

CONSUMER PROTECTION, STATUTE AND THE ONGOING INFLUENCE OF THE GENERAL LAW IN SINGAPORE

Consumers seeking redress for misleading and other types of wrongful conduct by traders will usually seek to rely on the rights provided under consumer protection statutes, primarily in Singapore the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) (“CPFTA”), even where well-established doctrines in equity, contract and tort may also be available to provide relief. This body of general law doctrines and principles nonetheless remains influential in interpreting and applying the provisions of consumer protection statutes. This article considers the rights and remedies given to consumers under the CPFTA, the role of the general law in interpreting these provisions and also, given the inevitable scarcity of relevant case law, the imperative to have regard to the judicial interpretation of comparable legislative regimes in other jurisdictions.

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I. Introduction

1 In 2014 *The Straits Times* reported the case of a Vietnamese tourist who tried to buy the latest iPhone in Singapore. The tourist paid \$950 for the phone, and was then asked by the trader to pay an additional \$1,500 as the fee for a warranty pursuant to a contract signed by the tourist. The tourist had been asked if he wanted a warranty accompanying the sale of the phone but assumed it was complimentary. The tourist was not told he would have to pay for the warranty. The tourist had then been asked to sign an agreement, but “did not scrutinise it as his English was not fluent, and he thought Singapore was a safe place to shop”. After the trader requested the further \$1500, the tourist left the shop without the phone and having forfeited the \$950 he had

paid towards the purchase.¹ Although the details of the transaction are somewhat scanty, the inference from the article is that the trader took advantage of the inexperience and poor language skills of the tourist to trick him into signing a contract containing an exorbitantly expensive warranty.

2 The problems facing this hapless tourist may well have been satisfactorily addressed by well-established principles of contract and equity. As every student of contract law knows, while signature binds a party to the terms of a contractual document regardless of whether he or she read or understood those terms,² the rule is not conclusive. The signature rule will not apply where some form of vitiating factor, such as mistake, misrepresentation, undue influence or duress, has compromised the consent of the party who has signed, which would appear to have been the case in the reported scenario.³ However, it is likely that, had the tourist pursued the matter, he would have turned to statute as the most easily accessible source of legal relief.

3 In Singapore, the Consumer Protection (Fair Trading) Act⁴ (“CPFTA”) provides extensive and relatively straightforward rights of redress to consumers who have been induced to enter a contract as a result of specified forms of “unfair practice”.⁵ Nonetheless, principles from contract, tort, equity and restitution continue to prove a pervasive source of influence on the development of consumer protection law. Whilst not always explicitly drawn upon by consumer protection statutes, the general law is often of assistance in the process of understanding what the content and scope of the statutory provisions should be. Indeed, the CPFTA provides a good illustration of the different ways in which statute may itself determine the role for the general law in informing the interpretation of its substantive and remedial provisions.

1 Chew Hui Min, “Vietnamese Tourist Kneels and Beggars for Refund of iPhone 6 at Sim Lim Square” *The Straits Times* (online) (4 November 2014) <<http://www.straitstimes.com>>. See also Jalelah Abu Baker, “Another Sim Lim Incident: Student Reduced to Tears after Being Charged \$1,000 for Warranty Fees for iPhone 6” *The Straits Times* (online) (5 November 2014) <<http://www.straitstimes.com>>.

2 *L’Estrange v F Graucob Ltd* [1934] 2 KB 394. See also *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 at [28]–[29]; *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 at [39]–[41].

3 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; *Toll (FGCT) Pty v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 180–181. See also *Grossey v Chartered Bank* [1988] 2 SLR(R) 458 at [21].

4 Cap 52A, 2009 Rev Ed.

5 On the distinction between procedural and substantive unfairness, see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 620, *per* McHugh JA.

4 This article uses the story of the unfortunate Vietnamese tourist as a prompt for exploring the rights and remedies given to consumers under the CPFTA and the role of the general law in interpreting and applying the provisions of this regime. Part II⁶ provides an overview of the statutory regime and the opportunities for recourse to the general law in interpreting that regime. Part III⁷ considers the nature of an unfair practice under the CPFTA. Part IV⁸ considers the rights of redress provided to consumers in response to an unfair practice. Part V⁹ concludes. The discussion throughout draws on the experience of Australian courts in applying cognate provisions under the Australian Consumer Law,¹⁰ and its precursor the Trade Practices Act 1974, as a useful resource in the light of the sparse body of case law applying the CPFTA.

II. Consumer protection and general law influences

A. *The consumer protection framework*

5 The primary consumer protection statutes in Singapore are the Unfair Contract Terms Act¹¹ and the CPFTA. The Unfair Contract Terms Act regulates the use of exclusion and limitation clauses in consumer contracts and is a substantial re-enactment of the English Unfair Contract Terms Act 1977.¹² The CPFTA provides a “consumer”¹³ who has entered into “consumer transaction”¹⁴ involving an “unfair practice”¹⁵ with a right to commence an action¹⁶ against the supplier for some form of redress.¹⁷ The CPFTA was based on the Saskatchewan Consumer Protection Act¹⁸ and also has similarities with the European

6 See paras 5–13 below.

7 See paras 14–37 below.

8 See paras 38–57 below.

9 See para 58 below.

10 Competition and Consumer Act 2010 (Cth) Sch 2 (“Australian Consumer Law”).

11 Cap 396, 1994 Rev Ed.

12 c 50.

13 “Consumer” is broadly defined to cover an individual acting otherwise exclusively in the course of a business: see s 2(1) of the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed).

14 Primarily involving the supply of goods or services: see s 2(1) of the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed).

15 The unfair practices giving rise to the right to sue are set out in Pt III of the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed).

16 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 6(1).

17 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 7.

18 RSS 1996, c C-30.1 (now repealed). See Ravi Chandran, “Consumer Protection (Fair Trading) Act” [2004] Sing JLS 192 at 193 and Wee Ling Loo & Soen Yin Erin Goh-Low, “Award of Damages under the Singapore Consumer Protection (Fair Trading) Act” (2007) 9 Austl J Asian L 66 at 66.

Union's Unfair Commercial Practices Directive¹⁹ and the Australian Consumer Law.²⁰

6 The objectives of the Parliament in enacting the CPFTA were to protect consumers while balancing the interests of traders. In the second reading of the CPFTA in Parliament, the Minister of State for Trade and Industry, Raymond Lim Siang Keat, stated:²¹

On the one hand, the Act must provide adequate safeguards for consumers and allow them legal recourse to claim against unfair practices. On the other hand, we do not want to over-regulate and add to business costs. Amongst traders, those who engage in unfair practices are a minority. It will be unfair to impose undue regulatory costs on the majority who conduct business ethically. This would also be bad for consumers, for such costs will in the end be passed back to them.

The CPFTA seeks to achieve this balance between the interests of consumers and traders by providing provisions for the protection of consumers but also maintaining an expectation that consumers will take reasonable steps to protect their own interests. The Minister explained that:²²

... the principle of caveat emptor remains. That is the operating paradigm. What does it mean when we say 'buyers beware'? It means that, as a society, we believe that the individual should take responsibility for his or her own action when he or she enters into a transaction.

19 Directive 2005/29/EC of the European Parliament and of the Council (11 May 2005) (unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council) [2005] OJ L 149/22. In England, enacted through the English Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No 1277).

20 Australian Consumer Law ss 18 (misleading conduct), 20–22 (unconscionable conduct) and 50 (undue harassment and coercion). See also s 24C of the Malaysian Consumer Protection Act 1999 (No 599 of 1999).

21 *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76 at cols 3352–3355, quoted in *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1085 at [21].

22 *Singapore Parliamentary Debates, Official Report* (11 November 2003) vol 76 at cols 3455–3457, quoted in *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1085 at [22]. See also, in relation to the Small Claims Tribunals Act (Cap 308, 1998 Rev Ed), *Singapore Parliamentary Debates, Official Report* (24 August 1984) vol 44 at cols 1999–2002 (S Jayakumar, Minister for Labour and Second Minister for Law and Home Affairs).

7 There are few reported cases applying the protections in the CPFTA.²³ This is not altogether surprising and certainly does not indicate some form of deficiency in the regime. Rather it reflects the primacy of alternative dispute resolution methods in addressing consumer-trader disputes. There is no regulator overseeing the operation of the CPFTA. Instead reliance is placed on consumers themselves enforcing their rights under the legislation. The Consumers Association of Singapore reports that most consumer complaints received by it are settled directly by consumers after receiving advice or letter writing assistance,²⁴ or by negotiation and mediation.²⁵ It will usually be preferable for consumer-trader disputes to be resolved by these informal means²⁶ rather than in court.²⁷ Consumer claims typically involve relatively small amounts of money that do not justify litigation and consumers typically do not have the resources to pursue a claim through court in any event.

8 Where a dispute cannot be resolved informally, the CPFTA provides that a consumer who has entered a consumer transaction involving an “unfair practice” may commence an action in “a court of competent jurisdiction against the supplier”.²⁸ Most small amount consumer claims will be heard in the Small Claims Tribunal (“SCT”). The rationale behind the establishment of the SCT was “for disputes to be resolved in a quick, efficient and cost-effective manner”.²⁹ Under the Small Claims Tribunals Act³⁰ the tribunal is directed to balance the

23 See *Consumers Association of Singapore v Garraway Enterprises Ltd Singapore Branch* [2009] SGDC 193 (unfair practices); *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 (misleading conduct); and *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] 2 SLR 1398 (defective goods).

24 Rachel Au-Yeong, “Sick of Scams: But What Is the Cure?” *The Straits Times* (online) (15 November 2014) <<http://www.straitstimes.com>>.

25 Consumers Association of Singapore website, “Mediation” <https://www.case.org.sg/complaint_mediation.aspx>.

26 On alternative dispute resolution in consumer disputes see further Geraint Howells, Rhonda James & Peter Spiller, “Making the Alternative Appropriate: ADR for Consumers” (2001) NZ Bus LQ 204; Geraint Howells & Rhoda James, “Litigation in the Consumer Interest” (2002) 9 ILSA J Int’l & Comp L 1; and Iain Ramsay, “Consumer Redress and Access to Justice” in *International Perspectives on Consumers’ Access to Justice* (Charles Rickett & Thomas Telfer eds) (Cambridge University Press, 2003) at p 17.

27 See Small Claims Tribunals Act (Cap 308, 1998 Rev Ed).

28 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 6(1). There is no right of action where the amount of the claim, or where there is no claim for money, the value of the subject matter, exceeds the prescribed limit (\$30,000): s 6(2).

29 *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] 2 SLR 1398 at [79].

30 Cap 308, 1998 Rev Ed.

demands of substantive justice and of justice according to the law.³¹ Thus, the Act provides that:³²

A tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal forms or technicalities.

The body of law that will determine the “substantial merits and justice of the case” is largely found in the CPFTA. The protections provided to consumers in this statute can be characterised as an attempt to avoid “strict legal forms or technicalities” because, as we shall see, they replicate the protective themes found in the general law of contract, equity and tort in a simplified form. Inevitably, therefore, understanding the rights of redress in response to unfair practices under the CPFTA involves thinking about the relationship between statute and the general law.

B. Statute and the general law

9 The relationship between statute and the general law with which it overlaps is a topic of increasing importance to legal scholars, practitioners and courts.³³ In this “age of statutes”³⁴ it is almost impossible to consider an area of private law without colliding with statute.³⁵ In the context of consumer protection, statute can no longer be treated as the “elephant in the room”,³⁶ nor can the relationship between the two sources of law be thought of as “oil and water”.³⁷ Consumer

31 Small Claims Tribunals Act (Cap 308, 1998 Rev Ed) s 12(4).

32 Small Claims Tribunals Act (Cap 308, 1998 Rev Ed) s 12(4).

33 See William Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford: Oxford University Press, 1999); David Wright, *Common Law in the Age of Statutes: the Equity of the Statute* (LexisNexis Butterworths, 2015); Elise Bant, “Statute and Common Law: Interaction and Influence in Light of Principles of Coherence” (2015) 38(1) UNSW LJ 367; Andrew Burrows, “The Relationship of Common Law and Statute in the Law of Obligations” (2012) 128 LQR 231; Jack Beatson, “The Role of Statute in the Development of Common Law Doctrine” (2001) 117 LQR 247; Joachim Dietrich, “What is ‘Lawyering’? The Challenge of Taxonomy” (2006) 65(3) Camb LJ 549; Paul Finn, “Statutes and the Common Law” (1992) 22 UWAL Rev 7; Paul Finn, “Statutes and the Common Law: The Continuing Story” in *Interpreting Statutes* (Suzanne Corcoran & Stephen Bottomley eds) (Federation Press, 2005) at p 52; Mark Leeming, “Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room” (2013) 36 UNSW LJ 1002; and Lord Robert Walker, “Developing the Common Law: How Far Is Too Far?” (2013) 37 MULR 232.

34 Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982) at p 1.

35 See *Buck v Comcare* (1996) 66 FCR 359 at 364–365, per Finn J.

36 Mark Leeming, “Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room” (2013) 36 UNSW LJ 1002.

37 Jack Beatson, “Has the Common Law a Future?” (1997) 56 Camb LJ 291 at 308.

protection statutes such as the CPFTA are situated squarely in a field traditionally governed by tort, contract and equity and will usually, either explicitly or by necessity, require courts to draw on this body of general law to determine the meaning and scope of the protections granted by that statute.³⁸

10 The process of statutory interpretation must be undertaken with a primary focus on the words and the purposes of the statute.³⁹ Nonetheless, recourse to the general law principles with which the statute overlaps will often be useful, and indeed unavoidable, in giving content to open-textured statutory terms and guiding the application of new or novel provisions. Operating in a similar environment of consumer protection legislation with strong resonances with the general law, the High Court of Australia has repeatedly stated that “it is wrong to approach the operation of [the Australian Consumer Law] by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law”.⁴⁰ Nonetheless, the court has also recognised that the general law provides “an accumulation of valuable insight and experience which may well be useful in applying the [Australian Consumer Law]”.⁴¹

11 As we shall see, the CPFTA initiates the dialogue with the general law in two very different ways. The primary right of action provided to consumers under the CPFTA to seek redress in response to an “unfair practice” relies on standards that are reminiscent of general law doctrines but which are expressed in distinct language and, in some instances, accompanied by explicit guidance as to their intended scope of application. In this context therefore general law doctrine is

38 On this process, see generally David Wright, *Common Law in the Age of Statutes: The Equity of the Statute* (LexisNexis Butterworths, 2015).

39 Section 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), providing that courts are to prefer an interpretation that would promote the purpose or object underlying any written law. See also *Donald McArthur Trading Pte Ltd v Pankaj s/o Dhirajla* [2007] 2 SLR(R) 321 and Goh Yihan, “Statutory Interpretation in Singapore” (2009) 21 SAclJ 97. Compare s 15AA of the Australian Acts Interpretation Act 1901, and see also Joseph Campbell & Richard Campbell, “Why Statutory Interpretation Is Done As It Is Done” (2014) 39 Aust Bar Rev 1 and Murray Gleeson, “The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights” (2009) 20 PLR 26.

40 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at 407, [44]. See also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503–504, [17], per Gaudron J, 510, [38], per McHugh, Hayne and Callinan JJ, 529, [103], per Gummow J, and 549–550, [152], per Kirby J.

41 *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at 470, [18], per Gleeson CJ. See also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 512, [41], per McHugh, Hayne and Callinan JJ, 529, [102]–[103], per Gummow J, 542–543, [137]–[138], per Kirby J; and *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25; (1999) 199 CLR 413 at 460–461, [128]–[129], per Kirby and Callinan JJ.

supplanted “by a broad judicial discretion to prevent injustice, within the guidelines given in [the] Act”.⁴² The general law may remain relevant but largely in assisting in the process of charting the parameters of the statutory rights.

12 The CPFTA contemplates a different relationship between the statute and the general law at the stage of providing rights of redress. In setting out the types of remedial orders that a court may make in response to an unfair practice, the CPFTA expressly invokes general law doctrines.⁴³ Here the challenge is to identify what adjustments should be made to those general doctrines to ensure that their application is consistent with the overriding purposes of the legislation.

13 In navigating these different invocations of general law in the interpretation of the statute, we are, for the reasons already discussed, faced with a paucity of case law. In some circumstances, a useful comparison may be found in other jurisdictions. Any use of case law interpreting other statutory schemes must be done in a manner that is mindful of the scope and statutory purposes of the CPFTA. As Woo Bih Li J stated in *Freely Pte Ltd v Ong Kaili*⁴⁴ (“*Freely*”):⁴⁵

... it would be inappropriate to import, *carte blanche*, all principles applicable to the interpretation of the equivalent legislation in other jurisdictions, unless these principles accord with the wording of our CPFTA and Parliament’s intention in enacting the CPFTA in Singapore. [emphasis in original]

Recognising this caveat, Singaporean courts interpreting the CPFTA have already found a useful resource in interpreting the CPFTA⁴⁶ in Australian courts’ approach to the prohibitions on misleading or deceptive conduct and unconscionable conduct under the Australian Consumer Law and its precursor the Trade Practices Act.⁴⁷ Unusually, these provisions are not restricted to consumer-to-business transactions

42 Patrick Parkinson, “The Conscience of Equity” in *Principles of Equity* (Patrick Parkinson ed) (Australia: Thomson Reuters, 2nd Ed, 2003) at p 33, quoted in Joachim Dietrich, “Giving Content to General Concepts” (2005) 29 MULR 219 at 234.

43 See Wee Ling Loo & Soen Yin Erin Goh-Low, “Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act” (2007) 9 Austl J Asian L 66.

44 [2010] 2 SLR 1065.

45 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [20].

46 See *Consumers Association of Singapore v Garraway Enterprises Ltd Singapore Branch* [2009] SGDC 193 and *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065.

47 Trade Practices Act 1974 (Cth). See also, noting the relevance of this legislation in interpreting the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed), Wee Ling Loo & Soen Yin Erin Goh-Low, “Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act” (2007) 9 Austl J Asian L 66 at 70.

but may also apply to business-to-business transactions and are regularly raised in commercial litigation. The Australian regulator has also been active in taking enforcement action in response to unfair business practices by traders that have a significant impact on consumers.

III. Unfair practices under the CPFTA

14 Section 4 of the CPFTA defines four main categories of unfair practices, providing that:

... it is an unfair practice for a supplier, in relation to a consumer transaction:

- (a) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- (b) to make a false claim;
- (c) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer —
 - (i) is not in a position to protect his own interests; or
 - (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction; or
- (d) without limiting the generality of paragraphs (a) to (c), to do anything specified in the Second Schedule.

The categories of unfair practice identified in the CPFTA in ss 4(a)–4(c) bear a broad resemblance to the common law doctrines of misrepresentation, deceit and unconscionable dealing. However, the statute does not expressly invoke these doctrines and clearly contemplates new rights of action that are not fettered by the requirements of the general law doctrines that they might be thought to resemble.⁴⁸ The scope for recourse to general law doctrines in interpreting these provisions is therefore limited, but it is not excluded altogether. The relevant doctrines operate in a similar context to the statute in responding to concerns about procedural unfairness inducing entry into a transaction. Provided their role is properly tempered by a careful construction of the language of the statute and the purposes it promotes, general law doctrines may quite properly be used to provide

48 Joachim Dietrich, “Giving Content to General Concepts” (2005) 29 MULR 219 at 236.

insights into the characteristics and scope of the conduct sanctioned as unfair practices under the statute.

A. *Misleading conduct*

15 In the scenario outlined at the outset of this article, the tourist signed a contract committing him to purchase an expensive warranty along with the phone. The newspaper article suggests that the trader misrepresented the cost or value of the warranty to the consumer.

16 Section 4(a) provides a right to sue in response to conduct that may reasonably result in a consumer being “deceived or misled”.⁴⁹ In common with consumer protection regimes in many other jurisdictions,⁵⁰ liability under this provision does not, at least at the first stages of the inquiry, turn on there being some element of fault on the part of the trader. There is no requirement of an intention to deceive or of negligence expressly stated on the face of the legislation, which gives the action:⁵¹

... a wider ambit than other analogous common law causes of action, viz, fraudulent and negligent misrepresentation, which are founded on the fault of the defendant.

17 Fault nonetheless remains relevant to the equation. An inquiry into reasonableness is necessarily a “very *fact-centric* exercise” [emphasis in original].⁵² Given the open-textured nature of the standard there is considerable scope for courts to embrace a range of considerations they consider relevant to the assessment as to whether the conduct was an unfair practice reasonably likely to mislead or deceive, and fault may be one of these considerations. In *Freely Woo J* recognised that the state of mind of the maker of the statement may be “probative in establishing whether s 4(a) of the CPFTA has been breached”.⁵³ The point here seems to be that a deliberately false statement is more likely to be one that would “reasonably” deceive a consumer. Consistently, under the general law an intention to induce reliance relieves pressure on the need to establish actual reliance by the plaintiff.⁵⁴ Similarly, under the statutory

49 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 4(a).

50 See, eg, regs 5 and 6 of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No 1277) and s 18 of the Australian Consumer Law.

51 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [45], per Woo Bih Li J. See similarly *Parkdale Custom Built Furniture Pty Ltd v Puxu* (1982) 149 CLR 191 at 197–198, per Gibbs CJ.

52 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [77].

53 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [45].

54 *Gould v Vaggelas* (1985) 157 CLR 215 at 252, per Brennan J (deceit); *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167, per Lord Denning (negligent
(cont'd on the next page)

prohibition on misleading or deceptive conduct in the Australia Consumer Law, the High Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*⁵⁵ noted that, although deception was not an element of the action, deliberate stratagems to induce reliance by focusing on some facts and omitting (or underplaying) others are more likely to be found to have induced reliance and hence be found to be misleading or deceptive.⁵⁶

18 Section 5(3)(a) provides that in determining whether or not the trader has engaged in an unfair practice “the reasonableness of the actions of that person in those circumstances is to be considered”. Thus, although the question of whether a trader has engaged in misleading conduct does not require the trader to have been at fault, the reasonableness of the conduct of the trader is a factor to consider in deciding whether the practice was unfair. Such considerations are consistent with the statutory purposes of the CPFTA, which is premised on balancing “the interests of consumers against that of businesses and traders”.⁵⁷ In circumstances where the claim is that the trader engaged in misleading conduct, this type of inquiry is arguably implicit in the definition of the unfair practice.

19 Any inquiry into whether a consumer might *reasonably* be misled must include consideration of the entirety of the conduct of the trader. The hypothetical reasonable consumer who provides the perspective for the investigation into an unfair practice is less likely to have been misled in circumstances where the trader has acted reasonably in its use of information. It is therefore possible that a trader who has acted entirely innocently in engaging in conduct that might reasonably mislead a consumer would not be found to have engaged in an unfair practice. However, one would expect that to avoid liability the trader should have taken reasonable steps to verify the veracity of information imparted to consumers and also to communicate to consumers any limitations on the accuracy of that information. The CPFTA precludes parties from contracting out of the provisions of the Act.⁵⁸ Experience from Australia suggests that while parties cannot exclude or limit liability for misleading conduct under the Australian Consumer Law, a trader may, through a suitably phrased and sufficiently prominent

misstatement). See also *San Sebastian Pty Ltd v Minister administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 at 358.

55 (2013) 250 CLR 640.

56 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 657, [55]–[57], *per* French CJ and Crennan, Bell and Keane JJ.

57 *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76 at cols 3352–3355, quoted in *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1085 at [21].

58 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 13(1).

qualification or disclaimer, control the scope of liability for its statements.⁵⁹

20 In identifying whether a trader has engaged in an unfair practice, the concern is with whether consumers might *reasonably* be misled as a result of the trader's conduct rather than whether a particular consumer was actually misled and as a result entered into a transaction. The initial inquiry is therefore objective rather than into whether any particular individual was actually misled.⁶⁰ Australian decisions assessing whether conduct has been misleading under s 18 of the Australian Consumer Law suggest that where the object of the conduct is an identified individual, courts will consider the response of a reasonable person with the characteristics of that individual.⁶¹ Where the conduct is directed towards a class of persons, or the public at large, courts will consider the likely effect of the conduct on a "representative member" of that class and whether that representative person or member of a class would tend to act in reliance on the conduct.⁶² This makes the inquiry extremely wide-ranging and relatively forgiving of the decision-making frailties of individual consumers. As explained in *Freely by Woo J*:⁶³

... whether conduct has been misleading or deceptive under s 4(a) of the CPFTA, which specifically refers to the word 'reasonable', has to be tested objectively, in relation to one or more identified sections of the public, the Court considering all who fall within an identified section of the public, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.

Therefore, whether the conduct of the trader in the scenario at the outset of this article involved a misrepresentation about the cost of the warranty directed to the public at large or the particular consumer, the

59 See, eg, *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592. Compare, however, *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640.

60 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [45].

61 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 at 604, [36]–[37], per Gleeson CJ and Hayne and Heydon JJ.

62 *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 at 85, [103]. See also *Parkdale Custom Built Furniture Pty Ltd v Puxu* (1982) 149 CLR 191 at 199, per Gibbs CJ; *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 at 604, [36], per Gleeson CJ and Hayne and Heydon JJ; *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at 319, [35], per French CJ.

63 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [45]. See also *Parkdale Custom Built Furniture Pty Ltd v Puxu* (1982) 149 CLR 191 at 199, per Gibbs CJ; *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at 468, [13], per Gleeson CJ; *Miller v BMW Australia* [2010] HCA 31; (2010) 241 CLR 357 at [22], per French CJ and Kiefel J.

possible naivety of the tourist in assuming the warranty was free does not necessarily preclude relief under the CPFTA. The case for finding an unfair practice is viable if there are other factors making any such representation plausible in the circumstances in which it was made, particularly if combined with an intention to mislead on the part of the trader.

B. Omissions

21 It is also possible that in the scenario at the outset of this article the trader simply failed to mention the high price of the warranty to the tourist before asking him to sign the contract. Section 4(a) makes clear that consumers may reasonably be misled not only by positive conduct but also by a failure to speak or act, providing that it is an unfair practice for a supplier, in relation to a consumer transaction, to “do or say anything or *fail* to do or say anything, if as a result a consumer might be reasonably be deceived or misled”. We know from the general law that it is likely to be more difficult to establish that silence is misleading.⁶⁴ Generally contracting parties are not under a duty to disclose information even where that information is highly pertinent to the other party’s decision in whether to enter into the contract and on what terms.⁶⁵ Nonetheless, silence may amount to a misrepresentation under the general law where it is accompanied by conduct that combines to create a misleading impression, such as where a party engages in conduct that conceals the true situation⁶⁶ or makes a statement that omits crucial facts that would render the statement false.⁶⁷ Similar considerations may well inform the interpretation of s 4(a).

22 In the scenario considered at the outset of this article, the tourist was required to pay a high price to purchase a one-year warranty that considerably outstripped the cost of the iPhone, which was the primary product of purchase. The warranty may only have provided rights substantially equivalent to those already available to the consumer

64 See, eg, *La Banque Financière de la Cité v Westgate Insurance Co Ltd* [1988] 2 Lloyd’s Rep 513 at 559, per Slade LJ. See also *Trans-World (Aluminium) Ltd v Cornelder China* (Singapore) [2003] 3 SLR(R) 501. See generally John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 3rd Ed, 2012) at para 16.02.

65 See generally Anthony Duggan, Michael Bryan & Frances Hanks, *Contractual Non-Disclosure* (Longman Professional, 1994).

66 *Miller v BMW Australia* [2010] HCA 31; (2010) 241 CLR 357 at [23], per French CJ and Kiefel J; *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 7-019.

67 *Dimmock v Hallett* (1866) LR 2 Ch App 21; *Miller v BMW Australia* [2010] HCA 31; (2010) 241 CLR 357 at [23], per French CJ and Kiefel J; *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 7-020.

for free.⁶⁸ Apple commonly provides a one-year free warranty on its products.⁶⁹ Statutory protection for consumers dealing with defective goods is also provided under Singapore's so-called "lemon law".⁷⁰ In these circumstances it might be argued that offering a warranty without disclosing the high cost of that warranty amounts to a failure to say something under s 4(a) that would reasonably deceive or mislead a consumer. Certainly, under the Australian Consumer Law a decisive consideration in deciding whether a failure to disclose information is misleading is where a consumer would have a reasonable expectation of disclosure, based on factors including the expertise of the consumer and the importance of the information being considered.⁷¹ Practices that omit or hide material information are also classified as unfair under the English Consumer Protection from Unfair Trading Regulations 2008⁷² and similar concerns are identified in the black list of unfair practices in the Second Sched to the CPFTA.⁷³

C. *Unfair advantage-taking*

23 In the scenario at the outset of the article it is possible that, in signing the tourist up to a contract where the warranty cost more than the product, the trader took unfair advantage of the clear language difficulties and commercial inexperience of the consumer to sign him up to an excessively expensive contract. Under s 4(c) of the CPFTA it is an unfair practice to "take advantage" of a consumer who, to the

68 For concerns about the lack of value provided by many extended warranties, see Jeannie Marie Paterson, "The New Consumer Guarantee Law" (2011) 35 MULR 252 at 266–267.

69 See, eg, Apple website, "Your Hardware Warranty" <<http://www.apple.com/legal/warranty/products/ios-warranty-rest-of-apac-simplified-chinese.html>> (accessed September 2016).

70 Under the Sale of Goods Act (Cap 393, 1999 Rev Ed) there are a number of implied terms relating to the quality of goods. Traders cannot contract out of these terms: Consumer Protection (Fair Trading) Act ("CPFTA") (Cap 52A, 2009 Rev Ed) s 13. The CPFTA also assists consumers in proving a breach of these implied terms through a presumption that goods were defective at the time of sale or delivery, for defects that are detected within six months, unless such a presumption is incompatible with the nature of the goods or the seller could prove otherwise: CPFTA s 12B. See further *Speedo Motoring Pte Ltd v Ong Gek Sing* [2014] 2 SLR 1398 at [30] and [41]–[42] and Alexander Loke, "The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore" [2014] Sing JLS 285.

71 See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 557, per Lockhart J, and *Miller v BMW Australia* [2010] HCA 31; (2010) 241 CLR 357 at [20], per French CJ and Kiefel J.

72 Consumer Protection from Unfair Trading Regulations 2008 (UK) (SI 2008 No 1277) reg 6.

73 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Second Sched, para 20.

knowledge of the supplier, is not able to protect his own interests or reasonably understand the transaction.⁷⁴

24 The right to sue for what might be termed “unfair advantage-taking” under the CPFTA has strong similarities to the equitable doctrine of unconscionable dealing recognised in England⁷⁵ and, in a more expansive form, Australia.⁷⁶ Indeed, the advantage taken of the Vietnamese consumer appears almost a modern variation of the equitable jurisdiction to give relief against unconscionable conduct described by Kay J in *Fry v Lane*:⁷⁷

... where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.

The doctrine of unconscionable dealing is not recognised in Singapore as a vitiating factor justifying setting aside an otherwise validly made contract.⁷⁸ In *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd*⁷⁹ Quentin Loh J stated:⁸⁰

I do not think unconscionability as a vitiating factor in contract forms any part of Singapore law ... least not until the time comes for an abandonment of the doctrine of consideration in favour of doctrines like economic duress, undue influence and unconscionability. We already have the doctrines of undue influence, constructive fraud in equity and even *non est factum* in contract for the protection of the weak, the elderly, the very young and the ignorant.

Echoes of this suspicion of unconscionable conduct are also found in English law, which, as Capper comments, seems to have been influenced by the impression “that the unconscionable bargain was too vague and uncertain to be a useful tool of analysis”.⁸¹

25 The right of action based on what might be termed “unfair advantage-taking” under the CPFTA therefore presents a unique extension of Singaporean law. It does not require the same types of evidence of vitiated consent required by the doctrine of *non est factum*,

74 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 4(c).

75 See, eg, *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84; [1978] 2 WLR 535; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87; [1983] 1 All ER 944.

76 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

77 (1888) 40 Ch D 312 at 322. See also *Cresswell v Potter* [1978] 1 WLR 255.

78 See *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 and *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232.

79 [2011] 2 SLR 232.

80 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [66]. See also *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296.

81 See further David Capper, “The Unconscionable Bargain in the Common Law World” (2010) 16 LQR 403 at 416.

duress or undue influence. Rather, the focus of the right, in common with relief provided in the consumer protection regimes in other jurisdictions,⁸² is on providing a relatively straightforward and accessible right of response to traders who, in taking advantage of vulnerable consumers, deny the potential for autonomous decision-making by these consumers on which the law of contract and the functioning market are premised.⁸³

26 The elements required to establish unfair advantage-taking under s 4(c) of the CPFTA approximate the key elements of the equitable doctrine in responding to unconscionable conduct, at least as applied in Australia. The doctrine applies to grant relief against a contract or gift where:⁸⁴

... one party by reason of some condition or circumstance is placed at a special disadvantage *vis-à-vis* another and unfair or unconscientious advantage is then taken of the opportunity thereby created.

Thus, the experience of equity may prove useful in charting the boundaries of the statutory provision, provided, as already noted, that the task proceeds in a manner that is directed by the words of the provision and is mindful of the purposes of the legislation. In this regard it is notable that the CPFTA is focused on rights of redress in response to unfair advantage-taking which carries understandings of moral condemnation that may be subtly different to those involved by the concept of “unconscionability”.⁸⁵

27 The first element of unfair advantage-taking is that the consumer affected must have been “not in a position to protect his own interests”⁸⁶ or “not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction”.⁸⁷ There is a clear parallel with the ideas of vulnerability or special disadvantage that triggers relief under the doctrine of unconscionable dealing. Cases considering this form of equitable relief may, accordingly, provide some insight into the types of disadvantage

82 See also reg 7 of the English Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No 1277) (prohibition on aggressive market practices) and s 21 of the Australian Consumer Law (prohibition on unconscionable conduct).

83 Stephen Smith, *Contract Theory* (Oxford University Press, 2004) at p 56.

84 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462, *per* Mason J. Compare the statement of law in the UK in *Strydom v Vendside Ltd* [2009] EWHC 2130 at [36], *per* Blair J. See also *Boustany v Pigott* (1995) 69 P & CR 298.

85 See further Jeannie Marie Paterson & Gerard Brody, “Safety Net Consumer Protection” (2015) 38 J Consum Policy 331.

86 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 4(c)(i).

87 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 4(c)(ii).

relevant to bringing a consumer within the protection of this provision in the CPFTA.⁸⁸ Here too the underlying principle is the protection of a party unable to judge his or her own best interests in the transaction in question.⁸⁹

28 Unconscionable dealing in equity does not premise relief merely on there being some inequality of bargaining power between the parties,⁹⁰ the weaker party having suffered some hardship,⁹¹ or the transaction being improvident.⁹² These elements are often part of a commercial transaction and do not of themselves justify relief in equity premised on the transaction being unconscionable. In considering this element of special disadvantage required for relief against unconscionable dealing, Australian courts commonly refer to the statement of Fullagar J in *Blomley v Ryan*⁹³ listing:⁹⁴

... poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.

This state can only be assessed through a process involving a:⁹⁵

... precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [parties concerned].

Applying a similarly multifactorial approach in applying the statutory prohibition on unconscionable dealing under the Australian Consumer

88 See also Jeannie Marie Paterson, “Unconscionable Bargains in Equity and under Statute” (2015) 9 J Eq 188 (discussing this relationship in the Australian context).

89 *Blomley v Ryan* (1956) 99 CLR 362 at 392, per McTiernan J; *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 at 462, per Mason J, and 476–477, per Deane J; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51 at 64, per Gleeson CJ.

90 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 at 462, per Mason J; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51 at 64, per Gleeson CJ.

91 *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at 401, [19]. See also *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; (2003) 217 CLR 315 at 325–326, [26], per Gleeson CJ and McHugh, Gummow, Hayne and Heydon JJ.

92 *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at 401–402, [20].

93 (1956) 99 CLR 362.

94 *Blomley v Ryan* (1956) 99 CLR 362 at 405, per Fullagar J. See also *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87 at 95; [1983] 1 All ER 944 at 961 (Ch), per Peter Millett QC (appeal dismissed: [1985] 1 WLR 173; [1985] 1 All ER 303 (CA)).

95 *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at 426, [122], citing *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118–119, per Dixon CJ and McTiernan and Kitto JJ.

Law, Australian courts have looked to the experience of the consumer and the relative complexity of the underlying transaction in assessing whether the conduct of a trader has been unconscionable.⁹⁶

29 The second element required for the action of unfair advantage-taking under the CPFTA is that the trader “knows or ought reasonably to know” of vulnerable position of the consumer.⁹⁷ Knowledge is also an element of relief in unconscionable dealing and provides the basis for the moral condemnation of a trader’s conduct. It is transacting with a consumer that the trader knows to be unable to protect his or her own interests that offends the conscience of equity.⁹⁸ The requirement of knowledge under the CPFTA makes clear that the right to seek redress on the basis of unfair advantage-taking is at least partly defendant focused, sanctioning unfair conduct on the part of the trader, as opposed to responding solely to perilous circumstances of the consumer.

30 The knowledge requirement under the CPFTA extends beyond cases where the trader had actual knowledge of the inability of the consumer to protect his or her own interests. It also encompasses the situation where the trader “ought to have known” of the vulnerable position of the consumer. This phrase might cover the situation of “wilful blindness or shutting one’s eyes to the obvious”.⁹⁹ However, wilful blindness is usually equated with actual knowledge¹⁰⁰ and would therefore not require a separate reference to be encompassed by the CPFTA. The phrase “ought to have known” is more commonly associated with the idea of constructive knowledge, which is the knowledge that a reasonable person would have had in the circumstances.¹⁰¹

31 This attenuated concept of knowledge reduces the moral culpability required from a trader for relief to be granted. Such step has been controversial in Australia¹⁰² and ultimately rejected by the High Court as inappropriate in finding unconscionable dealing.¹⁰³ However,

96 *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292; (2013) 303 ALR 168 at 185–186, [55] (Santamaria, Neave and Osborn JJA agreeing).

97 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 4(c).

98 *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133; (2005) 146 FCR 292 at [19], *per* Finn J, citing Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at p 250 *ff*.

99 See *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [42].

100 *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at 439, [157]. *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 at 478, *per* Deane J.

101 See, *eg*, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [37].

102 Rick Bigwood, “Still Curbing Unconscionability: *Kakavas* in the High Court of Australia” (2013) 37 MULR 463 at 501.

103 *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; (2013) 250 CLR 392 at 439–440, [161].

the CPFTA is not premised on a response to unconscionability but to unfairness, which arguably is a standard that requires a lesser degree of moral outrage for its contravention than unconscionability.¹⁰⁴ A trader's conduct in transacting with a vulnerable consumer in circumstances where that trader had the means of discovering the consumer's inability to protect his or her own interests arguably satisfies this benchmark moral standard. The consumer is thereby protected in a situation where his or her ability to consent was impaired and the trader's interests are protected to the extent that the transaction is only susceptible to challenge in circumstances where it might reasonably have discovered the true situation of the consumer's impaired state.

32 As we have already seen, a concern with the relative fault to the trader is apparent under the CPFTA, which provides that in determining whether or not a trader has engaged in an unfair practice, "the reasonableness of the actions of that person in those is to be considered".¹⁰⁵ This means that the way in which a trader, with knowledge that it is dealing with a consumer unable to protect his or her own interests, responded to that position of evident vulnerability will be relevant to determining whether the trader's conduct has been unfair. Presumably, a trader who takes steps to ensure the consumer is properly supported in his or her decision-making, such as through a family member or some form of independent advice, may not have engaged in an unfair practice.

33 The third element required in establishing unfair advantage-taking under the CPFTA is that the supplier took "advantage" of the vulnerable consumer. The requirement might be interpreted to refer to financial disadvantage, so requiring the consideration paid to be disproportionate to the value of the transaction. Equally, it might be argued that the advantage-taking requirement should be satisfied in any circumstances in which a trader has committed a patently vulnerable consumer to a transaction without taking any steps to ensure that the interests of the consumer are protected. An elderly consumer who sells a cherished family heirloom without the ability to appreciate the consequences of that action may have been impacted by an unfair practice regardless of whether the sale was at value or not. Nonetheless, even under this approach, the presence of financial disadvantage, or otherwise harsh and onerous contract terms, will have probative value in establishing the other elements of the action.

104 *Cf Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583–584, [122], *per* Spigelman CJ.

105 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 5(3)(a).

34 In Australia, a lack of proportionality between the contract price and the value of the underlying transaction is not necessary to find that a contract has been procured by unconscionable dealing in equity.¹⁰⁶ However, courts have long treated inadequacy of consideration as a factor raising the suspicions of equity that unconscionable advantage was taken of a vulnerable consumer.¹⁰⁷ In *Blomley v Ryan* Fullagar J explained that:¹⁰⁸

Inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.

Equally, under the statutory prohibition on unconscionable conduct, courts have been prepared to use the patent imprudence of a transaction as a basis for inferring that advantage was taken of a vulnerable party.¹⁰⁹ For example, in *Australian Securities and Investments Commission v National Exchange Pty Ltd*¹¹⁰ a significant discrepancy between the price offered by the trader to purchase shares from consumers and their market value supported the court's inference that the transaction was

106 *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133; (2005) 146 FCR 292 at 296, [12], per Finn J. Compare the position in England where courts insist that harsh terms must have been imposed in a “morally reprehensible manner”: *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 110; [1978] 2 WLR 535 at 550, per Browne-Wilkinson J; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87 at 94 and 95; [1983] 1 All ER 944 (Ch) at 961, per Peter Millet QC (appeal dismissed: [1985] 1 WLR 173; [1985] 1 All ER 303 (CA)). See further David Capper, “The Unconscionable Bargain in the Common Law World” (2010) 16 LQR 403.

107 *Blomley v Ryan* (1956) 99 CLR 362 at 405, per Fullagar J; *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413; (2002) 11 BPR 20,841; *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133; (2005) 146 FCR 292 at 296, [12], per Finn J. See also *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 111; [1978] 2 WLR 535 at 550, per Browne-Wilkinson J; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87 at 95; [1983] 1 All ER 944 (Ch) at 961, per Peter Millet QC (appeal dismissed: [1985] 1 WLR 173; [1985] 1 All ER 303 (CA)); and *Hart v O'Connor* [1985] AC 1000; [1985] 3 WLR 214; [1985] 2 All ER 880.

108 *Blomley v Ryan* (1956) 99 CLR 362 at 405, per Fullagar J.

109 See, eg, *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132; *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350; (2013) ATPR 42-437 at 43-257–43-258, [172]–[178], per Mansfield and *Australian Securities and Investments Commission v The Cash Store Pty Ltd* [2014] FCA 926 at [94], per Davies J. See also *Harry v Kreutziger* (1979) 95 DLR (3d) 231.

110 [2005] FCAFC 226; (2005) 148 FCR 132.

designed to take advantage of inexperienced consumers.¹¹¹ In the scenario at the outset of this article it is the significant cost of the warranty as compared to the product to which the warranty is attached that raises a suspicion of predatory and therefore unfair conduct on the part of the trader.

D. The black list of unfair practices

35 The Second Sched to the CPFTA contains a “black list” of specific practices defined as necessarily unfair.¹¹² The list includes a range of objectionable behaviours impacting on consumers that may be seen as more concrete instances of conduct that would, in any event, be caught by the more general unfair practices in the main body of the CPFTA. It is possible that the tourist at the outset of this article would have a right to relief under the Second Sched black list, although the case does not fall squarely within any of the specified instances of necessarily unfair practices.

36 One potentially relevant specified unfair practice is:¹¹³

... [t]aking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.

This provision appears to extend the focus of the right to redress for an unfair practice beyond conduct affecting the contracting process, such as through misleading conduct or taking advantage of the vulnerable position of a consumer, to concerns about substantive fairness in the form of “harsh, oppressive or excessively one-sided” terms. It may be that, as earlier discussed, the existence of highly unfair or unconscionable terms is evidence that something has “gone wrong” in the bargaining process with advantage being taken of an inexperienced or otherwise disadvantaged consumer.¹¹⁴ Nonetheless, the black-listing of the practice does show the potential for regulation of substantively unfair contract terms under the CPFTA, this being a topic that has been of increasing

111 *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132 at 140–141, [33].

112 See further the Second Sched to the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed). Also considering these provisions *Consumers Association of Singapore v Garraway Enterprises Ltd Singapore Branch* [2009] SGDC 193.

113 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Second Sched, para 11.

114 See text at para 34 above.

concern¹¹⁵ and targeted regulation in other jurisdictions.¹¹⁶ It is not clear, however, that the provision would provide a right of redress to the tourist at the outset of this article. In that case it would appear the concern was with the disproportionate price rather than a substantive imbalance in the rights and obligations of the parties allocated by the terms of the contract.

37 The black list of unfair practices in the Second Sched also refers to:¹¹⁷

... [u]sing small print to conceal a material fact from the consumer or to mislead a consumer as to a material fact, in connection with the supply of goods or services.

Reference has already been made to the possibility that a trader's conduct in failing to disclose a significant feature of a transaction may, in some instances, amount to unfair misleading conduct. This black-listed unfair practice reinforces that position, making clear that suppliers cannot neutralise the effect of otherwise misleading conduct through fine print terms buried deep within the boilerplate provisions of a consumer contract. The terms of the contract signed by the unsuspecting tourist discussed at the outset of this article would need to be examined to determine the applicability of this doctrine, but this specific instance of an unfair practice may well have been relevant to strengthen his case for relief.

IV. Remedies

38 Just as remedies often drive the course of commercial litigation, the primary concern of consumers affected by an unfair practice is likely to be their rights of redress under the CPFTA. Were the tourist in the scenario outlined at the outset of this article to pursue his rights under the CPFTA, it is likely that he would be seeking to be released from the

115 See Oren Bar-Gill, *Seduction by Contract* (Oxford: Oxford University Press, 2012) and Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013).

116 Unfair Terms in Consumer Contracts Regulations 1999 (UK) (SI 1999 No 2083); Australian Consumer Law Pt 2-3; Fair Trading Act 1986 (1986 No 121) (New Zealand) ss 26A and 46H-46M. See further Jeannie Marie Paterson, "The Australian Unfair Terms Law: The Rise of Substantive Unfairness As a Ground for Review of Standard Form Consumer Contracts" (2009) 33 MULR 934 and Susan Bright, "Winning the Battle against Unfair Contract Terms" (2000) 20 Legal Stud 331. See also Sakina Shaik Ahmad Yusoff, Suzanna Mohamed Isa & Azimon Abdul Aziz, "Legal Approaches to Unfair Consumer Terms in Malaysia, Indonesia and Thailand" (2012) 20(S) *Pertanika J Soc Sci & Human* 43.

117 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) Second Sched, para 20.

obligation to pay for the warranty and to recover the money paid towards the purchase of the phone that appears to have been forfeited when he walked away from the transaction.

39 The CPFTA sets out a range of remedial orders that may be granted by courts in response to an unfair practice, providing that:¹¹⁸

Without prejudice to any other powers of the court to grant relief, a court (other than a Small Claims Tribunal) may in any proceedings where the court finds that a supplier has engaged in an unfair practice —

- (a) order restitution of any money, property or other consideration given or furnished by the consumer;
- (b) award the consumer damages in the amount of any loss or damage suffered by the consumer as a result of the unfair practice;
- (c) make an order of specific performance against the supplier;
- (d) make an order directing the supplier to repair goods or provide parts for goods; or
- (e) make an order varying the contract between the supplier and the consumer.

The orders specified in sub-ss (a), (b) and (c) are expressed in terms of well-established general law doctrines. This specific use of language must have been deliberate and acts as an instruction to courts to look to the identified general law remedies in fashioning the relief available to a consumer in response to an unfair practice. Presumably, however, any invocation of general law doctrines to determine the remedy awarded under the CPFTA must be consistent with the purposes of that Act in protecting consumers while also maintaining a balance with the interests of traders.

A. *Restitution*

40 Section 7(4)(a) refers to “restitution of any money, property or other consideration given or furnished by the consumer”. Interestingly, the legislation does not specifically provide the court with a general power to set aside a contract.¹¹⁹ Under the general law, where a contract is tainted by some form of procedural impropriety vitiating the consent

118 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 7(4).

119 Compare ss 243(a) (power to declare the whole or any part of a contract void) and 243(c) (power to refuse to enforce any or all of the provisions of a contract) of the Australian Consumer Law.

of one of the parties, the possibility of restitution of money and property exchanged under that transaction follows from the claimant's election to rescind the contract.¹²⁰ The question becomes whether there is a power under the CPFTA for the contract to be rescinded. It is this setting aside of the contract that will clear the path for the restitution of benefits exchanged under the contract, such as, for example, allowing the plaintiff to recover money that is paid as part of the purchase price of goods that were not delivered.

41 The list of possible orders in s 7 is stated not to limit any powers the court may otherwise have in response to an unfair practice. A court might conclude that the express power to order restitution implicitly contains a power akin to rescission that allows it to set aside any contract, or part of a contract, that may have eventuated from the impugned unfair practice. Indeed, there is some support for the view that the process of rescinding a contract is itself restitutionary in nature.¹²¹ This argument is somewhat weakened by the express inclusion of such a power in s 12(d), as a response to goods that fail to conform to the contract, including to the terms implied under the Sale of Goods Act.¹²² The express provision of a power to rescind in one part of the CPFTA might be thought to suggest that it is not available under other parts of the statute where not specifically mentioned. But this would be an unduly narrow interpretation. Without a power to rescind the contract, the restitution contemplated by s 7(4)(a) cannot be effected.

42 The express invocation of restitution as a possible remedial order suggests that the ordinary checks and balances applying to the processes of rescission and restitution under the general law are applicable under the statute.¹²³ However, these must be informed by the purposes of the statute and it is conceivable that in some cases the imperative of consumer protection might support a more generous approach to the ordinary requirement of counter-restitution or *restitutio in integrum*.

120 James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2016) at p 146. See *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 384, *per* Lord Diplock.

121 James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2016) at pp 37 and 45–46.

122 Cap 393, 1999 Rev Ed. On these provisions see generally Alexander Loke, "The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore" [2014] Sing JLS 285.

123 Ravi Chandran, "Consumer Protection (Fair Trading) Act" [2004] Sing JLS 192 at 218. On the bars to rescission see *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997.

B. Damages

43 Section 7(4)(b) provides for courts to award damages in the amount of “any loss or damage suffered by the consumer as a result of the unfair practice”. The award is clearly aimed at compensation as opposed to fulfilling other remedial goals. However, the measure of the compensatory award is not specified. The task for the court is therefore to “select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case”.¹²⁴

44 In *Freely*, Woo J held that:¹²⁵

... the appropriate measure of damages under the CPFTA for loss or damage which arises from unfair practice is, generally, the tortious measure of damages, *viz*, the difference between the value of what has been purchased and what was paid.

This is clearly correct given the nature of the provision infringed.¹²⁶ The unfair practice in response to which damages are awarded is engaging in conduct that misleads or involves obtaining an unfair advantage. It does not require the making good of promises. The loss or damage that should be compensated arises from the plaintiff’s reliance on or response to the impugned unfair conduct.¹²⁷

C. Damages and causation

45 The discretion to award damages in s 7(4)(b) provides that the loss or damage being compensated must arise “as a result of” the unfair practice. These words import a requirement of a causal connection between the plaintiff’s loss or damage and the defendant’s unfair practice. Causation in law is commonly considered to encompass two elements: a factual inquiry, identifying the link or nexus between the loss and the impugned conduct; and a normative scope of liability question, encompassing principles of remoteness, mitigation and contributory negligence.¹²⁸

124 *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at 470, [18], *per* Gleeson CJ.

125 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [81]. See also Ravi Chandran, “Consumer Protection (Fair Trading) Act” [2004] Sing JLS 192. Compare Wee Ling Loo & Soen Yin Erin Goh-Low, “Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act” (2007) 9 Austl J Asian L 66 at 74 (advocating that there should be a choice between the different measures).

126 See also Craig Colvin, “Tales of the Unexpected: Damages for Lost Expectations” (1997) 5 TPLJ 17.

127 For a good example of this reliance-based award see *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [86]–[87].

128 See the Australian Civil Liability Acts directing courts to consider both factual causation and scope of liability questions when assessing causation: Civil Law

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46 In regard to the factual inquiry, a plaintiff must show more than that the impugned unfair practice would have influenced a reasonable consumer to enter into a transaction. The plaintiff must show that the practice actually influenced his or her decision to transact.¹²⁹ The question here is what kind of test is required to establish this causal nexus. Should courts apply the “but for” test or an “a factor” test? In *Freely Woo J* held that the unfair practice “need not be the sole cause of the loss or damage”.¹³⁰ This suggests that to establish factual causation, it is sufficient that the misleading conduct was a cause of the plaintiff’s loss even if it was not the sole cause.¹³¹ Such an approach is consistent with that taken in response to misstatements under the general law, where courts have taken the view that a misrepresentation does not need to be the sole inducement to found liability, so long as it played a “real and substantial” part in inducing the plaintiff to act.¹³² A similar approach has been adopted in cases involving deceit,¹³³ duress¹³⁴ and, in a statutory context, misleading conduct contrary to the Australian Consumer Law.¹³⁵

47 The next issue is whether the requirement that the loss or damage arise “as a result of” the unfair practice also imports scope of liability limitations into the calculation of damages under the CPFITA. The statutory remedies under the Australian Consumer Law are available where a person suffers loss “because of” the prohibited conduct.¹³⁶ In awarding damages under the precursor to this legislation, Australian courts have recognised the potential relevance of scope of liability considerations beyond mere factual causation.¹³⁷ In *I & L*

(Wrongs) Act 2002 (ACT) s 45(1); Civil Liability Act 2002 (NSW) s 5D(1); Civil Liability Act 2003 (Qld) s 11(1); Civil Liability Act 1936 (SA) s 34(1); Civil Liability Act 2002 (Tas) s 13(1); Wrongs Act 1958 (Vic) s 51(1); Civil Liability Act 2002 (WA) s 5C(1).

129 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [74].

130 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [73].

131 *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at [109], per McHugh J, with whom Gummow J agreed; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 643–644, [49], per Gummow and Hayne JJ. Cf, however, *Brosnan v Katke* [2016] FCAFC 1 (noting the continued reliance of a “but for” test).

132 *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [23], per L P Thean JA.

133 *Gould v Vaggelas* (1985) 157 CLR 214 at 238, per Wilson J; *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, per Bowen LJ; see also 481, per Cotton LJ, 485, per Fry LJ. See also *Nicholas v Thompson* [1924] VLR 554 and *Wilcher v Steain* [1962] NSW 1136.

134 *Barton v Armstrong* [1976] AC 104 at 120, per Lords Wilberforce and Simon; see also 118, per Lord Cross.

135 *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459.

136 Trade Practices Act 1974 (Cth) ss 82 and 87, now ss 236 (damages) and 237 (compensation orders) of the Australian Consumer Law.

137 See *Henjo Investments Pty Ltd v Collins Murrickville Pty Ltd* (1998) 39 FCR 546 at 557, per Lockhart J; *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at 489–491, [96]–[98], and 504, [136], per McHugh J, with whom Gummow J

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*Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*¹³⁸ Gleeson J explained that:¹³⁹

When a court assesses an amount of loss or damage for the purpose of making [a remedial order under the Australian Consumer Law], it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose.

48 Limiting the causation inquiry under the CPFTA to simple factual causation would make traders liable for all losses sustained by consumers that are linked to the impugned unfair practice. This approach has an analogy in the tort of deceit where the damages awarded include all losses that flowed directly from the plaintiff's reliance on the defendant's fraudulent misstatement.¹⁴⁰ However, such an interpretation of the key words "as a result of" would not sit easily with the purposes underlying the CPFTA, namely protecting consumers while also balancing the interests of traders.¹⁴¹ Wee Ling Soo and Soen Yin Erin Goh-Low argue:¹⁴²

[I]t would be against the spirit and intent of the [CPFTA] to make an errant supplier liable for all damages that flow from his unfair practice without limitation, bearing in mind parliamentary concern regarding undue burdens on businesses.

Even in deceit, losses will be excluded from the award of damages where they are attributed to factors extraneous to the wrongful act, for example, losses arising from third party interventions or gross failures of

agreed; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109 at 119, [26], per Gleeson J.

138 [2002] HCA 41; (2002) 210 CLR 109.

139 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109 at 119, [25]–[26], per Gleeson J.

140 *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [23]; *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [81]. See also *Potts v Miller* (1940) 64 CLR 282 at 289–290, per Starke J, 297 and 299, per Dixon J, and *Toteff v Antonas* (1952) 87 CLR 647 at 650–651, per Dixon J.

141 *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76 at cols 3352–3355, quoted in *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1085 at [21].

142 Wee Ling Loo & Soen Yin Erin Goh-Low, "Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act" (2007) 9 Austl J Asian L 66 at 77.

a plaintiff to mitigate his or her own losses.¹⁴³ Similar considerations have been identified as relevant in controlling the scope of defendant liability under the Australian Consumer Law.¹⁴⁴

49 These considerations support the view that the regime is unlikely to favour unrestricted liability. Thus, a consumer is unlikely to be able to claim compensation for loss or damage caused by factors extraneous to the unfair practice, on the ground that these losses cannot be said to have arisen “as a result” of the practice.¹⁴⁵ Such factors may be described as “breaking the chain of causation”, although in reality the inquiry is into normative considerations of what type of factors should be judged as extraneous to the consequences of the unfair practice.

50 It is possible that in some circumstances a lack of care on the part of a consumer might be considered an extraneous factor releasing the trader from liability for losses following an unfair practice. However, the standard required to “break the chain” of causation is one of gross carelessness on the part of the plaintiff. Any inquiry into the level of care taken by a consumer in assessing damages under the CPFTA should take into account the relative expertise and capacity of consumers in assessing what standard of reasonable care can be demanded of them.¹⁴⁶ Thus, for example, in the scenario with which this article began, the failure of the tourist to read the contract carefully is unlikely to be a ground for denying a claim for damages on causal grounds in circumstances where the very misrepresentation that formed the basis of the unfair practice was in regard to the cost of the warranty or where unfair advantage was taken of the consumer’s poor English language skills.

51 There seems little support in the language or framework of the CPFTA to incorporate the more robust limitations drawn from the

143 *HTW Valuers Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 667, [65].

144 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109 at 119–120, [27], *per* Gleeson CJ; *HTW Valuers Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 659, [40], quoting *Potts v Miller* (1940) 64 CLR 282 at 298, *per* Dixon J. See, *eg*, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109 at 119–120 (grossly unreasonable conduct by the plaintiff may reduce defendant liability as a supervening cause); *HTW Valuers v Astonland* (2004) 217 CLR 640 at 659 (extrinsic losses); and *Hay Property Consultants Pty Ltd v Victorian Securities Corp Ltd* [2010] VSCA 247 (drawing from the law of negligence, criminal acts by a third party held to “break the chain” of causation).

145 Wee Ling Loo & Soen Yin Erin Goh-Low, “Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act” (2007) 9 Austl J Asian L 66 at 71.

146 *Singapore Parliamentary Debates, Official Report* (11 November 2003) vol 76 at cols 3455–3457, quoted in *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1085 at [22].

general law into whether the losses were reasonably foreseeable, or otherwise too remote to be recovered or an apportionment requirement for reducing damages on grounds of carelessness by consumers contributing to their losses.¹⁴⁷ Certainly in Australia, in the absence of a provision expressly proving for a reduction in damages on the basis of a plaintiff's contributory negligence, courts held that a plaintiff's lack of care for his or her own interests was not relevant to the defendant's scope of liability other than in exceptional cases.¹⁴⁸

52 The CPFTA expressly contemplates an inquiry into the actions taken by the consumer to mitigate any loss or damage flowing from an unfair practice. Section 7(9) provides that:

Where the court finds that an unfair practice has occurred, the court shall, in making [a remedial order], have regard to whether or not the consumer made a reasonable effort to —

- (a) minimise any loss or damage resulting from the unfair practice; and
- (b) resolve the dispute with the supplier before commencing the action.

The presence of this express direction to consider the extent to which the consumers have attempted to mitigate any loss resulting from an unfair practice supports the suggestion already made that there are no other limitations in the award of damages not expressly referred to in the legislation, other than those extrinsic events of intervening acts or extreme carelessness that render it impossible to say that the loss or damage arose “as a result of” the unfair practice.

D. Specific performance

53 Section 7(4)(c) provides courts with a power to award specific performance. The traditional preconditions for and limitations on this award under the general law presumably apply to this power, which

147 Wee Ling Loo & Soen Yin Erin Goh-Low, “Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act” (2007) 9 Austl J Asian L 66 at 72.

148 *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 138; *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at 468, [13], per Gleeson CJ, and 493, [106], per McHugh J; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; (2002) 210 CLR 109 at 136, [85], per McHugh J, and 154, [144], per Kirby J, citing French J in *Pavich v Bobra Nominees Pty Ltd* (1988) ASC 55-684. The Australian Competition and Consumer Act 2010 now provides for apportionment of damages in circumstances where the trader was not fraudulent and where the consumer suffered loss or damage partly as a result of his or her own “failure to take reasonable care”: see s 137B.

expressly adopts the general law remedy.¹⁴⁹ The purposes of the CPFTA may remain relevant. In particular, specific performance is not normally granted for fungible goods.¹⁵⁰ The issue in this context is whether the consumer protection purposes of the CPFTA override these considerations, allowing consumers to claim the goods they have selected rather than having to fall back on a claim for damages.

E. Repair and variation

54 The discretions given to a court to directly repair or vary the contract under ss 7(4)(d) and 7(4)(e) are seemingly open-ended responses with no equivalent under the general law.¹⁵¹ These types of provisions are, however, common in consumer protection legislation. The repair response is useful where the major failing of the goods is not performing as warranted.¹⁵² The variation power has been used in Australia to adjust the contract so as to be more equitable as between the parties, having regard to the nature of the offending conduct.¹⁵³

F. Discretionary relief and causation

55 None of the remedial powers referred to in s 7(4), other than s 7(4)(b) (damages), expressly refer to causation. This, Ravi notes, raises the question of whether “a causal connection between unfair practice and entry into the contract from which relief is sought [is] required”.¹⁵⁴ It is possible that a court might vary or order specific performance of a contract where the trader had engaged in misleading conduct even in circumstances where the individual consumer in question had not relied on that misrepresentation in entering into the contract. Such a response might be thought appropriate where the trader’s conduct was highly egregious and would also provide a strong incentive against traders engaging in this kind of conduct in the future. On the other hand, granting relief in cases where there was no causal link between the unfair practice and the entry into a transaction would seem unduly to

149 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 (noting that specific performance is only awarded if just and equitable and also the range of relevant factors in making this determination).

150 See, eg, *Dominion Coal Co Ltd v Dominion Iron & Steel Co Ltd* [1909] AC 293 at 311.

151 *Cf Vadasz v Pioneer Concrete* (1995) 184 CLR 102 at 115–116 (partial rescission).

152 See, eg, s 261 of the Australian Consumer Law and s 23 of the English Consumer Rights Act 2015 (c 15).

153 See, eg, *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 and *Spina v Permanent Custodians Ltd* [2009] NSWCA 206 (loan transactions varied to relieve plaintiffs of liability to repay moneys they did not receive).

154 Ravi Chandran, “Consumer Protection (Fair Trading) Act” [2004] Sing JLS 192 at 218.

favour consumers' interests over those of the trader in a manner that is inconsistent with the legislative purpose of encouraging "greater consumer responsibility and pro-activity".¹⁵⁵ The better view therefore is that questions of at least factual causation are relevant to the exercise of the court's discretion to grant all of the forms of relief listed in s 7(4).

G. Remedies in the Small Claims Tribunal

56 The Small Claims Tribunals Act¹⁵⁶ grants the SCT the power to make a more limited range of remedial orders than those available to courts under the CPFTA. The Act provides that:¹⁵⁷

- (a) the tribunal may order a party to the proceedings to pay money to another party;
- (b) the tribunal may make a work order against any party to the proceedings;
- (c) the tribunal may make an order requiring a party to the proceedings to do anything referred to in paragraph (b) within such time as may be specified in the order and, in default of his complying with that order, to pay money to a person specified in the order;
- (d) the tribunal may make an order dismissing the claim to which the proceedings relate; and
- (e) the tribunal may make such ancillary orders as may be necessary to give effect to any order made by the tribunal.

Where the tribunal makes an order for the payment of money in response to an unfair practice under the CPFTA, then it can be argued that the remedial power of the tribunal should be exercised in a way that is consistent with the powers of a court in s 7(4). Certainly, in *Freely Woo J* treated the measure of damages awarded under the CPFTA as also applicable to an award under the SCT.

57 As under the CPFTA, there is no express power for the tribunal to set aside a contract. Rescission of the contract accompanied by restitution of any money paid may often be the fairest and most effective response to a consumer contract induced by an unfair practice. Given the consumer protection purposes of the legislation, it should be

155 See, eg, *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76 at col 3352 (Raymond Lim Siang Keat) and *Singapore Parliamentary Debates, Official Report* (11 November 2003) vol 76 at col 3444 (Raymond Lim Siang Keat). See also discussion in Wee Ling Loo & Soen Yin Erin Goh-Low, "Award of Damages under the Singapore Consumer Protection (Fair Trading) Act" (2007) 9 *Austl J Asian L* 66 at 81.

156 Cap 308, 1998 Rev Ed.

157 Small Claims Tribunals Act (Cap 308, 1998 Rev Ed) s 35.

possible to argue that the power to award the payment of money includes an order for restitution of money and that ancillary to this power is the power to set aside the contract and to make such other restitutionary orders as are needed to return the parties to their ordinal positions.

V. Conclusion

58 The scenario at the outset of this article highlights both the application of the CPFTA to provide a remedy for a consumer tourist subject to predatory conduct by an unscrupulous trader, and also the way in which that application will necessarily be informed by general law principles drawn from contract, tort, restitution and equity. While it is the provisions of the statute, and not some modified version of the general law, that must be applied to resolve a particular dispute, the general law that forms the background context to the statute will inevitably, and quite properly, influence the interpretation and application of the statute. The remedial provisions of the CPFTA invite this process by describing the orders available from the court in response to an unfair practice in terms of common law doctrine. However, even where the statute is not so explicit in its contemplated relationship with the general law, an understanding of the scope of the rights granted to consumers can be assisted by general law analogies, along with insights from the experience of courts in dealing with consumer protection legislation in other comparable jurisdictions.
