining goods as being of merchantable quality if they were fit for the 'purpose or purposes ... as it is reasonable to expect', the definition may have lowered the standard of merchantable quality where a seller is able to establish that goods of the particular type, such as a new car, can reasonably be expected to possess a number of minor defects on delivery. The result of this is that as the defects *increase* both in number and frequency the chance of their being held to be a breach of contract *diminishes.* Any general deterioration in the manufacture of a particular kind of article would be accompanied by a corresponding decline in the standard of merchantable quality.

(4) *Other factors missing:* Other factors which will influence the decision of whether goods are merchantable are also glaringly absent. These include the appearance and finish of the goods, durability and safety.

In particular, the absence of the requirement of safety has led to a rather absurd position in the law. In *Kendall v Lillico,* the House of Lords held by a

---

26 'Merchantable Quality—what does it mean?' published by the Consumers' Association in November 1979, as cited at 16 of The Law Commission Working Paper No 85 and The Scottish Law Commission Consultative Memorandum No 58, *Sale and Supply of Goods.*

27 *Ibid* at 32; *cf Rogers v Parish (Scarborough) Ltd* [1987] QB 933 which held that merchantable quality covers non-functional defects.

28 *Supra,* n 11 at para 2.13.

29 *Ibid.*

bare majority that groundnuts which could be safely fed to cattle and other animals were merchantable even though they proved fatal to pheasants and partridges and were sold without the proper warning. This conclusion appears to have been reached because it was found that a buyer *-withfull knowledge of thefacts* would have accepted the goods in discharge of the contract without a substantial abatement of price. The case is thus criticized as having allowed unsafe goods to be sold as merchantable by creating a fiction that the buyer has full knowledge of the facts.

Under the old law, because of the absence of an express provision, it was unclear whether 'merchantable quality' would include 'durability'. Thus, goods which were not as durable as they should have been may still have met the test under the old s 14(6), which stated that goods are of merchantable quality 'if they are fit for the purpose or purposes for which goods of that kind are commonly bought'. The definition did not state if the goods had to be fit for such a purpose or purposes for any particular length of time. Some purposes may entail the goods being used for only a short while. Others may require the goods to be used over an extended period of time. The old definition of 'quality' in s 61(1), which has since been deleted and incorporated into the new s 14(2B), stated that 'quality' included the 'state or condition' of goods. However it was also unable to offer much assistance in this regard, for it could be interpreted as only meaning that the initial condition of the goods was relevant and not its condition over a period of time.

3. *The amendment*

In place of the expression 'merchantable quality', Parliament has enacted the implied condition of 'satisfactory quality',[30] via the new s 14(2) of the SGA:

> Where the seller sells goods in the course of a business, there is an *implied condition* that the goods supplied under the contract are of *satisfactory quality.* [Emphasis added.]

What 'satisfactory quality' means is explained by s 14(2A) of the SGA:

> For the purposes of this Act, goods are 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 relevant) and all the other relevant circumstances.

It should be noted that the latter phrase of 'any description of the goods, the price (if relevant) and all the other relevant circumstances'[31] is the same as that provided in the old s 14(6) definition of 'merchantable quality'. It was retained because the Law Commission saw no reason for altering this element of the definition.[32]

---

30 Section 14(2) amended SGA.

31 Section *14(2A)* amended SGA.

32 *Supra,* n 17 at para 3.27.

The phrase 'any description of the goods' would however, upon clarification, include advertising.[33]

Another new section in the SGA, s 14(2B), elaborates on the term 'quality':

> For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods:
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied;
> (b) appearance and finish;
> (c) freedom from minor defects;
> (d) safety; and
> (e) durability.

It should be noted that the 'state or condition' of goods remains an aspect of the quality of goods.[34]

(1) *A higher standard:* It should also be noted that the Law Commission had in fact recommended the expression 'acceptable quality' but this was not accepted because '[a] non-complaining buyer might decide reluctantly that goods he bought were of acceptable quality, even if by objective standards the quality was not satisfactory.'[35] This implies that goods of 'satisfactory quality' are of a higher standard than those which are merely of 'acceptable quality'. Such a change should be applauded for this can only mean greater protection of the rights of the buyer.

Detractors could argue that sellers who are manufacturers themselves will merely factor in the cost of producing goods of a higher quality into the price the buyer has to pay, but such an argument does not hold water. It is based on the premise that the seller has been producing goods of only an 'acceptable' quality but not 'satisfactory' quality all along. Unless the seller has managed to monopolize the whole market, it will be nothing short of a miracle for such a seller to remain in business for long. This is because goods which are barely

---

[33] House of Lords Hansard, 22 July 1994 at col 488 *per* Earl Ferrers. Note however that he says that' it will be a matter for the courts to decide'. This could mean that the normal rules of contractual interpretation would apply, *eg* whether what was said in the advertisement was a representation amounting to a term of the contract or a mere puff. However, if this is what Earl Ferrers means, then there has actually been no change in the law with regard to this concern about advertisements. It is submitted that what he means is that advertisements, like any description of the goods, can affect the buyer's expectations of the quality of the goods. If the buyer's expectations have been raised, even though what was in the advertisements were but mere puffs, the goods will need to be of a sufficiently high quality before they can 'meet the standard that a reasonable person would regard as satisfactory'.

[34] Note though that it now applies through s 14(2B) of the amended SGA, *ie* the provision for 'satisfactory quality' itself, rather than through s 61(1) as part of the general definition of 'quality'.

[35] House of Commons Hansard, 11 February 1994 at col 633, *per* Mr David Clelland (Tyne Bridge); *supra,* n 33 at col 480, *per* Lord Dormand of Easington.

of 'acceptable' quality, as interpreted by the English Legislature, would face little, if any, demand. Even if there is demand for such goods, the reason for the existence of such a demand, instead of a demand for goods of an objective satisfactory quality, can only be because the former are cheaper, and under s 14(2A) of the amended SGA, 'price' is a factor to be considered if the goods are of 'satisfactory quality'. Thus the goods would still be of a 'satisfactory quality'.

(2) *Fitness for purpose:* Whilst fitness for purpose also remains part of the definition of the new implied term as to quality, its role and scope have been changed substantially. It is now merely one of the aspects of quality and not the sole criterion.[36] This means that the fact that the goods 'are fit for the purpose or purposes for which goods of that kind are commonly bought'[37] is not enough anymore.

Whilst previously it had been held that 'fitness for purpose' is not confined to mere functional fitness,[38] this demotion of the importance of the phrase makes it clear that other aspects of quality are also important.[39] It is submitted that, given the addition of other aspects of quality (which are not exhaustive), the strained meaning previously given to the phrase 'fitness for purpose' should be done away with.' [F]itness for purpose' under the new implied condition of 'satisfactory quality' should be limited to functional fitness so as not to lead to confusion. Other aspects of quality are more appropriately dealt with separately under the new s 14.

Furthermore, where previously it was sufficient for goods to be fit for one of the many purposes for which it is commonly used,[40] goods must now be fit for 'all the purposes for which goods of the kind in question are commonly supplied'.[41] However, Atiyah and Adams suggest that because judicial attitude has previously been to treat such a requirement as being too onerous,[42] the likely result would not be a major shift in the law but rather a different approach being taken to achieve the same result in certain exceptional cases, namely by holding that a particular purpose is uncommon.[43] This was in fact the approach of Nicholls LJ *in Aswan Engineering v Lupdine Ltd,* though he was in the minority, who held that it was not reasonable for the purchaser to expect that the pails he contracted for be able to cope with the stress in all climatic conditions and in all temperatures however extreme, either of heat or

---

36 *Supra,* n 17 atpara 3.31.

37 *Per* the old s 14(6) of the SGA, which has since been deleted.

38 *Rogers v Parish (Scarborough) Ltd* [1987] 2 WLR 353.

39 *Supra,* n 17 atpara 3.31.

40 *M/S Aswan Engineering Establishment Co v Lupdine Ltd [* 1987] 1 WLR 1.

41 Section 14(2B)(a) amended SGA.

42 *Aswan Engineering v Lupdine Ltd, supra,* n 40; see also *Kendall v Lillico, supra,* n 15 and *Sumner Permain & Co Ltd v Webb & Co Ltd* [1922] 1 KB 55.

43 PS Atiyah and John Adams, *The Sale of Goods* (9th ed, 1995) at 143.

cold.[44] It is submitted however that the content of the law has been altered and this cannot be disputed. Whilst exceptional cases will continue to be treated in the same manner, albeit through different reasoning, the general position would be that goods are expected to be fit for *all* the purposes for which they are commonly supplied. The law's adoption of such a general position is a marked change to be welcomed as heralding a rise in the standard of goods available to all purchasers, including consumers.

(3) *Appearance and finish and freedom from minor defects:* New to the definition of quality are the aspects of 'appearance and finish' and 'freedom from minor defects'. Since the list of aspects of quality given in the new s 14(2B) only apply in appropriate cases, it should be noted that these two references are 'relevant more to new goods than to second-hand goods, and... more to consumer purchases than to business purchases'.[45] This, it should be noted, is not dissimilar to the old position.[46] Another example of goods which these references ought not apply to include natural products such as articles made of earthenware or pottery. Such goods may contain slight inconsistencies or imperfections but these will not amount to breaches of contract.[47] It must also be noted that the implied term as to condition is still, notwithstanding these two references, subject to the principle of *de minimis non cur at lex*.[48] Atiyah and Adams suggest that the provision of s 14(2B)(c) requiring goods to be free from minor defects would not make much difference in practice since the overriding test is the requirement that the goods are of 'satisfactory quality'.[49] However, given that one of the aims of this amendment was to eliminate the possible lowering of standards that the previous test (which provided 'as it is reasonable to expect') could have resulted in, especially in the area relating to minor defects in new goods, it is submitted that a greater role will be served by this provision than what Atiyah and Adams give it credit for.

(4) *Safety:* Another addition to the list of aspects of quality is that of safety. Whilst it was accepted by the Law Commission that this aspect of quality was already part of the law before the amendment and that they 'did not propose any alteration in the law' in this regard,[50] it is submitted that the law in this area has indeed been changed by the amendment. This is because one of the reasons for the change was to 'make clear that hazardous things or substances,

---

44 *Aswan Engineering v Lupdine Ltd, supra,* n 40 at 155-6.

45 *Supra,* n 17 at para 3.40.

46 PS Atiyah and John Adams, *supra,* n 43 at 133.

47 *Supra,* n 17 at para 3.40; see also, *ibid* at 153 where Atiyah lists out 'fruit and vegetables' as examples of natural products.

48 *Ibid;* As defined by *Osborn's Concise Law Dictionary* (8th ed, 1993), '[t]he law does not concern itself with trifles.'

49 PS Atiyah and John Adams, *supra,* n 43 at 149.

50 *Supra,* n 17 at para 3.44.

which can be safely used only when unusual precautions are taken, will not be of the required standard of quality if appropriate warning is not given'.[51]

It is submitted that this clearly has the effect of reversing the House of Lords decision *at Kendall v Lillico,* and giving effect instead to the dissenting judgements of Lords Reid and Pearce. In this respect, we respectfully differ from the learned opinions of Atiyah and Adams who suggest that 'the specific reference to "safety" does not assist in reaching a more sensible conclusion' and that 'a similar approach might be adopted to that ... in *Kendall v Lillico'*.[52] It should be noted however that despite their fears, they 'hoped ... that this approach would not in general be adopted, [especially] in the case of unsafe consumer goods'.[53]

(5) Durability: Another 'new' aspect of quality is that of durability of goods. The expression is not defined or elaborated upon in the amendment but it is clear from the Law Commission Report that it means that goods are 'required to last for a reasonable time'.[54] It should also be noted that the expression does not require the goods to be of the same quality for the entire duration as it had been in at the time of delivery. Durability takes into account 'use or proper natural deterioration'.[55] Durability of goods, as explained by the Law Commission, is 'essentially a question of their original condition on delivery'.[56] Goods can break or fail either because they are *initially* unable to withstand the strains of ordinary use or because some untoward event occurs *subsequent* to delivery. In the former case the goods are not durable but in the latter case they are durable and there will be no breach of the new s 14(2).[57] It is submitted that by laying down the consideration of 'durability' in ascertaining the 'quality' of the goods, consumer protection is enhanced.

(6) *Afresh start:* Atiyah remains 'firmly of the opinion that resort to the old case law will still turn out to be necessary in a wide variety of situations [and it is] unlikely, ... that the new provisions will be treated as making a fresh start.'[58] However, even if this be the case, it is submitted that the old case law will have to be subject to the abovementioned changes in the law. The new amendments, where appropriate, will override the old case law. For example, it is difficult to see how the old case law will apply in the definition of the term 'merchantable quality', since 'acceptable quality' was initially proposed as a higher standard to 'merchantable quality' and the term 'satisfactory quality'

---

51 *Ibid* at para 3.45.

52 PS Atiyah and John Adams, *supra,* n 43 at 147.

53 *Ibid.*

54 *Supra,* n 17 at para 3.51.

55 *Ibid* at para 3.52.

56 *Ibid* at para 3.54.

57 *Ibid.*

58 PS Atiyah and John Adams, *supra,* n 43 at 131-2.

being eventually used because, as described above, it was felt that this would be an even higher standard. If old case law is to be of any use at all, it will only be in the sense that goods which fail the old, lower standard of 'merchantable quality' will fail the new standard of 'satisfactory quality'.

4. *Critique ofthe amendment*

Atiyah has also criticized the use of the expression 'satisfactory quality' because 'the word "satisfactory" in many modern contexts tends to be associated with mediocrity.'[59] It is submitted that such an interpretation of the expression is wrong in view of the reasons offered for the change of the expression from 'acceptable quality' to 'satisfactory quality'.[60]

B. *Remedies for breach of implied terms*

1. *The pre-amendment position*

In all contracts for the sale of goods, ss 13, 14 and 15 of the SGA operate to imply certain *conditions* into the contract. Section 13 implies a condition that the goods will correspond with its description. Section 14 implies a condition that the goods are of satisfactory quality, whilst s 15 implies a condition that the bulk will correspond with the sample in quality and that the goods will be free from any defect, making their quality unmerchantable (now unsatisfactory), in contracts for sale by sample.

Such statutorily implied conditions have the effect of allowing all buyers to reject goods if the conditions are breached, even if the breach is only a very small or trivial one, subject to the *de minimis* principle.

2. *Problems with the pre-amendment position*

(1) *Inflexibility ofclassification:* The classification of the terms implied by the SGA failed to take into account important developments in the common law on the classification of terms of contracts, such as the development of 'innominate terms' in the case *ofHongkong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd*[61] where it was held that the right to reject would only arise if the breach was such that the innocent party would be deprived 'of substantially the whole benefit which it was intended that he should obtain from the contract'.[62] This classification was eventually applied to contracts of sale (though not to the implied terms aforementioned) in *Cehave v Bremer* through s 61(2) of the Sale of Goods Act 1893. This development was approved by the House of Lords

---

59 Ibid at 131and 154.

60 *Supra, n 35.*

61 [1962) 2 QB 26.

62 *Ibid, per* Diplock LJ at 70.

subsequently.[63] Thus, one criticism against the implied terms is that its rigid classification of terms into conditions or warranties 'leads to inflexibility and to a danger that the obligation of the seller to supply goods of the appropriate quality will be watered down.'[64]

(2) *Dangers to buyers;* If the defect is only a minor or trivial one and the court does not feel that the buyer should succeed in the action, it may well hold that there was no breach of the implied condition at all. The court would be reluctant to find for the buyer because a condition when breached, gives the buyer the right to reject the goods, however unmeritorious his claim may be. It would thus be tempted to hold that there was no breach at all of the implied term.[65] Such a decision, though arguably correct on its facts, is artificial. What is worse is that the holding may affect subsequent cases that come before the courts. It may be more difficult for subsequent litigants to prove that there was a breach of the implied condition as a result of adverse, albeit 'artificial', precedents. A counter-argument against this, of course, is that there is nothing wrong in making it more difficult for litigants to prove that there was a breach of the implied condition when the breach is only a minor or trivial one, but again, it is submitted that such judicial reasoning, in its attempt to arrive at a just solution, smacks of artificiality.

The courts have less flexibility in arriving at a just solution on the facts of the case because the implied terms can only be conditions. When faced with a buyer coming before it with a minor defect in the goods he bought, the courts are only left with the choice of either allowing the buyer to reject the goods or not allowing the buyer any remedy at all. The court is not in a position to deny the buyer the right to reject and award him the damages he deserved instead, by treating the implied term as a warranty,[66] or even an innominate term, as a result of the rigid condition-warranty dichotomy adopted by the SGA.

(3) *Effect on sellers:* Conversely, such inflexibility has also been criticized as being harsh on the sellers. This would occur when the courts applied the implied terms without regard to the effects of their breach.[67] Thus the buyer could reject the goods even if they were commercially within their specifications.[68] Such decisions have been criticized by the House of Lords as

---

63 *Reardon Smith Line Ltd v Hansen-Tangen [*1976] 1 WLR 989, *per* Lord Wilberforce at 998; *Bunge Corporation v Tradax Export SA [*1981] 1 WLR 711.

64 *Supra, n* 17 at paras 2.26 and 4.1.

65 *Ibid* at para 2.26; The Law Commission also referred to *Millars of Falkirk Ltd v Turpie* 1976 SLT (Notes) 66, and *Cehave v Bremer, supra,* n 23, as demonstrating this possible effect on the courts.

66 Ibid at para 4.1.

67 See *eg Arcos Ltd v Ronaasen & Son [*1933] AC 470 and *Re Moore & Co Ltd and Landauer&Co* [1921] 2 KB 519.

68 *Arcos Ltd v Ronaasen & Son [*1933] AC 470.

being 'excessively technical'.[69] They reflect the inherent rigidity of the terms implied by the SGA as a result of the absence of statutory recognition of the innominate term or a flexible equivalent. This position could also potentially be abused by buyers who would choose to reject the goods *not* because of the minor breach *but* because the market for the particular goods had gone down, thus allowing him to obtain replacements at a lower price.

3. *The amendments*

A new section, s 15A, has been introduced into the SGA under the Sale of Goods (Amendment) Act:

> (1) Where in the case of a contract of sale—
> (a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a condition implied by section 13, 14 or 15; but
> (b) *the breach is so slight that it would be unreasonable for the buyer to reject them,* then, if the buyer *does not deal as consumer,* the breach is not to be treated as a breach of a condition but may be treated as a breach of warranty.
> (2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.
> (3) It is for the seller to show that a breach fell within subsection (1) (b). [Emphasis added.]

As can be seen above, the law in this area is changed when the buyer 'does not deal as a consumer'. Although the word 'consumer' is not defined in the SGA, the new s 61(4A) provides that '[references in this Act to dealing as consumer are to be construed in accordance with Part 1 of the Unfair Contract Terms Act.'

Section 12(1) of the Unfair Contract Terms Act,[70] defines the term 'deals as consumer' as follows:

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

The definition of 'business' is exactly the same in both s 14 of the Unfair Contract Terms Act and s 61(1) of the SGA:

> [B]usiness includes a profession and the activities of any Government department or local or public authority.

---

[69] *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, *per* Lord Wilberforce at 998.

[70] Cap 396, 1994 Ed.

4. *Critique of the amendment*

It can be seen that the new amendments do not apply to situations when the buyer is a consumer. It is not immediately clear why the amendment in this respect is restricted to the non-consumer buyer. One reason suggested by the Law Commission is that a consumer is 'almost always buying goods for domestic use ... and not for the purpose of making a profit [and that] he will not usually be content with defective goods when he intended to buy perfect goods, even if the price were reduced or he were to be compensated in some way'.[71] This reason, however, will similarly apply to non-consumers when they are not buying for the purposes of re-sale but for their own commercial purposes. If the reason for such a distinction is to be valid, the distinction should not be made between consumers and non-consumers, but between buyers for resale and buyers for their own use instead. For example, a manufacturer who would be a non-consumer, may only want to purchase the best ingredients so that he can produce goods of the highest possible quality. There is no reason why the manufacturer, and not the consumer, would be contented with less than perfect goods.

It is submitted that for the purposes of the new s 15A, there should not have been any distinction between groups of people at all. Since the law, involving consumers, has not been changed, the criticisms leveled against the pre-amendment position would still apply where they are concerned. Although it can be argued that consumers deserve greater protection than non-consumers, such ideals should not be maintained at the expense of flexibility in the law. The Law Commission has argued that the consumer would not usually be in a position to dispose of defective goods and it would be difficult to quantify the damages,[72] but this is not a good reason for the consumer buyer to reject the goods when it is unreasonable for him to do so. If the goods are defective to the extent that the consumer buyer is unable to use it for his original purpose, and he is forced to dispose of it, then it is submitted that the breach would not have been one which was so slight that it would be unreasonable for the consumer to reject in the first place.

Another reason given by the Law Commission for the distinction between consumers and non-consumers is that the seller is likely to be in a stronger bargaining position than the consumer buyer and would be able to bully him into accepting lesser damages if he were not allowed to reject the goods,[73] and this is especially so when it is realized that 'the overwhelming majority of consumer disputes are not taken to court, or even to lawyers'.[74] However, this argument does not hold in the light of s 15A(3), which states that it is for the seller to show that the breach is one which is so slight that it would be unreasonable for the buyer to reject the goods. Even if the distinction between

---

71 *Supra,* n 17 at para 4.4.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

consumers and non-consumers were to be obliterated, the consumer would still be able to reject goods when the implied conditions are breached, unless the seller is able to show that the breach is one which is so slight that it would be unreasonable for the buyer to reject the goods. The burden of proof is on the seller, and there is no reason why the seller should not succeed when he can discharge this burden of proof.

The courts should be free to hold, albeit not lightly, that consumers are not allowed to reject goods when the facts of the case so suggest.

C. *Acceptance of goods*

1. *The pre-amendment position*

Section 35(1) of the 1979 Act provided three instances where the buyer would be deemed to have accepted the goods tendered to him and would thus have lost his right to reject:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or (except where section 34 otherwise provides) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

Section 34 provides:

> (1) Where goods are delivered to the buyer, and he has not previously examined mem, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
> (2) Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

2. *Problems with the pre-amendment position*

(1) *Intimation of acceptance:* Prior to the amendment, intimation of acceptance was *not* subject to a reasonable opportunity of examination of the goods.[75] The buyer in such a case was deemed to have waived his right to examine them.[76] This position is unacceptable, especially in relation to so-called 'acceptance notes' which a buyer may be required to sign when goods are delivered to him. This is because, in such instances, he is unlikely to have had an opportunity of examining the goods when he signs the notes.[77]

---

[75] *Ibid* at para 2.45.

[76] *Ibid.*

[77] *Ibid.*

(2) *Inconsistent act:* One problem that may relate to the second limb of s 35, which provides for acceptance by way of an act inconsistent with the ownership of the seller, is that property in goods may pass to a buyer before he takes delivery of them.[78] This is because in such a case the buyer will not be able to act inconsistently with the ownership of the seller, since the seller will have ceased to own goods before they are delivered to the buyer. This problem appears to have been solved by the courts.[79] The words 'ownership of the seller' have been construed as referring to a conditional ownership of the seller, the condition being that the goods will comply with the terms of the contract and are not rejected by the buyer.[80] Further, it is not stated what acts are inconsistent with the ownership of the seller. Beyond the act of re-sale and delivery to a sub-buyer, it is unclear what acts will amount to such an 'inconsistent act'.[81] The underlying policy for such a rule is also not wholly clear[82] and it is further felt that delivery of goods pursuant to a re-sale or other disposition should not constitute an inconsistent act.[83]

(3) *Lapse of reasonable time:* With regard to the third and last limb of s 35 which provides for acceptance by the lapse of reasonable time, it is uncertain whether it is subject to s 34(1) of the old Act. However, it has been suggested by the Law Commission that 'lapse of reasonable time' is not subject to s 34(1).[84] In any event, this 'difference in practice would in any case be slight'[85] and the Law Commission notes that '[i]t is difficult to imagine many situations in which the buyer will have retained the goods for any length of time without having had a reasonable opportunity to examine them.'[86]

(4) *Seeking repairs:* Furthermore, two problems could arise as a result of the provisions of s 35 in relation to the instance when the buyer seeks to have defects in the goods remedied. First, this may be deemed to be an implied intimation of acceptance or an 'inconsistent act', thus preventing him from rejecting the goods.[87] Such a position is unsatisfactory and is not in line with normal practice because it would then be the case that 'buyers would be best advised *not* to allow the seller to try to put the goods right, but to insist on

---

78 Sections 17 and 18 SGA.

79 *Supra,* n 17 at para 2.46.

80 *Kwei Tek Chao v British Traders and Shippers Ltd [* 1954] 2 QB 459, *per* Devlin J at 487.

81 *Supra,* n 17 at paras 2.47 and 5.33.

82 *Ibid* at para 5.33.

83 *Ibid* at para 5.35.

84 *Ibid* at para 2.49.

85 *Ibid.*

86 *Ibid.*

87 *Ibid* at para 5.26.

[rejection]'.[88] Although buyers should not be discouraged from rejecting goods when they have a right to do so, they should similarly not be discouraged from allowing the seller to repair the goods first. This is because the rejection of goods is economically wasteful, for even if the seller manages to resell them, time and expense has to be incurred in the process.

Second, it is unclear whether or not the time spent in seeking this remedy would count towards the lapse of reasonable time.[89] The Law Commission considered that it would 'clearly be wrong if the clock remained running while ... the goods were ... being repaired.'[90] This is because, it is a benefit to the seller to be able to repair the goods instead of having to face rejection for minor defects. However, if the clock were deemed to continue running, by the time repairs are completed, reasonable time could have lapsed to prevent the buyer from rejecting the goods.[91] Such a result would then have the effect of discouraging buyers from trying to effect repairs for minor defects in goods.

3. *The amendment*

Under the Amendment Act, there is no change to the three instances when the law would deem that the buyer has accepted the goods tendered to him and thus lost his right to reject. Two of these instances are found in s 35(1):

> Subject to subsection (2), the buyer is deemed to have accepted the goods—
>
> (a) when he intimates to the seller that he has accepted them; or
> (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

Subsection (2) states:

> Where goods are delivered to the buyer and he has not previously examined them, he is not deemed to have accepted them under subsection (1) until he has had a reasonable opportunity of examining them for the purpose:
>
> (a) of ascertaining whether they are in conformity with the contract; and
> (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

---

[88] Ibid at para5.27.

[89] *Ibid* at para 5.26.

[90] Ibid at para 5.30.

[91] *Ibid.*

The other instance when the law would deem that the buyer has accepted the goods tendered to him and thus lost his right to reject is found in s 35(4):

> The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(1) *Intimation of acceptance:* The position as to intimation of acceptance has been altered by the amendments. It is now clearly subject to the right of the buyer to a reasonable opportunity to inspect the goods.

(2) *Inconsistent act:* Under the new s 35(6), with regard to an acceptance by an inconsistent act, the law has been altered such that delivery of goods under a sub-sale or other disposition will no longer amount to acceptance.[92] Two strands of cases under the old law relating to 'inconsistent act' were identified by the Law Commission. The first was where 'the buyer has destroyed, damaged or used the goods or incorporated them into another product so that they cannot be returned to the seller in good order.'[93] The second was where 'the buyer conducted himself in such a way as to show that he did not intend to reject the goods',[94] The rule as applied in the latter strand of cases appears to be for all intents and purposes abolished with the application of the new s 35(6)(b). It may then be said that the 'underlying principle' remaining in the new rule relating to 'inconsistent act' is that 'goods cannot be rejected if they cannot physically be returned to the seller'.[95] Having a single principle is a definite improvement in this area of the law as it can then be clearly applied to different cases, guiding the courts as to when an act will be one which is inconsistent with the ownership of the seller.

Though it may be argued that there are other forms of conduct which can show an intention not to reject other than delivery under a sub-sale or other disposition, it is submitted that the abolition of the old rule that such dispositions amounted to acceptance makes it sufficiently clear that these acts must unequivocally show an intention not to reject. If this is the case, such acts are then more appropriately covered by the 'intimation of acceptance' rule rather than the 'inconsistent act' rule which should only apply where *restitutio in integrum* of the goods to the seller is not possible. Whilst it has been suggested that the principle of *restitutio in integrum* cannot apply to contracts for the sale of goods,[96] the alternative suggested is that it is only a *prima facie* position that the buyer will not lose his right to reject until he has had an opportunity to examine the goods.[97] This position would then be rebutted 'if the

---

92 Section 35(6)(b) amended SGA.

93 *Supra,* n 17 at para 5.35.

94 *Ibid.*

95 *Ibid* at para 2.47.

96 Peter Kincaid, 'Acceptance and Examination under the Amended Sale of Goods Acts' [1994] 68 ALJ 515.

97 *Ibid* at 521.

buyer's act interferes with the seller's reversionary interest to an extent that is greater than is necessary for a reasonable examination of the goods, unless to the extent that it is greater the effects of that interference can quickly be reversed.'[98] Such an alternative, it is submitted, is not in substance markedly different from the principle *of restitutio in integrum,* especially when the later part of the formulation is noted. It also requires a strained reading of the words '[s]ubject to' which is unnecessary since it would achieve largely the same result.

(3) *Lapse of reasonable time:* It is now also clear that in determining whether there has been a 'lapse of reasonable time', reasonable opportunity of examination of goods is relevant.[99] Here, it should be noted that there is an inconsistency between the express words of the Act and the explanatory statement to the Bill. In the explanatory statement, it is declared that '[t]he right to a reasonable opportunity to examine the goods is not relevant to the operation' of s 35(4), which is the new provision for acceptance through lapse of reasonable time.[100] It is submitted that the explanatory statement should be ignored as erroneous as it is obvious that s 35(5), which provides that the opportunity to examine is relevant to the determination of lapse of reasonable time, has been accidentally omitted.

(4) *Seeking repairs:* Under the new s 35(6)(a), it is now clarified that attempts at repair will not of itself amount to acceptance of goods. This therefore eliminates the previous anomalous position where a buyer of defective goods who allowed the seller to attempt repairs instead of rejecting the goods outright may lose his right to reject as a result and encourages 'informal attempts at cure'.[101] It has also been clarified that it does not matter, with regard to the operation of s 35(6)(a), whether it was the seller himself or someone else who would attempt the repair.[102] Such an amendment can also be said to be beneficial to the buyer in instances where he needs the defective goods urgently and the seller does not have any more of the same goods in stock. Without the amendment, the buyer would be left with only the undesirable choices of either rejecting the defective goods and being left with none at all, or allowing the seller to repair but thereby losing the right to reject the goods forever. With the amendment in place, the buyer has the third choice of allowing either the seller or another party to attempt repairs to the goods first while retaining the option to reject the goods if the repairs are not satisfactory or where rejection is otherwise necessary.

---

98 *Ibid at 522.*

99 Section 35(5) amended SGA.

100 Explanatory Statement, Government Gazette Bills Supplement, Bill No 33 of 1996, 29 October 1996.

101 *Supra,* n 17 at para 5.28.

102 *Ibid at para 5.29.*

4. *Critique of the amendment*

Although it is now clear that attempts at repair will not lead to an acceptance by way of an inconsistent act, it is still unclear whether such repair time will be taken into account to calculate the lapse of reasonable time. Whilst the Law Commission felt that the new s 35(6) would lead to the result that a court would not take into account time taken in seeking repairs in deciding whether there has been a lapse of reasonable time,[103] the court could still interpret the provision in s 35(6)(a) as applying only in respect of cases involving 'inconsistent acts', especially when it is read in the context of s 35(6)(b). It is submitted that it would have been preferable for the amendments to have spelt out the position clearly and put it beyond doubt.

D. *Remedies in respect of deliveries of wrong quantities*

1. *The pre-amendment position*

Before the SGA was amended, under s 30(1), the buyer could reject the whole of the goods when the seller delivered less goods than what he had contracted to sell:

> Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

Under s 30(2), the buyer could also reject the whole of the goods or the excess when the seller delivered more goods than what he had contracted to sell:

> Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.

2. *Problems with the pre-amendment position*

As can be seen, the SGA prior to the amendment was extremely harsh on sellers with regard to the obligation to deliver the right quantity of goods. As long as the seller delivered the wrong quantities, the buyer would have the right to reject the goods. The courts did not have any flexibility at all in arriving at solutions which did justice to the facts of the case. Furthermore, a similar criticism to that made against the breach of implied terms under ss 13, 14 and 15 of the SGA could be made in respect of the right to reject, in that the development of the common law on the *Hongkong Fir* 'innominate terms' had not been taken into account.

Such a position was also overly technical and could lead to abuse by buyers

---

[103] *Ibid* at para 5.31.

who could choose to reject goods *not* because the delivery was of the wrong quantity *but* because the market had fallen and they could obtain substitute goods at a lower price. Sellers were unfairly prejudiced as a result.

3. *The amendment*

With the Sale of Goods (Amendment) Act, one of the two new subsections introduced into s 30 is s 30(2A):

> A buyer who does not deal as consumer may not—
> (a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subsection (1); or
> (b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under subsection (2),
> if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for the buyer to do so.

The other new subsection, s 30(2B), states that the burden of proof is on the seller:

> It is for the seller to show that a shortfall or excess fell within subsection (2A).

4. *Critique of the amendment*

Because of the reasons given above, under 'Problems with the pre-amendment position', such an amendment is immensely welcomed.

(1) *Restriction to non-consumer.* However, as with the amendment as to remedies available to a non-consumer in relation to a breach of implied terms, it is not immediately clear why this particular amendment is restricted to non-consumers. It is submitted that there should not be any distinction between consumers and non-consumers.

The objection here is even stronger than that made against the similar distinction with respect to the remedies in the breach of implied terms, as discussed above.[104] This is because the reason for the rejection of the whole bulk of the goods is *not* because of its low quality, *but* merely because the different quantity was delivered. The arguments that were made with respect to breach of implied terms would thus have no application here. There is no reason why the consumer buyer should be allowed to reject when 'the shortfall or, as the case may be, excess is so slight that it would be unreasonable for the buyer to do so.'[105]

It could be argued that the amendment was made to prevent buyers from seeking to take advantage of market conditions by alleging short or excess deliveries when the market falls and such an occurrence would be rare in the

---

[104] See Pt IIB4, *supra* .

[105] Section 30(2A)(b) of the SGA.

case of consumers who generally do not buy goods in bulk,[106] but this is not a good reason at all. Although such an occurrence would be rare in the case of consumers, it does not mean that the law as applicable to non-consumers should not apply to them as well. After all, murders are relatively rare occurrences, but that should not lead Parliament to repeal s 300 of the Penal Code![107]

(2) *Right to reject whole delivery in cases of excess:* Another criticism would be the failure to abolish the right of the buyer to reject the whole delivery where there is an excess of goods. There does not appear to be any clear rationale behind this rule. After all, would the buyer be put through excessive, if any, inconvenience by accepting the quantity of goods he contracted for and rejecting the others? If he would be put through a great deal of inconvenience to get the goods he contracted for, then it is submitted that the goods are *not* in a deliverable state.[108] In such a case, there is no duty on his part to even accept the goods and thus there is no need to give him a right to reject them. It is thus submitted that, assuming that the goods were in a deliverable state, in the case of delivery of an excess of goods, the buyer should not be allowed to reject the whole but should be compelled to accept what he contracted for with a corresponding right to choose to accept or reject the excess goods.

E. *Partial rejection of goods*

1. *The pre-amendment position*

Where a contract of sale was not severable, s 11(3) operated so that where the buyer had accepted part of the goods, he could not reject the rest but could only sue for damages. Section 11(3) stated that:

> Where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.

---

106 *Supra,* n 17 at para 6.20. *Cf the* recommendations of the Scottish Law Commission that the amendment apply to *all* buyers at para 6.21.

107 Cap 224, 1985 Rev Ed.

108 *Underwood v Burgh Castle Brick & Cement Syndicate* [1922] 1 K B 343, where it was held that goods would not be in a deliverable state if the sellers were bound to do something to it to put it in a deliverable state. See also *Head (Phillip) & Sons v Showfronts* [1970] 1 Lloyd's Rep 140, where Mocatta J held that it is essential for an article to be in a deliverable state that it should be specific and ascertained in a manner binding on both parties. If there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, it would not be in a deliverable state.

The only exception to this rule was to be found in s 30(4) which stated that:

> Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

2. *Problems with the pre-amendment position*

Except for the limited exception to the general rule as provided for by s 30(4) of the old Act, there were no means by which a buyer could partially reject a delivery of goods (other than a buyer buying under a severable contract, and even then only as *between* deliveries but not *within* a single delivery). The Law Commission felt that 'in commercial terms it seemed reasonable for a buyer to be able to retain satisfactory goods and reject defective goods'.[109] It was also noted that such a rule allowing partial rejection had been adopted in other jurisdictions, most notably in the United States Uniform Commercial Code.[110]

The old position can thus be criticized as working against the reasonable expectations of both buyers and sellers. Buyers, who were in urgent need of goods which they had contracted for, could not try to meet this need by accepting the satisfactory goods without also, at the same time, accepting the defective goods which they might have had no use for. Sellers would then be disadvantaged because buyers would not be willing to accept even the satisfactory goods because they would then be deemed to have accepted the defective ones as well.[111]

3. *The amendment*

Under the new s 35A, the buyer now has a right to accept some of the goods tendered on delivery and reject the rest if they are defective. Section 35A(1) states that:

> If the buyer—
> (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them; but
> (b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,
> he does not by accepting them lose his right to reject the rest.

This scheme is similar to that provided under the old s 30(4) except that it applies to all breaches and not merely to the breach of the implied condition of

---

[109] *Supra, n* 17 at para 6.8.

[110] *Ibid* at para 6.8.

[111] It may be that this can be avoided through the creation of a new contract whereby the buyer agrees to accept only the satisfactory goods, but the buyer would be well-advised to get this contract in writing in case the seller denies making it and argues that the buyer has accepted *all* the goods under the original contract of sale.

correspondence with description.[112] The new position also does not seek to reduce the buyer's rights where there is a delivery of a wrong quantity.[113]

(1) *Mien the right arises;* It should also be clarified that the right to reject part of the goods will not arise if the buyer does not have the corresponding right to reject the whole.[114] This right to reject the whole may be lost by virtue of 'acceptance' under s 35 of the SGA and, once so lost, the buyer will no longer have the right to a partial rejection of the goods.[115]

(2) *Right to choosefor non-conforming goods:* It should further be noted that the buyer is not, by operation of s 35A, compelled to reject *all* the non-conforming goods.[116] The rationale behind such a rule is that the goods ''may be defective to different extents, and the buyer may be able to use some of them.'.[117] Thus, the rule is made non-compulsory so as to 'encourage the retention by the buyer of goods for which he has a use'.[118] However, if the buyer chooses to accept any goods conforming to the contract, he must accept *all* the conforming goods.[119]

(3) *Commercial units:* This right of partial rejection is subject, however, to the exception of the acceptance of parts of 'commercial units', as provided for in s 35(7). Where a division will materially impair the value of goods or the character of the unit, the unit is said to be a commercial unit.[120] In respect of such goods, acceptance of part of the goods will amount to acceptance of the entire commercial unit. There is no right of partial rejection. An example of such a commercial unit is a car.[121] In such a case, the buyer should not be entitled to remove from it parts that are in good working order and reject what is left.[122]

4. *Critique ofthe amendment*

A minor criticism can be made to the effect that this right of partial rejection is not clearly made subject to the rules relating to slight shortfalls and excesses in delivery in relation to non-consumers. However, it is submitted that it is

---

112 *Supra,* n 17 at para 6.9.

113 *Ibid.*

114 Ibidppp at para 6.10.

115 *Ibid.*

116 *Ibidatpara* 6.11.

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

120 Section 35(7) amended SGA.

121 *Supra, n* 17 at para 6.12.

122 *Ibid.*

sufficiently clear that the new s 35A is subject to the new s 30(2A). This is because, for the right of partial rejection to arise, the buyer must first have a right to reject the goods under s 35A(1)(a). However, this right will not be available if s 30(2A) applies to the particular facts.

F. *Sale of undivided shares in goods*

1. *The pre-amendment position*

Section 2(2) of the SGA provided that:

> There may be a contract of sale between one part owner and another.

Whilst s 16 of the SGA, which states that' [w]here there is a contract of sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained', does not prevent property expressed as an undivided share in goods from passing, it is not sufficiently clear whether or not such a sale of undivided shares is a sale of 'goods' within the meaning of the SGA.[123]

2. *Problems with the pre-amendment position*

Although the natural implication, from the context of s 2(2), is that such a sale would be covered by the SGA,[124] it can be argued that an undivided share in goods is 'an abstraction, a chose in action or incorporeal property' and thus not within the scope of the SGA.[125] On the other hand, it is also arguable that such a sale was intended to be within the scope of the Act. This is because the original Sale of Goods Act 1893 was a codification Act which codified the common law relating to the sale of goods. Furthermore, in the 1835 case of *Marson v Short*[126] it was held that a sale by the owner of a horse who had a half share in it, was a sale of goods for Stamp Act purposes. It may, however, be argued that a codification Act on a particular area of the law is not a statutory enactment of all the previous case law that has been laid down on that area, unless stated otherwise, and therefore the position is still unclear.

3. *The amendment*

The new amendments to s 61 of the SGA serve to make clear that a sale of an undivided share of goods is a sale of goods within the meaning of the SGA:

> '[G]oods' includes all personal chattels other than things in action and

---

[123] The Law Commission No 215 and the Scottish Law Commission No 145, *Sale of Goods Forming Part of a Bulk* at para 2.5.

[124] *Ibid.*

[125] *Ibid.*

[126] (1835)2 Bing NC 118.

> money; and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale, and *includes an undivided share in goods[.]* [Emphasis added.]

It should be noted that such a sale is regarded as fundamentally different from a sale of a specified quantity of goods out of a specified bulk, which will be discussed below. In particular, where the bulk is larger than originally contemplated at the time of the contract, the buyer of an undivided share in the bulk will gain, and where it is smaller, he will lose.[127] For example, the sale of a half share of 10 tonnes of wheat lying in a certain warehouse will be the sale of an undivided share in goods. However, the sale of 5 tonnes of wheat lying in a certain warehouse will be a sale of a specified quantity of goods out of a specified bulk. As such, the provisions in relation to the latter do not apply to the former.

4. *Critique of the Amendment*

(1) *Lack of clarity:* It is submitted that the amendments that have been made to this area of the law, though helpful, are not sufficiently extensive to clarify it. Further amendments in the line of those made in relation to the sale of a specified quantity of goods out of a specified bulk are necessary.

For example, it is not clear from the amendments themselves whether the law relating to the sale of a specified quantity of goods out of a specified bulk will apply to this area of the law. Using the example given above, it may be asked if there is any practical difference between the sale of a half share and the sale of 5 tonnes out of 10 tonnes of wheat lying in a certain warehouse. Furthermore, it may even be argued that if the quantity of the bulk is known, the sale of any share of the bulk is akin to the sale of a specified quantity of goods out of the specified bulk, and thus the law in this area should apply.

It is submitted, however, that since the law relating to the sale of an undivided share in goods has been conceptualized as being fundamentally different from that of a sale of a specified quantity of goods out of a specified bulk, the law relating to these two areas should be different as well, unless there is case law or legislation which specifically says otherwise. For example, a buyer who owns a half share of wheat lying in a warehouse will lose 20% of its value if the total quantity is reduced from 10 tonnes to 8 tonnes due to theft. The buyer who merely owns 5 tonnes, however, will not be affected.

(2) *No sound reason for distinction:* The distinction between sales of undivided shares and sales of goods *ex bulk* drawn as a result of the amendments does not seem to be based on any sound rationale. This leads to the artificial difference when a contract of sale for part of a bulk is expressed by shares, *eg* half, against that by quantities, *eg* 2 out of 4.

---

[127] *Supra,* n 123 at para 5.2.

(3) *Non-existence of bulk specified:* It is also unclear, when the undivided share is out of a specified bulk *(ie* specific goods), whether s 6 can apply where the bulk is smaller than contracted for at time of contract. In *Barrow, Lane & Bollard Ltd v Phillip Phillips & Co Ltd,*[128] it was held that s 6 continued to apply where only part of the goods perished, Wright J being of the view that '[a] contract for a parcel of 700 bags is something different from a contract for 591 bags, and the position appears ... to be in no way different from what it would have been if the whole 700 bags had ceased to exist.'[129] As such, it is even arguable that where there is a shortfall of goods at the time of contract as a result of some of them perishing, s 6 would render the contract void.

G. *Sale of goods ex bulk*

1. *The pre-amendment position*

Prior to the amendment, s 16 of the SGA operated to prevent any passing of property for unascertained goods. Section 16 states:

> Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

1. Problems with the pre-amendment position

Section 16 thus prevented property from passing in the instance of two classes of goods—wholly unascertained goods and goods that are purchased as a quantity out of a bulk.[130] This position *vis-a-vis* the former class of goods may be justified because 'how can we speak of someone having bought goods if we cannot tell what it is he has bought?'[131] However, it is less understandable in the latter class.

(I)Momentary separation: The old position led to 'a crucial difference in legal result between the case where fungible goods never leave the bulk and the case where, with the agreement of both parties, they are separated for a few minutes and then restored to the undivided mass.'[132] In the case where there is momentary separation, the buyer becomes an owner in common of the whole bulk when the goods are once more merged with the rest.[133]

(2) *Phraseology:* Furthermore, in view of the amendments allowing the transfer

---

[128] [1929] 1KB 574.

[129] Ibid at583.

[130] Sapra,nl23atpara2.7.

[131] Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed, 1989) at 17.

[132] Supra, nl23atpara2.7.

[133] *Ibid.*

of property in an undivided share of goods, it also resulted in a 'crucial difference in legal result between the case where a contract for fungible goods identifies them by quantity, weight or other measure and the case where it identifies them in a proportionate way (whether a fraction or a percentage of the bulk).'[134] In the latter case, the buyer becomes an owner in common of the bulk.[135]

(3) *Insolvency of seller.* Also, whilst it may be common for purchasers of a quantity out of bulk to receive a delivery order from the seller addressed to a third party such as a storekeeper, he does not correspondingly receive any proprietary or possessory rights over the goods.[136] As a result, if the seller were to become insolvent the goods could still be taken by the liquidator.[137]

Because the buyer would be an unsecured creditor, his rights would not prevail over those of secured creditors and this could result in the case whereby after satisfying these secured creditors, the buyer would be left with only a right on paper.[138] This injustice may amply be demonstrated by the recent case of *Re Goldcorp Exchange Ltd*[139] where property in gold bullion was held not to have passed to pre-paying buyers who were left with nothing when the seller Goldcorp Exchange Ltd became insolvent.

Re Goldcorp may be contrasted with *Re Stapylton Fletcher Ltd*[140] where, for a particular group of purchasers, property in wine passed to them to hold as tenants in common because the seller had physically removed wine purchased by customers from its trading stock and placed them in their reserve. The removal constituted sufficient ascertainment to allow property to pass according to the implied intentions of the parties, and upon mixing these ascertained goods with those of other customers', the seller created a tenancy in common between all its customers in this new bulk.

Even if one takes the view that giving secured creditors priority over unsecured creditors generates no apparent injustice, the two cases above illustrate the urgent need for reform in this area of the law if excessive technicality is to be avoided.

(4) *Sale of entire bulk:* Another anomaly created by s 16 could be seen where the seller had sold all the goods in the bulk under several contracts. If the entire bulk was owned by one single buyer, property would pass to him through ascertainment by exhaustion (see below). However, if there was more than one

---

134 *Ibid.*

135 *Ibid.*

136 *Ibid* at para 2.8.

137 *Ibid.*

138 Janet Ulph, 'The Sale of Goods (Amendment) Act 1995: co-ownership and the rogue seller' [1996] LMCLQ 93 at 94.

139 [1994]3WLR199.

140 [1995] 1 All ER 192.

buyer, property would not pass through the operation of s 16.[141] This whole bulk thus continued to 'belong' to the seller and would be available to the liquidator upon his insolvency.[142]

(5) *Right to sue:* This lack of legal ownership or possessory title could also prevent the buyer from being able to sue in tort or delict for damage to the goods.[143] This result may be demonstrated by the cases *of Leigh and Sullivan LtdvAliakmon Shipping Co Ltd (The Aliakmon)*[144] *Nacap Ltd v Moffat Plant Ltd,*[145] and *Obestian Inc v National Mineral Development Corp Ltd (The Sanix Ace),*[146] where the buyers of goods were unable to sue for damage sustained by their goods because property could not pass.

(6) *Passing of risk:* Section 16, however, did not prevent risk from passing and the buyer could become liable for damages sustained by the goods even though they were not owned by him.[147] This led to a particularly strange result whereby it could actually be wiser for the buyer to contract for the risk of damage, rather than have the risk remain with the seller.[148] This was because if risk passed, he would then be able to insure himself and thus not lose out totally in the event of the seller's insolvency.[149]

(7) *Expectations of the parties:* Even where the contract did not end up in disaster, s 16 being a mandatory rule served to foil the parties' reasonable expectations.[150] It served as an impediment to freedom of contract.[151] Very often both parties may have wanted the property to pass when the price was paid in exchange for certain documents, such as bills of lading, but s 16 served to prevent such a passing of property where the goods formed part of a larger identified bulk.[152] Whilst it may be argued that parties could always separate out and identify, even momentarily, the goods that formed part of the contract.

---

141 *Supra,* n 123 at para 2.10.

142 *Ibid.*

143 Ibid atpara2.14.

144 [1986] AC 785.

145 1987SLT221.

146 [1987] 1 Lloyd's Rep 465.

147 Supra, n 123 at para 2.12.

148 Tom Bums, 'Better Late than Never: The Reform of the Law on the Sale of Goods Forming Part of a Bulk' [1996] 59 MLR 260 at 262. This happened in the case of *Sterns Ltd v Vickers Ltd* [1973] 1 KB 78, where risk passed to the buyer before properly. It is commonplace for risk to pass before property in cif and fob contracts.

149 *Ibid* at 262-3.

150 *Supra, n* 123 at para 2.15.

151 *Ibid.*

152 *Ibid.*

it may not always have been practical or economical to do so.[153]

Such a position is especially unacceptable when it is recognized that 'in the last 30 years or so the bulk cargo trade had increased to the point where it is standard practice throughout the world.'[154] Under such contracts (mostly in shipping), price is often paid in exchange for documents of title (such as bills of lading) to the quantities purchased,[155] whereupon the buyer would assume that he had become the legal owner of the goods.[156] However, the old law rendered these documents worthless and thus served to defeat both parties' expectations.[157] Speculative buying and selling of goods in bulk in the commodity markets also increased in the 1980s leading to the result that the undivided shares in the goods 'may have changed hands many times before the cargo ship reached its port of destination.'[158]

These factors which increased the number of sales of goods in undivided bulk also increased the likelihood that more buyers would suffer a loss as a result of the unreformed law.[159] In fact, it has been said that 'one of the strongest arguments for changing the law is the fact that the law is now lagging so far behind the commercial requirements of the day.'[160]

As mentioned, documents of title such as bills of lading are accepted by many as evidence of title, and banks in practice take bills of lading relating to part of a bulk cargo as security for advances to the buyer.[161] These might, in the event of the seller's insolvency and the operation of s 16, 'turn out to be valueless.'[162]

Generally, there 'was a clear feeling that it was unjust and anomalous that a buyer who had paid for goods forming part of an identified bulk should have no proprietary interest in the bulk and should stand to lose both the price and the goods on the seller's insolvency.'[163]

(8) *Methods of avoiding the effects ofs 16:* Certainly however, it must be said that parties may, through clever drafting and sophisticated terms, be able to get around the unjust effect of s 16 indirectly. One such method would be through an express agreement that the price is held in trust for the buyer until delivery

---

153 *Ibid.*

154 *Ibid* at para 3.2; see also PS Atiyah and John Adams, *supra,* n 43 at 295.

155 *Ibid.*

156 Tom Burns, *supra,* n 148 at 260; see also PS Atiyah and John Adams, *supra,* n 43 at 294.

157 *Supra,* n 123 at para 3.2; see also, Tom Burns, *ibid* at 261.

158 Tom Burns, *ibid* at 266.

159 *Ibid.*

160 *Supra,* n 123 at para 3.3.

161 *Ibid* at para 3.4; see also, Tom Burns, *supra,* n 148 at 261.

162 *Ibid.*

163 *Supra,* n 123 at para 3.6.

of goods, as was done in the case of *Re Kayford Ltd (In Liquidation),*[164] though this may not always be commercially practical since the seller in such a case would not have 'free use' of the money paid. Another possible solution, would be for the buyer, as mentioned before, to contract for the risk and then insure himself against this risk. However, insurance 'shifts, but does not solve, the problem, and costs money.'[165] Another possible means to escape the harsh effect of s 16 on the seller's liquidation would be to require the seller to arrange for an advance payment bond by which the seller's bank would provide a bond guaranteeing repayment in the event of the seller's insolvency.[166] However, all of these techniques have a cost in terms of 'time, money and inconvenience'.[167] In general, they make contracts more complex and the process of their conclusion slower and more cumbersome.[168] In particular, they will prove unattractive to '[s]ellers in high-volume international trades with rapidly fluctuating prices'.[169]

However, other means to escape the clutches of s 16 have met with failure. Arguments to the effect that the seller holds the goods (or money) on trust for the pre-paying buyer or that he was in a fiduciary position in relation to the said buyer have failed where the contract is a simple contract for the sale of goods without more *(eg* express provisions to the effect that the money is to be held on trust as in *Re Kayford Ltd (In Liquidation)).*[170] Estoppel has also failed since it only functions against the seller and not third party creditors.[171] Generally, the same fate has visited claims of equitable rights to the goods.[172]

3. *The amendment*

The new s 20A provides that 'property in an undivided share in the bulk' can pass to the buyer who 'becomes an owner in common of the bulk' provided that certain requirements are met. To be able to invoke the new s 20A, the buyer must show that the contract is one 'for the sale of a specified quantity of unascertained goods' which 'form[s] part of a bulk [that] is identified in the contract or by subsequent agreement of the parties' and also that he is a pre-paying buyer.

---

[164] [1975] 1 WLR279.

[165] *Supra,* n 123 at para 3.7.

[166] Tom Burns, *supra,* n 148 at 263.

[167] *Ibid.*

[168] *Ibid.*

[169] *Supra, n* 123 at para 3.7.

[170] See *supra,* n 164.

[171] Ibid.

[172] *Re Wait* [1927] 1 Ch 606 at 635-6, where Atkin LJ states that if parties intend to create equitable rights, this should be clearly spelt out; see also *Re Goldcorp Exchange Ltd, ibid* at 91 where Lord Mustill stated that 'under a simple contract for the sale of unascertained goods no equitable title can pass merely by virtue of the sale.'

(1) *Passing of property:* It should be noted that property in the actual physical goods still cannot pass as long as the goods remain unascertained.[173] This position remains the law. The buyer merely obtains property in an undivided share of the bulk.[174] For property in goods to pass, there must still either be unconditional appropriation of those goods,[175] ascertainment of those goods by exhaustion,[176] or sufficient ascertainment of those goods so as to allow property to pass as per the parties' intentions.[177] The buyer's co-ownership of the bulk is intended only to 'be an interim stage'.[178] It has been suggested that this position is akin to that of equitable owners with the seller being subject to a trust,[179] but such a position has been conceded as giving rise to problems as a result of the 'web of fiduciary relationships which would ... be created'.[180] It has also been conceded that this would result in conflict with the express desire of the Law Commission that the parties should be able to deal freely with their respective shares of the bulk.[181]

(2) *Partpayment:* Where payment has only been made in part, the buyer would acquire a proportionately reduced share in the bulk.[182] Thus if B contracted to buy 100 bottles of wine out of a bulk of 1,000 bottles from S and the price under the contract was $1,000, he would only be able to claim co-ownership to 5% (and not 10%) of the bulk if he only paid half the price.

Where there is actual delivery out of the bulk, the goods delivered are regarded as coming out of the pre-paid goods first.[183] Thus, in the given example, suppose S delivered 50 bottles of wine to B. These 50 bottles would be deemed to be the 50 bottles already paid for by B. As such, B would not remain a co-owner in the bulk. The rationale for this rule is that 'payment and delivery are mutual obligations, and concurrent conditions under the Sale of Goods Act'.[184]

(3) *Adjustments to shares:* Provision has also been made 'to take account of fluctuations in the bulk'[185] in the new s 20A(4). Where there are several co-owning buyers, 'in a case of shortfall all of their shares have, as a matter of

---

[173] *Supra,* n 123 at para 4.9.

[174] Section 20A(2)(a) amended SGA; see also, *ibid* at para 4.9.

[175] Section 18 Rule 5(1) and (2) SGA.

[176] Section 18 Rule 5(3) and (4) amended SGA.

[177] Section 17 SGA.

[178] *Supra,n* 123 at para 4.9.

[179] Janet Ulph, *supra,* n 138 at 101.

[180] *Ibid.*

[181] *Ibid.*

[182] Section 20A(3), (5) and (6) amended SGA; see also, *ibid* at para 4.10.

[183] Section 20A(5) amended SGA; see also, *supra,* n 123 at para 4.7.

[184] Sections 27 and 28 SGA.

[185] *Supra,* n 123 at para 4.10.

logical necessity, to be reduced proportionally so that the total of their shares in the undivided bulk is equal to the whole bulk.'[186] For example, where a bulk contains 100 units and X, Y and Z by separate contracts buy and pay for 20, 30 and 50 units respectively, if half the bulk were to be destroyed accidentally, their respective shares in the goods would *not* be calculated in the normal way *(ie* X, Y and Z would *not* have a two-fifth, a three-fifth and a whole share respectively) since this would be absurd.[187] Rather, their shares would be reduced proportionately so that they would still own in the proportions 2:3:5 but the total shares would be equal to the total in the bulk. Their shares therefore would be 20%, 30% and 50% respectively.

Where however, the bulk is greater than what the seller expects, the excess goods would simply remain the seller's.[188] There is no question of the buyer receiving an unintended bonus.[189]

(4) *Types of co-ownership:* The concept of co-ownership conceived by the amendments is different from ordinary co-ownership at common law.[190] At common law, consent of one co-owner in respect of property held by several co-owners 'is not necessarily a defence to an action founded on conversion or trespass to the goods and for certain purposes, such as demanding delivery of the whole of the co-owned goods, all the co-owners must act together.'[191] The Law Commission felt such a form of co-ownership to be 'too restrictive'.[192] As such, s 20B was enacted so as to facilitate normal trading of the undivided shares of the bulk. Section 20B(1) clarifies that each co-owner is deemed to have consented to 'any dealing with or removal, delivery or disposal of goods in the bulk by any other ... owner in common [so long as] the goods fall within that co-owner's undivided share in the bulk at [that] time.' This rule serves to ensure that each co-owner (including the seller) will have the complete freedom to deal with their shares.[193]

This deemed consent is further clarified in s 20B(3)(a) which states that there is no obligation on the part of any co-owner to compensate any other co-owners 'for any shortfall in the goods received by' those other co-owners. This rule serves a practical purpose for it is often 'impracticable to sort and

---

[186] *Ibid* at para 4.11; see also section 20A(4) amended SGA.

[187] *Supra,* n 123 at para 4.11.

[188] Ibid at para 4.14.

[189] *Ibid.* Cythe position in relation to the sale of an undivided share in goods expressed as a fraction or percentage of the bulk. In such cases, the buyer would bear the risk of the bulk being smaller than it is and would also correspondingly reap the benefit of having extra goods if the bulk were larger than contemplated.

[190] Tom Bums, *supra,* n 148 at 269.

[191] *Supra,* n 123 at para 4.15; see also *Harper v Godsell* (1870) LR 5 QB 422 at 428 on demanding delivery of the whole of the bulk.

[192] *Supra,* n 123 at para 4.15.

[193] *Ibid.*

apportion the goods'.[194] The buyer who suffers a shortfall will thus be limited to his claim under contract against the seller.[195] The rule which provides for this position of 'first come, first served' continues to apply on the seller's insolvency.[196] Whilst it was felt that this scheme would operate harshly on the last or later co-owners who claim delivery, the Law Commission preferred this position to that *of a pro rata* scheme because of 'practical difficulties',[197] such as the difficulty of its application in relation to fluctuating bulks.[198] Other problems faced by such a scheme include 'severe difficulties of proof, unfairness to the first buyer who may have no knowledge of the existence of later buyers, and claims arising long after the first delivery.[199] The Law Commission concluded that 'the attempt to achieve perfect justice among co-owning buyers in cases of shortfall on insolvency would be likely to do more harm than good and indeed [could] imperil the whole reform.'[200]

However, such a *pro rata* scheme can be put in place by the co-owners themselves.[201] This deemed consent and corresponding protection from claims by other co-owners extends, under ss 30(2) and (3) of the SGA, to deliveries to co-owners of excess goods provided that they pay for these excesses.[202]

(5) Oversales: The deemed consent does not however extend to 'over-sales by a seller who remain[s] in possession of the goods or documents of title to the goods' so as to bring in 'new co-owners when the bulk [is] already insufficient for the existing co-owners.'[203] However, such a situation can still be brought about through the operation of s 24 of the SGA. Section 24 provides:

> Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

If both s 24 and the new s 20A are satisfied, this new pre-paying buyer in good faith would become a new co-owner even if there would in consequence

---

[194] Ibid at para 4.17.

[195] Section 20B(3)(c) amended SGA.

[196] *Supra,* n 123 at para 4.17.

[197] *Ibid* at paras 4.22 to 4.33.

[198] Ibid at para 4.19.

[199] *Ibid* at para 4.20.

[200] *Ibid* at para 4.30.

[201] Section 20B(3)(b) amended SGA; see also, *ibid* at para 4.17.

[202] Supra, n 123 at para 4.21.

[203] Ibid at para 4.18.

be a shortfall.[204] The proportion each co-owner holds in respect of the others would then be adjusted using s 20A(4) (see above).[205] It should be highlighted that merely satisfying s 24 per se is not sufficient to make the buyer in good faith a co-owner in the bulk if he has not also paid in advance for his share, thereby bringing s 20A into operation at the same time.

4. *Critique of the amendment*

(1) *Preferential position in insolvency claims:* One possible criticism of the amendment is that there is 'no commercial morality in creating a special preference in insolvency for buyers out of bulk.'[206] It was considered unfair that such buyers be placed in a better position than 'any other buyers who had not yet received delivery, or than unpaid sellers who had supplied goods without reserving title, or than those who have paid in advance for services'.[207]

It was felt that the result of the new rule would be 'to take yet more property out of the pool available for ordinary trading creditors.'[208] This latter criticism was rejected because 'the reform is concerned with the rules on passing of property in sales transactions, not with the creation of a preference in insolvency.'[209] The amendment, it was felt, served to remove 'an anomaly in the rules on the passing of property on sale'.[210] It is submitted that this response by the Law Commission is unsatisfactory. In considering whether or not to propose the amendment, they had looked into the harsh effects of s 16, especially in relation to instances where the seller became insolvent. Yet, in discussing the issue of granting preference to prepaying buyers of goods out of a bulk, they declared that the issue was not one relating to insolvency. Such an argument is wholly unsatisfactory!

However, a strong answer to the criticism can be found in the fact that s 16 was a mandatory provision which the parties could not contract out of.[211] Arguments to the effect that parties were free to decide when property in the goods was to pass and when payment was to be made were not convincing for the simple reason that s 16 was mandatory.[212] Whilst it may have been possible in theory for the buyer to check the creditworthiness of the seller or refuse to pay in advance or to take out insurance before property passed, these may not

---

204 *Ibid.*

205 *ibid.*

206 Ibid at para 3.18.

207 *Ibid.*

208 *Ibid.*

209 *Ibid* at para 3.19.

210 *Ibid.*

211 Ibid at para 3.20.

212 Janet Ulph, *supra,* n 138 at 97.

always be practicable and 'in reality, neither consumers in domestic transactions nor traders in international transactions had fully appreciated the risks associated with paying money in advance of possession of the goods.'[213]

The mandatory effect of s 16, coupled with the fact that the price of the goods would be part of the pool available to creditors, justifies the result of the amendment. This is because there is little morality in allowing creditors to keep both the goods and the price.[214]

(2) *Passing of risk:* The amendments also contain one significant omission, and that is that there is no provision for the allocation of risk between the seller and buyer where the goods deteriorate before the buyer takes delivery of his share of the goods.[215] Because of this omission, it is unclear when risk will pass except where the parties have spelt it out clearly. Applying s 20(1) of the SGA, there are at least two possible instances when risk will pass. It can, on the one hand, be argued that risk passes to the buyer when he acquires an undivided share in the bulk. On the other hand, it can be argued that this is not a true transfer of property within the meaning of s 20(1) and thus risk only passes when property in the particular physical goods is transferred.

Whilst the Law Commission indicates that the buyer should be 'entitled to delivery of goods which conformed to the contract in quantity and quality'[216] and this is reflected in s 20B(3)(c), the provision does not adequately deal with the problem of risk. This is because it is well-established that in a contract of sale, risk may pass before property and this rule applies equally to contracts for the sale of goods forming part of a bulk. One possible solution could be to hold that, where there has been a deterioration of quality after the contract has been concluded, the contract is frustrated[217] but it is difficult to see what the grounds of frustration could be, especially if the deterioration in quality is not too drastic. After all, it certainly cannot be the case that a failure of the law to allocate risk would frustrate the contract! Such uncertainty is clearly undesirable in the commercial setting of most sales transactions.

It is submitted that, since the aim of the amendment is to give the prepaying buyer a proprietary interest in the goods (albeit as a co-owner), he acquires a proportionate share of the risk in relation to the bulk. This view is reinforced by the effects of s 20A(4) which provides for adjustments in the co-owners' shares to take into account fluctuations in the bulk.

(3) *Payment of price:* The requirement of payment of price has been criticized as introducing 'an unwelcome inconsistency into the law'.[218] It has been

---

213 *Ibid* at 97-98.

214 *Supra,* n 123 at para 3.22; see also Goode, *supra,* n 131 at 247.

215 Robert Bradgate and Fidelma White, 'Sale of Goods Forming Part of a Bulk: Proposals for Reform' [1994] LMCLQ 315 at 321.

216 *Supra, n* 123 at para 4.34.

217 Robert Bradgate and Fidelma White, *supra,* n 215 at 321-2.

218 Ibid at 318.

pointed out that nowhere else in the SGA is the payment of price a determining factor in the passing of property and that the United States Uniform Commercial Code does not limit the passing of property in this fashion.[219] In cases where the buyer has not paid the price, the amendment thus allows the seller's insolvency officer to 'choose whether or not to perform the contract and thus to take advantage of market price movements.'[220] If the market price drops, the 'seller' would tender delivery and claim the price but if the market rose, the 'seller' could choose to sell the goods to another buyer at a higher price, leaving the buyer as an unsecured creditor with an unliquidated claim for damages.[221] The justification given for such a restriction was that 'the amendment will be sufficient to remedy the injustice to the prepaying buyer who loses both his money and the goods for which he has paid.'[222]

This requirement of payment of price also leads to problems where there is a sub-sale. If B agrees to buy 500 tons from a bulk of 1,000 tons from S and then sub-sells to X before payment for or separation of goods, B has no property interest under the law and X consequently also acquires none. If X has paid B and S becomes insolvent, S's insolvency officer will be free to resell the goods. If B is also insolvent, then X's claim for non-delivery as against B would be worthless.[223]

(4) *Insolvency of a co-owning buyer.* The amendments are also silent on the issue of what is to happen if one of the co-owning buyers becomes insolvent or is otherwise unable to pay a debt.[224] It would thus appear that the existing rules on the enforcement of judgments would apply such that if the co-owned bulk goods are in the hands of the debtor, they may be seized under *a fieri facias*[225] If this is the case, then the remaining co-owners would be left to suffer since a possible delay in delivery caused by the seizure of the bulk will inevitably prove costly to them.[226] In addition, they may also become involved in court proceedings to assert their claim to the goods, which will again prove costly.[227]

(5) *Equity and trusts:* The reform has also been criticized specifically for its

---

219 *Ibid.*

220 *Ibid.*

221 *Ibid.*

222 House of Lords Hansard, 3 May 1995 at col 1462, *per* Lord Inglewood. It was felt that in a case where the buyer had not paid for the goods, 'there is no injustice to be remedied in the present workings of the law.' The concerns brought up by Robert Bradgate and Fidelma White in their article, *supra,* n 215, were however not brought to the attention of the House of Lords, nor were they addressed by the Law Commission.

223 Robert Bradgate and Fidelma White, *supra,* n 215 at 318.

224 Tom Burns, *supra,* n 148 at 270.

225 *Ibid.*

226 *Ibid.*

227 *Ibid.*

lack of discussion on 'the possibility of a "floating" trust over the goods, which would fix on any goods subsequently acquired which fitted the contract description.'[228] In fact, the Law Commission's apparent aversion towards equitable principles in general has been criticized.[229] However, it has also been conceded that such a concept would be impossible to apply to facts where the bulk fluctuates in size.[230] This is because 'one cannot have an effective declaration of trust where ... there is no property initially impressed with a trust and therefore no property which can be followed or traced into a substitute form.'[231] Once this is recognized, as is the fact that the amendments will affect goods forming part of a bulk that fluctuates in size, the criticism cannot stand.

(6) *Contradiction between ss 20A(4) and 20B(3):* There are two possible readings of the word 'delivery' under s 20B(3). If 'delivery' means delivery of the appropriate share of goods as adjusted by s 20A(4), then s 20B(3) would be redundant. This is because, if there are to be adjustments made to the share in the bulk when the bulk has been reduced to less than the quantities contracted for by all the co-owners, it will not be necessary to deal with the position of delivery to a co-owner leading to a shortfall since this would never happen. Where the buyer does not oversell, there would be no problem of shortfall save in instances where a part of the goods are destroyed. If this should happen, in such instances, s 20A(4) would have operated to adjust the shares of the goods that each co-owner already owns, so that where the co-owner takes delivery of goods that he is entitled to under this new share, he cannot possibly cause another co-owner to suffer a shortfall. Similarly, where the buyer oversells and s 24 operates to pass property in an undivided share to the new purchaser, s 20A(4) would also operate to adjust the shares of goods each co-owner has in relation to the whole. As a result of this adjustment, it would again be impossible for a shortfall to result from mere delivery to a co-owner of what he is entitled to. Under this reading, s 20B(3) would appear to be superfluous in the light of the effects of s 20A(4).

If, however, 'delivery' under s 20B(3) means delivery of the quantity of goods specified under the contract of sale, then s 20A(4) would be redundant. This is because, if s 20A(4) does not serve to adjust the quantities to be delivered to each and every owner, thereby creating rights against other co-owners for acceptance of a share greater than allotted to them after adjustments by s 20A(4), it would serve no purpose at all. This is because the seller would still be liable under the contract to deliver the appropriate quantity of goods to *all* the co-owning buyers and this duty is not affected by s 20A(4). As such, it could not have been intended that s 20A(4) affect the seller's duty. Such a reading of 'delivery' would thus take away the only possible purpose of s

---

[228] Janet Ulph, *supra,* n 138 at 95.

[229] *Ibid.*

[230] *Ibid* at 96; see also *Re Goldcorp Exchange Ltd, supra,* n 139 at 96-97, *per* Lord Mustill.

[231] Janet Ulph, *supra,* n 138 at 96.

20A(4), that is, to grant a right of action, probably in conversion, to a co-owner who receives less than his newly adjusted share (adjusted because of damage, loss or overselling by the seller) because another co-owner received more than he was entitled after the necessary adjustment, against this other co-owner.

(7) *Uniform Commercial Code:* The position brought about by the amendments can be compared to that under the United States Uniform Commercial Code which reformulated the law more than 40 years earlier in response to similar criticisms.[232] The reformers in the United States saw 'the over-reliance on the concept of property'[233] to be a root cause for the failure of the Uniform Sales Act (which was based on the UK Sale of Goods Act 1893) to meet the needs of commerce. Whilst this concept had the advantage of flexibility and economy in resolving many problems, it was not sophisticated enough for the American reformers.[234] It was felt that '[s]tretching the one concept to cover so many different issues created anomalies which could defeat even the inventiveness of the judiciary, as well as the purposes of commercial traders, and could produce questionable results.'[235] A 'classic example' of this was the position in law that property cannot pass to the buyer of goods that form part of a bulk.[236]

The alternative to a revised Uniform Sales Act that was proposed by Karl Llewellyn was a comprehensive Commercial Code 'cast in non-technical language which would modernize, clarify and simplify the law.'[237] Under this Code, although sale would still have the aim of transfer of ownership of goods from the seller to the buyer for price, the rights of the parties at any given time during the performance of the contract would be governed by the Code where the parties' contract was silent on the issue.[238] Such a step by step approach allowed the Code to deal with issues such as the allocation of risk, reservation of title, sales on approval and sale or return agreements *etc* 'in a more coherent and comprehensive way than the blunt instrument of the passing of property could permit.'[239] In particular, there was no need for ascertainment for property in an undivided bulk to pass. Section 2-105(4) of the Uniform Commercial Code states:

> An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold, although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

---

232 Tom Bums, *supra,* n 148 at 264.

233 *Ibid.*

234 *Ibid at 265.*

235 *Ibid.*

236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

239 *Ibid.*

It is clear from the amendments that the new s 20A is meant to serve the same purpose as s 2-105(4) of the Uniform Commercial Code whilst retaining the concept of property. This has led to the amendment being plagued with many problems not encountered under the Uniform Commercial Code.

However, given that the Amendment Act was meant to address only specific problems within the SGA, it would have been beyond its scope to abolish the concept of property and deal with relevant issues such as risk in the same manner as the Uniform Commercial Code.

H. *Ascertainment by exhaustion*

1. *The pre-amendment position*

Under s 16 of the SGA, where there was a contract for the sale of unascertained goods, no property in the goods could be transferred to the buyer unless and until the goods were ascertained. 'Ascertainment by exhaustion' is a doctrine which the courts use to 'ascertain' goods so that property in them can pass to the buyer. This doctrine was first formulated by Roche J in *Wait & James v Midland Bank*[240] and more recently adopted and expanded upon by Mustill J in *Karlshamns Oljefabriker v Eastport Navigation Corp (The Elafi)*[241] The effect can be summarized as follows:

> If B contracts to buy from S 100 tons of copra out of 1000 tons in a particular ship, property cannot pass because of the operation of s 16. However, if S delivers and discharges 900 tons of copra at various ports, property in the remaining 100 tons of copra can pass through the common intention of the parties because the goods are now *ascertained.* This would be the case even if the 100 tons were not purchased under a single contract but under four different contracts. It also does not matter if part of the 100 tons had been sold to B through an intermediary.

2. *Problems with the pre-amendment position*

One main problem with the doctrine of ascertainment by exhaustion is the generally unsatisfactory manner in which the matter of passing of property has been dealt with. The doctrine is said to operate even if part of the goods in the bulk have been sold to the buyer through an intermediary who would clearly not have obtained property in the goods. This is because:

> [w]hat is needed for ascertainment is that the buyer is able to say, 'Those are my goods.' This requirement is satisfied if he can say, *'All* those are my goods.' There is no need to be able to say that any particular goods came from any particular source.[242]

---

[240] (1926) 31 Com Cas 172.

[241] [1982] 1 All ER 208.

[242] Ibid at 215, per MustillJ.

Whilst the above statement may be correct, it is still necessary for the buyer to claim property in the goods to show that all the sources from which he obtained the goods were able to pass property to him. This is a crucial finding that could not be made in the case of *The Elafi* and it is also a point the judge did not seem to address. This is because, if no property passed to the intermediary (who was but a buyer of goods forming part of a bulk under the old law), this same intermediary could not then transfer property to the buyer, and if this could not be done, the buyer could not claim to hold the interest in *all* the property remaining in the bulk.

3. *The amendment*

The Sale of Goods (Amendment) Act introduces two new sub-rules to Rule 5 of s 18:

> (3) Where there is a contract for the sale of a specified Quantity of ascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk
> (a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and
> (b) the property in those goods then passes to that buyer.
> (4) Paragraph (3) applies also, with the necessary modifications, where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.

As can be seen, the doctrine of ascertainment by exhaustion is thus given statutory effect. Furthermore, the problem which applied when the doctrine was part of the common law has also been partly solved by the statutory amendments regarding transfer of property in goods forming part of a bulk.[243] This is because the intermediary, if he paid in advance, can now be considered an owner in common of the bulk. He can therefore deal with his interest in the bulk and is thus able to transfer it to the buyer who can then claim that he has an interest in the remainder of the bulk. Property passes as a result.

However, where the buyer has not paid in advance or has only paid for part of the goods in advance, the problem still remains.

III. CONCLUSION

Whilst most of the amendments can be seen as improvements to the law, they are not all without difficulties. Many of these difficulties have arisen because the amendments were made in a 'piecemeal fashion' which unduly hampered the reformers. The reform has been likened to the task of 'patching old cloth with new material' by one of the Law Commissions.[244] The reform has also

---

[243] Sections 20A and 20B amended SGA.

[244] *Supra,* n 17 at para 1.14.

been criticized as lacking in coherence.[245] The difficulties faced has also led the Law Commission to conclude that 'it is doubtful how far a process of "patching" the SGA can continue.'[246] The Law Commission recommended that if further alterations to the SGA are required, it may be necessary to 'start from the proposition that it would be better to have a new Act or Acts',[247] This same conclusion was also reached by the House of Lords in their debates on the present amendments.[248] This view is also shared by many academics who feel that the SGA is outdated and due for an overhaul.[249] After all, the SGA is essentially a 19th century statute, ill-suited to the commercial intricacies of the coming 21st century.

It is disappointing to see that our local Parliament did not take cognisance of the above views but merely enacted the statutory amendments to the SGA which had been passed in the United Kingdom. This can be seen from the speed at which the Amendment Act was enacted. The Bill was originally introduced on 28 October.[250] 10 days later, on 7 November 1996, the Second and Third reading, and also the passing of the Bill took place. There was no real debate on the Bill and the second reading for the Bill took up little more than two columns in the Report of Parliamentary Debates.[251]

Perhaps the legislators felt that if the statutory amendments are good enough for the United Kingdom, then they must be good enough for us. It is submitted, however, that what the legislators in the United Kingdom feel is appropriate for England may not be all that appropriate for Singapore. The aim of the Bill, as can be clearly seen from its Second Reading is to 'bring our commercial laws up to date with developments in the United Kingdom.'[252] Although the fact that our local commercial laws conform closely to those of the United Kingdom is an advantage when it comes to attracting foreign investments, as there is certainty of the law in the eyes of the foreign investor, it has been argued above that the amendments made to the SGA do not make the law as certain or just as it should be.

Whilst it was noted that the Attorney-General, the Law Reform Committee of the Singapore Academy of Law and the Law Society all commended the changes,[253] the substance and extent of these studies were not made known. As the amendments made to the SGA is a change which has an impact on anyone

---

245 Tom Burns, *supra, n* 148 at 271

246 *Supra,* n 17 at para 1.15.

247 *Ibid.*

248 House of Lords Hansard, 22 July 1994, col 482, *per* Lord Beaumont of Whitley.

249 Tom Burns, *supra, n* 148 at 271; see also Robert Bradgate and Fidelma White, *supra,* n 215 at 322, and Janet Ulph, *supra,* n 138 at 106-7.

250 Singapore Parliamentary Debates Official Report, 28 October 1996, col 755, *per* Associate Professor Ho Peng Kee.

251 Singapore Parliamentary Debates Official Report, 7 November 1996, cols 862 to 865.

252 *Ibid* at col 863, *per* Associate Professor Ho Peng Kee.

253 *Ibid.*

who buys something, there should have been at least a Select Committee set up to look into the amendments in greater detail.

All in all, however, the amendments do more or less address the problems they were set out to deal with. Together with the argument of commercial confidence through the adoption of the UK position in its entirety, it must be conceded that the advantages brought about by the amendments outweigh the disadvantages, although the legislative process could have been improved upon.