Introduction

Section 15 of the Sale of Goods Act 1957 ('the SOGA 1957') underscores the importance of determining whether a contract for the sale of goods is a sale by description. Section 15 provides:

Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. (Emphasis added.)

Another section which makes reference to a sale by description is s 16(1)(b) of the SOGA 1957. It reads:

Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be of merchantable quality.

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. (Emphasis added.)

It is clear from the above provisions that the benefits provided by both ss 15 and 16(1)(b) of the SOGA 1957 can only be utilized, if in the case of the former, 'a contract is for the sale of goods is a sale by description, Section 15 provides:

In this article, an attempt is made to look at some of the more significant cases that have evolved since similar provisions were introduced in the English Sale of Goods Act 1893 ('the 1893 UK Act'). It has been said that the fairly recent case of Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Arts Ltd is a clear indication that the English courts are moving towards a more restrictive definition of 'sale by description'. Given the fact that there are hardly any Malaysian cases of significance on this issue and the fact that the SOGA 1957 has its origins in the 1893 UK Act, any tendency to interpret our provisions against the backdrop of developments in England may seem like a convenient and practical approach. However, it is the writer's view that for reasons that are unique to our present law relating to contracts and sale of goods, the more recent English cases on sale by description must be viewed with caution and that the older and more established cases in this area which championed the wider, more liberal and all-encompassing definition of sale by description should not be hastily abandoned.
The benefits of buying by description -- the importance of ss 15 and 16(1)(b) of the SOGA 1957 for the buyer

If a contract of sale is one which is by description, then s 15 makes it an implied condition that the goods shall correspond with the description. If a sale is by description as well as by sample, then it is an implied condition that the goods correspond not only with the sample but also with the description. In other words, when a sale is by description, s 15 implies a promise on the part of the seller that the goods shall correspond with the description while s 16(1)(b) implies a promise on the part of the seller that the goods shall be of merchantable quality. As the SOGA 1957 stipulates that these promises are implied conditions, breach of either of these promises by the seller enables the buyer to treat the contract as repudiated provided he has not accepted the goods.

Section 15 in particular, puts the buyer in a particularly favourable position. He is entitled to the protection provided therein once he can establish that what he has bought under a sale by description does not correspond with the description. The fact that the subject matter may not be defective, is of merchantable quality and is perfectly suitable for its purpose, are all immaterial. Non-conformity with the description ipso facto is a breach of s 15 and gives the buyer the right to treat the contract as repudiated.

Even where the subject matter of a contract of sale not only fails to conform to its description but is also of unmerchantable quality and/or unfit for purpose, there may be circumstances where a buyer's only possible remedy may be under s 15. One such situation is when the sale is a private sale, that is, a sale from one individual to another, the former not selling in the course of his business. Unlike s 15 which applies generally, s 16(1)(a) which deals with the implied condition as to fitness for purpose and s 16(1)(b) which deals with the implied condition as to merchantable quality, can only be applied when the 'goods are of a description which it is in the course of the seller's business to supply' or are bought from 'a seller who deals in goods of that description', respectively. In other words, the provisions relating to merchantable quality and fitness for purpose are inapplicable in a private sale. For such a buyer therefore, non-conformity with description under s 15 may be his only means of rescinding a contract of sale if what he gets is not what he had expected.

Even when an item is bought from one who sells it in the course of his business, a buyer may still not be able to prove breach of either of the implied conditions relating to merchantable quality or fitness for purpose, as the requirements that must be fulfilled before either or both of these conditions can be implied are far more stringent than the requirements under s 15.

For instance, to invoke the implied condition as to fitness for purpose under s 16(1)(a), a buyer has to satisfy the following requirements:

(i) that he had, either expressly or by implication, made known to the seller the particular purpose for which the goods were required;
(ii) that he relied on the seller's skill and judgment;
(iii) that the goods were of a description which it was in the course of the seller's business to supply; and
(iv) that the goods were not purchased under their patent or trade name.

In order to invoke an implied condition as to merchantable quality under s 16(1)(b), the following requirements must be satisfied:

(i) that the goods had been bought by description;
(ii) from a seller who dealt in goods of that description; and
(iii) if the goods had been examined by the buyer, the defects complained of were not those which such examination ought to have revealed.

Finally, the stringent requirements for invoking merchantable quality and fitness for purpose aside, another reason for the importance of s 15 is simply because conformity to description seems to be far wider in its scope than either merchantable quality or fitness for purpose. If, because of personal preference, A orders an olive green Volvo and instead a flawless dark blue one is delivered, A's best, if not his only, justification for possibly rejecting the latter is for non-conformity with description, that is for the seller's breach of s 15 of the SOGA 1957.
Sale by description -- some characteristics

In dealing with sale by description, two distinct questions must be resolved. The first is, whether a contract of sale is one which is by description. Only when this question is answered in the affirmative can a particular transaction come within the scope of s 15 and/or s 16(1)(b). The second is, in what circumstances will there be a breach of s 15? or what is the scope of the phrase 'the goods shall correspond with the description' in that section?

It is said that 'sales other than by description are comparatively rare'. Atiyah in an earlier edition of his book observed that 'it is probably true to say that the only case of a sale not being by description occurs when the buyer makes it clear that he is buying a particular thing because of its unique qualities and that no others will do'. As such, the learned author reasoned, the sale of a manufactured item will nearly always be a sale by description (except where it is second-hand) because articles made to an identical design are not bought as unique goods but as goods corresponding with the description.

The adoption of a broad test in determining a sale by description is clearly reflected in the words of Lord Wright in Grant v Australian Knitting Mills Ltd:

[A] thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, eg woollen garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.

Correspondence with description

In analysing the approach taken by the courts when determining whether goods sold correspond with their description, three categories of sale by description must be distinguished, namely, sale of future or unascertained goods, sale of specific goods which have been seen by the buyer and sale of specific goods which have not been seen by the buyer. The distinction between these three categories of sale is important as the cases seem to indicate that the courts apply different tests in determining correspondence with description for each of the three categories of transactions.

(i) Future or unascertained goods

Future goods is defined in the SOGA 1957 as goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. The SOGA 1957 does not define unascertained goods but it is generally taken to include three categories of goods, namely generic goods, future goods and an unidentified part of a larger quantity of ascertained goods.

Generally, there are three ways by which future or unascertained goods can be sold, namely, by description only, by description and sample or by sample only. The first two methods clearly involve sale by description. It is for this reason that it has long been acknowledged that a sale by description whilst not exclusively applicable to sale of future or unascertained goods, are particularly common in relation to contracts of sale involving such goods.

A study of the more significant earlier cases seems to indicate that, in relation to future or unascertained goods, the phrase 'sale by description' is widely construed and strictly applied. Such an approach is indeed justifiable given the fact that, except in cases where the sale is by description as well as by sample, the description is the sole basis for the identification of the subject matter when future or unascertained goods are involved. Thus, exact conformity with the contract description was required and the contract description could include matters like specification as to measurement or method of packaging of the subject matter.

In Manbre Saccharine Co Ltd v Corn Products Co Ltd, there was a contract for the sale of starch in 280lb bags but the seller instead tendered the starch in 240lb bags and 140lb bags. An argument on behalf of the seller that '280lb bags' were not material to the bargain was rejected by McCardie J who reasoned:

[In my opinion, it is clear that such words were an essential part of the contract requirements. They constitute a portion of the description of the goods ... If the size of the bags was immaterial I fail to see why it should have been so clearly
specified in the contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of the goods will suffice for the purpose of the purchaser ...

In *Re Moore & Co Ltd and Landauer & Co*, the seller contracted to sell to the buyer a quantity of canned fruits in cases containing 30 tins each. The correct quantity was tendered by the seller but about half were in cases of 24 tins only. According to the evidence, there was no difference in the market value of the goods, whether packed in 30 or 24 tin cases. It was held that the contract was for the sale of goods by description and the seller was in breach of the implied condition relating to description. According to Bankes LJ: 'It is plain upon the facts of the contracts in the present case that the packing of these goods was part of the description of the goods. In those circumstances it is not a case in which it is necessary to inquire whether in the trade it was considered a matter of vital importance or whether it really affect the market value.

In *Arcos Ltd v EA Ronaasen & Son*, by two written contracts, the appellants agreed to sell to the respondents a quantity of redwood and whitewood staves, cif River Thames, of a thickness of half an inch. The staves that were delivered exceeded the specified thickness. It was held, inter alia, that the seller had been in breach of the implied condition that the goods would correspond with the description. Conformity with description requires exact compliance with the description and no allowance was made for the application of the doctrine of substantial performance. Neither was any margin allowed in determining whether there had been a breach of the implied condition relating to description. This strict stance is clearly reflected in an oft-quoted part of Lord Atkin's judgment:

It was contended that in all commercial contracts the question was whether there was a 'substantial' compliance with the contract, there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement, and the like, those conditions must be complied with. A 3 MLJ liv at ix

A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does 1/2 inch mean about 1/2 inch. If the seller wants a margin he must, and in my experience does, stipulate for it.

The learned judge further cautioned: 

While Lord Atkin distinguished between description and quantity, Lord Buckmaster distinguished between description and merchantable quality. According to his Lordship: 

The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description ... If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought. (Emphasis added.)

While the earlier cases seem to insist on exact compliance or conformity with every description, in the later case of *Ashington Piggeries Ltd & Anor v Christopher Hill Ltd*, the House of Lords viewed a similar provision relating to description that is, s 13 of the 1979 UK Act, from another perspective. According to the House of Lords, for purposes of that section, only those descriptions that identify the subject matter are material when the sale involves unascertained goods. According to Lord Guest, where goods are unascertained, 'description' implies a specification whereby the goods can be identified by the buyer. The same view was shared by Lord Diplock who, in addition, also introduced the element of intention: 

The 'description' by which unascertained goods are sold, is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied ... The key to s 13 is identification.
This new trend of limiting the scope of ‘sale by description’ vis-a-vis future or unascertained goods by confining it only to specifications which are intended to identify the goods, is also illustrated by the case of *Reardon Smith Line Ltd v Hansen-Tangen*, a later decision of the House of Lords. Whilst not a case on sale of goods, the judgment of the House of Lords in *Reardon Smith* is important as it seems to indicate the dissatisfaction of the Law Lords with the decisions in cases like *Re Moore & Co* whereby a buyer was allowed to reject goods for relatively minor deviations from the contract description.

In *Reardon Smith*, there was a charterparty pertaining to a vessel which was yet to be built, described as ‘Yard No 354 at Osaka Zosen’. However, Osaka Shipbuilding Co was unable to build the vessel in its own yard and they subcontracted the work to Oshima. The said vessel was numbered 004 in Oshima’s books but 354 in Osaka’s books and other export documents. In all other respects, the vessel when built complied fully with all the specifications in the charterparty. The sub-charterers however refused to take delivery of the vessel on the ground that it did not correspond with the contractual description since it was not in fact Osaka 354 but Oshima 004.

In considering whether the specifications pertaining to the yard number was a material description, Lord Wilberforce rejected the strict view taken by the earlier cases in the area of sale of goods:

[I] am not prepared to accept that authorities as to ‘description’ in sale of goods cases are to be extended, or applied, to such a contract as we have here. Some of these cases either in themselves (*Re Moore & Co* and *Landauer & Co*) or as they have been interpreted (eg *Behn v Burness*) I find to be excessively technical and due for fresh examination in this House. Even if a strict and technical view must be taken as regards the description of unascertained future goods (eg commodities) as to which each detail of the description must be assumed to be vital, it may be, and in my opinion is, right to treat other contracts of sale of goods in a similar manner to other contracts generally, so as to ask whether a particular item in a description constitutes a substantial ingredient of the identity of the thing sold, and only if it does to treat it as a condition ...

His Lordship then considered the meaning of the words ‘identity’ and ‘identification’:

It is one thing to say of given words that their purpose is to state (identify) an essential part of the description of the goods. It is another to say that they provide one party with a specific indication (identification) of the goods so that he can find them and if he wishes sub-dispose of them ... The difference is vital. If the words are read in the first sense, then, ... each element in them has to be given contractual force. The vessel must, as a matter of contract, and as an essential term, be built by Osaka and must bear their yard no 354; if not, the description is not complied with and the vessel tendered is not that contracted for. If in the second sense, the only question is whether the words provide a means of identifying the vessel. If they fairly do this, they have fulfilled their function. It follows that if the second sense is correct, the words used can be construed much more liberally than they would have to be construed if they were providing essential elements of the description. (Emphasis added.)

Having reasoned that the relevant words in the charterparty could only be construed in the second sense, his Lordship concluded that the appellants had failed to bring the case within the rules as to ‘description’.

His Lordship’s view was shared by the other law Lords. Lord Simon of Glaisdale had perhaps succinctly summarized the concern of their Lordships when he commented that it would be odd were the law to elevate a matter obviously immaterial to the parties at the time of contracting into a matter of fundamental obligation. His Lordship also shared Lord Wilberforce’s view that the cases on the sale of goods might have to be reconsidered on this basis.

(ii) Specific goods which have not been seen by the buyer

Specific goods, which are defined in the SOGA 1957 as goods identified and agreed upon at the time a contract of sale is made, can be the subject of a contract of sale even though the goods have not been seen by the buyer. This, for instance, is the case when a contract of sale is made over the phone based only on an advertisement inserted in a newspaper.

Arguably, specific goods which have not been seen by the buyer may either be existing goods (as above) or future goods. An example of the latter is when a buyer enters into a contract with a manufacturer to buy a specific item which has yet to be manufactured, for example, the 100,000th air-conditioning unit that will be
produced by Plant X. In such a situation, the subject matter whilst not in existence at the time of the contract (that is, future goods) is in fact specific goods, that is, identified and agreed upon by the parties.

In both these instances, where the specific goods have not been seen by the buyer, the buyer is thus relying on the description alone. Hence, the test as to description which is applied to future or unascertained goods should also apply.  

(iii) Specific goods which have been seen by the buyer

Sale of specific goods which have been seen or even examined by a buyer is a sale by description provided it is sold not merely as a specific thing but as corresponding to some description as well. The test in such a situation according to Aliyah is whether, on the true construction of the contract, the buyer has agreed to buy a specific chattel as it stands, to the exclusion of all liability on the part of the seller. 

In the well-known case of Beale v Taylor, the defendant had advertised his car as a ‘Herald Convertible, white 1961’. The plaintiff having viewed, examined and tried the car, bought it. The car was in fact made of two parts which had been welded together and only part of it was a 1961 model. It was held, at first instance, that the sale was of a particular car as seen, tried and approved and hence it was not a sale by description and the condition implied by s 13 of the 1893 UK Act did not apply. However, the decision was reversed on appeal. According to the Court of Appeal, the sale was a sale by description and there had been a breach of the implied condition as to description. An argument by the seller’s counsel that as the car had been seen, examined and tried by the buyer, it was not a sale by description but a sale of a ‘particular thing’, was rejected. Sellers LJ reasoned that this did not make a sale any less a sale by description:

The buyer relied on the fact that there had been a description of the vehicle as a Triumph Herald 1200 motor car with the registration number 400 RDH and that the vehicle which was delivered did not correspond with the description.

His Lordship also observed:

It would seem from the above, that the sale of specific goods which have been seen by the buyer can only be a sale by description if the following elements are present:

(a) some description relating to the goods, and
(b) reliance by the buyer on such description.

The presence of the two elements mentioned above is crucial in determining whether a sale of specific goods which have been seen by the buyer is a sale by description. That however, is only the first hurdle. The next hurdle is to prove that there has been a breach of that provision. It would seem from the judgment of Sellers LJ, that this is the more difficult hurdle as it must be shown that ‘the deviation of the goods from the description is not apparent’.

Hence not every deviation from description can amount to a breach of s 15 when the subject matter has been seen by the buyer -- only any deviation which is not apparent.

While according to the above case, reliance by the buyer on the description is merely one of the two elements in determining whether a sale is one which is by description, this element though still relevant, seems to have been treated differently by the Court of Appeal in the fairly recent case of Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd.

The respondent, a firm of art dealers, was asked to sell two oil paintings which were described in its catalogue as being by Gabriele Munter, an artist of the German Expressionist School. H, the owner of the firm, who specialized in contemporary British artists, had no training, experience or knowledge which would have enabled him to tell that the paintings were in fact not by Munter, but fake copies. The appellants, art dealers
specializing in the German Expressionist School, showed interest after being told that the respondent had two paintings by Munter for sale. An employee of the appellants who, in fact, viewed the paintings, was told by H that he did not know much about the paintings and had never heard of Gabriele Munter. The appellants then bought one of the paintings for £6,000 without making further enquiries. In the invoice, the painting was described as being by Munter. Subsequently, the painting was discovered to be a forgery and the appellants sought repayment of the purchase price claiming, inter alia, that the sale was one which was by description, there had been a breach of s 13(1) of the 1979 UK Act. They failed at first instance as it was held that they had not relied on the description given by the respondent. The plaintiff's appeal to the Court of Appeal was also dismissed. According to the Court of Appeal, the sale was not one which was by description. The plaintiff thus failed to cross the first of the two hurdles mentioned earlier. It was in reaching that conclusion that the majority in the Court of Appeal seemed to have greatly restricted the scope and application of sale by description, at least vis-a-vis specific goods which had been seen by the buyer.

According to the Court of Appeal, the fact that a description was applied to goods, either in the course of negotiations or in the contract itself, did not necessarily make the contract one for the sale of goods by description for the purpose of s 13(1) of the 1979 UK Act.

Several requirements had to be satisfied before such description could be brought within the purview of 'sale by description'. Referring to s 13(1) of the 1979 UK Act, Nourse LJ said: 35

[T]hose words would suggest that the description must be influential in the sale, not necessarily alone, but so as to become an essential term, i.e. a condition, of the contract. Without such influence a description cannot be said to be one by which the contract for the sale of goods is made.

According to his Lordship, the use of the word 'by' in the relevant provision shows that 'one must look to the contract as a whole in order to identify what stated characteristics of the goods are intended to form part of the description by which they are sold'. 36

'Influence' according to his Lordship was related to the more familiar concept of reliance in the following way:

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The description must have a sufficient influence in the sale to become an essential term of the contract and the correlative of influence is reliance. Indeed reliance by the buyer is the natural index of a sale by description.

Hence, reliance by the buyer upon the description per se is not the criteria; it must be reliance on a description which forms an essential term of the contract; reliance on an influential term of the contract.

While the emphasis in the judgment of Nourse LJ is on 'influence', Slade LJ stressed on the importance of the element of intention. According to his Lordship: 38

If the court is to hold that a contract is one 'for the sale of goods by description', it must be able to impute to the parties (quite apart from s 13(1) of the 1979 Act) a common intention that it shall be a term of the contract that the goods will correspond with the description. If such an intention cannot be properly imputed to the parties, it cannot be said that the contract is one for the sale of goods by description within the ordinary meaning of words. The practical effect of s 13(1), as I understand it, is to make it plain (if it needed to be made plain) that in a case where such a common intention can be imputed, the relevant term of the contract will be a condition as opposed to a mere warranty. (Emphasis added.)

The presence or absence of reliance, according to his Lordship was only relevant to the extent that it throws light on the intention of the parties at the time of the contract. His Lordship reasoned that if there was no such reliance by the purchaser:

... this may be powerful evidence that the parties did not contemplate that the authenticity of the description should constitute a term of the contract, in other words, that they contemplated that the purchaser would be buying the goods as they were. (Emphasis added.)
A case for the retention of the older approach in Malaysia

While the newer cases like Reardon Smith and Harlingdon clearly have persuasive value in Malaysia, it is felt that in spite of what was said in these cases, there are still valid arguments for the retention of the older approach, particularly in Malaysia.

It must be borne in mind that under the SOGA 1957, a sale by description is, by virtue of s 16(1)(b), a vital requirement in an action for breach of an implied condition as to merchantable quality. This is because such a condition is only applicable ‘when goods are bought by description’. Hence, if an extremely restrictive meaning is given to that phrase, a purchaser may be denied of not just one but two remedies provided for under the Act, namely breach of implied condition as to description and breach of implied condition as to merchantable quality. This is not the position in the UK as the provision relating to merchantable quality is no longer restricted to cases where goods are bought by description. Hence remedies for breach of the implied condition as to merchantable quality are applicable irrespective of whether or not a sale is by description.

Until and unless the Malaysian legislature amends s 16(1)(b) to be in line with its parallel provision in the 1979 UK Act, the Malaysian buyer has much more to lose compared to his English counterpart if the local courts were to adopt the test in Harlingdon.

The other important factor which must not be overlooked is the fact that although s 15 of the SOGA 1957 makes conformity with description an implied condition, a seller can, if he wishes, exclude such an implied condition. This is expressly allowed by s 62 of the SOGA 1957 which reads: ‘Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement ...’

Whilst it must be acknowledged that consumer protection is noticeably being given more attention by the relevant authorities at present, Malaysia does not have an act which is similar to the Unfair Contract Terms Act 1977 of the UK. Hence, there are no checks on possible abuses of contracting out provisions like s 62 of the SOGA 1957. Given the fact that sellers can readily contract out of all the implied conditions in the SOGA 1957 if they so choose, in the absence of such contracting out, the courts should not impose unrealistic pre-requisites before such conditions are implied.

A final point that must not be overlooked is that s 15 makes conformity with description an implied condition, breach of which allows the innocent party to repudiate the contract. However, if s 15 is inapplicable, then a purchaser must prove that a description is a term of the contract before he can sue for damages for breach of contract. If the purchaser cannot establish that the relevant description is a term of the contract, then the only other possible remedy lies in misrepresentation. A contract is voidable for misrepresentation provided the consent to the agreement is caused by the misrepresentation. Relying on misrepresentation, be it fraudulent, negligent or innocent, to avoid a contract, is certainly not as easy as alleging breach of a condition which is implied by statute.

Fraudulent misrepresentation is, under the Contracts Act 1950, a variety of fraud. If consent to an agreement is caused by fraud, the contract can be avoided by the innocent party. However, the difficulty with fraudulent misrepresentation is that as an allegation of fraud is involved, a high standard of proof is required. However once fraud is established, the court may award damages even if the innocent party chooses not to rescind the contract.

For innocent and negligent misrepresentation, not only must the consent to the agreement be caused by the misrepresentation, it must additionally be shown that the party whose consent was so caused did not have the means of discovering the truth with ordinary diligence. Thus, a purchaser who seeks to rely on non-fraudulent misrepresentation when there is non-conformity with description must prove the following:

--that the description amounted to a representation by the seller;
--that the representation was in fact a misrepresentation within s 18 of the Contracts Act;
--that he had given his consent to the agreement because of the misrepresentation, and
--that he had not had the means of discovering the truth with ordinary diligence.

Having satisfied all these requirements, a purchaser is then entitled to rescind the contract. The effect of such a rescission is that the purchaser need not perform any promise therein and he must restore any bene-
fits he has received from the seller. He is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. 46 He cannot however, sue the seller for damages under the Contracts Act 1950 as such a remedy is only available when there is a breach of contract. 47 While in cases of fraudulent or negligent misrepresentation, the purchaser may be able to bring an action for damages in tort, the victim of an innocent misrepresentation cannot do so. This means that if he chooses not to rescind the contract or if he has lost the right to do so either because he has affirmed the contract, or because of the lapse of reasonable time or because restitution in integrum is impossible, then there is no other remedy available to him. This is unlike the position in England where the Misrepresentation Act 1967 confers on the court a general power to grant damages in lieu of rescission in cases of non-fraudulent misrepresentation. 48

Conclusion

Given that the law relating to sale of goods in Malaysia shares a common lineage with that in England, the temptation to argue that all future case law developments must follow the course charted by the English courts may be almost irresistible.

However, vis-a-vis sale by description, there seem to be compelling reasons for not following recent developments in England. The development of a body of commercial law which is truly Malaysian can be set in motion even without the repeal of ss 3 and 5 of the Civil Law Act 1956 provided we are ready and willing to look at developments in England from a Malaysian perspective.

1 Formerly known as the Sale of Goods (Malay States) Ordinance 1957 until it was revised in 1989 (by Act A382). The Sale of Goods Act 1957 (the SOGA 1957) is now applicable throughout West Malaysia after it was extended to the states of Malacca and Penang by the Sale of Goods (Amendment and Extension) Act 1990 (Act A756). For the law relating to sale of goods that is applicable to East Malaysia, see Gan Ching Chuan and Nik Ramliah Mahmood, Two Decades of the Law Relating to Sales, Hire-Purchase and Equipment Leasing in Developments in Malaysian Law -- Essays to Commemorate the Twentieth Anniversary of the Faculty of Law, University of Malaya (1992), Pelanduk at pp 179-260. The SOGA 1957 was modelled after the English Sale of Goods Act 1893 (the 1893 UK Act) and hence most of the provisions in the two Acts are in pari materia. The 1893 UK Act has since been repealed and replaced by the Sale of Goods Act 1979 (c 54) (the 1979 UK Act).

2 Section 15 of the SOGA 1957 is in pari materia with s 13 of the 1893 UK Act. Section 13 of the 1979 UK Act has an additional clause which reads:

(3) A sale of goods is not prevented from being a sale by description by reason only that, being expressed for sale or hire, they are selected by the buyer.

3 Section 16(1)(b) of the SOGA 1957 is in pari materia with s 14(2) of the 1893 UK Act. The implied condition as to merchantable quality is now provided for in s 14(2) of the 1979 UK Act. This new provision, however, has done away with the requirement that the goods must be bought by description before the implied condition as to merchantable quality can apply. Section 14(2) of the 1979 Act provides:

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.


5 [1990] 1 All ER 737.

6 As to the relationship between a sale by description and the common law distinction between representations and contractual terms -- see Atiyah, Sale of Goods (8th Ed) at pp 127-134.

7 See Nichols v Godts (1854) 10 Exch 191.
8 Sections 12(2) and 13(2) of the SOGA 1957. The buyer may also choose to treat such a breach of condition as a breach of warranty and sue the seller for damages instead. See Associated Metal Smelters Ltd v Tham Cheow Toh [1971] 1 MLJ 271.


10 Atiyah, *Sale of Goods* (5th Ed) at p 75.

11 [1936] AC 85 at p 100.

12 Section 2 of the SOGA 1957.

13 Although not all future goods are unascertained, eg a specific identifiable chattel which has yet to be acquired by the seller at the time of the contract of sale, is a future goods which is not unascertained.

14 1919] 1 KB 198.

15 Ibid at p 207.

16 [1921] All ER 466.

17 Ibid at p 468.

18 [1933] All ER 646.

19 Ibid at p 650.

20 Ibid at p 651.

21 Ibid at p 648.


23 Ibid at p 475.

24 Ibid at p 503.

25 [1976] 3 All ER 570.

26 Ibid at p 576.

27 Ibid at p 577.


29 Atiyah (8th Ed) at p 136.


31 Ibid at p 1196.

32 Ibid.

33 Perhaps this is akin to the proviso in s 16(1)(b) which deals with merchantable quality. The proviso reads: ‘Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have remedied.’

34 [1990] 1 All ER 737.

35 Ibid at p 741.

36 Ibid at p 743.
37 Ibid at p 744.
38 Ibid at p 757.
39 Supra n 3.
40 See s 74 of the Contracts Act 1950.
41 Section 19(1) of the Contracts Act 1950.
42 Section 17 of the Contracts Act 1950. 'Fraud' includes ... the suggestion, as to a fact, of that which is not true by one who does not believe it to be true, by a party to a contract, with intent to deceive another party thereto or to induce him to enter into the contract.
44 Weber v Brown [1908] 1 FMSLR 12.
45 Exception to s 19. It was held in Weber v Brown that this exception is not applicable in cases of fraudulent misrepresentation.
46 Section 76 of the Contracts Act 1950.
47 Section 74 of the Contracts Act 1950.
48 Section 2(2) of the Misrepresentation Act 1967 [UK].