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THE PROTECTION OF PURCHASERS OF IMMOVABLE PROPERTY IN SOUTH AFRICA, WITH SPECIAL REFERENCE TO SECTION 29A OF THE ALIENATION OF LAND ACT 68 OF 1981 AND THE HOUSING CONSUMERS PROTECTION MEASURES ACT 95 OF 1998

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1 Introduction

Ownership of land has occupied a special position in our legal history. It has been said that

> "[t]he desire of individuals and social and political groups for the ownership of land is probably one of the greatest drives in human history. In non-industrial forms of society the main source of a community's wealth is land. He who holds land [...] holds economic power, and ownership of land becomes the basis of political power. The immovable and indestructible nature of land has led to the view that it constitutes the best form of security. These qualities set land apart from other commodities and make its ownership more complicated than the ownership of movables."[1]

The enactment of the Housing Consumers Protection Measures Act 95 of 1998, as well as the Alienation of Land Amendment Act 103 of 1998 constitutes a shift towards the recognition of the need for the protection of purchasers of immovable property, which is a controversial notion in our law, since it clashes with the traditional focus on the rights of the seller. Traditionally, it appears that the seller as owner of land could dictate the terms on which he or she chose to part with his or her[2] property – in line with the "absolute" notion of ownership, of which the freedom of disposal is one element. In the light of the history of land ownership in this country, limitations on the owner's freedom of disposal have to be viewed with circumspection. The first part of this paper will therefore focus on the concept of "ownership" so as to allow a comparison between the current position and the position which existed in our law prior to the 1998 amendments.

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[1] D J van der Post 'Land law and registration in some of the Black rural areas of Southern Africa' in Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) 213.

[2] Although it is the writer's intention to support the use of non-sexist language, the male form of the personal pronoun will henceforth be used in this research project purely to facilitate the flow of the discussion, but without suggesting that one of the sexes is worthy of being singled out.

Since the owner's rights with regard to property cannot exist in a vacuum, but have to be exercised in a way that recognises the rights of other members of society, it is also necessary to have a brief look at the current social conditions which have prompted the statutory intervention. The housing crisis, which will be considered in paragraph 3.2 below, has seen the emergence of unscrupulous operators in the building industry. These operators have managed to exploit the ignorance of South African housing consumers – many of whom would become the owners of immovable property for the first time. It would appear that the traditional contractual principles, which allow the seller to exclude liability for latent defects, cannot be allowed to operate in a sector which plays such an important role from a social point of view. The failure of conventional contractual remedies to protect adequately the interests of purchasers calls for a reassessment of the traditional principles of our law of contract in the light of current social demands.

Chapter 5 will look briefly at the statutory protection for purchasers which existed in our law prior to the 1998 legislation, where the Alienation of Land Act 68 of 1981 was the most important piece of consumer protection legislation in the context of immovable property. The Act continues to exist alongside the new statutes which will be examined in greater detail in the latter part of that chapter).

Although it is still too early to examine the practical impact of the new legislation, it is submitted that the shift in focus towards a more consumer-oriented approach is in line with the trend in foreign legal systems which have sought to strike a balance between the rights of the owner and the reasonable expectations of the purchaser.

2 The concept of "ownership"

2.1 Its central position in our legal system

"Ownership" is one of the key concepts in most legal systems, since it reflects the social and economic order of a particular society. Academic writers have pointed out that "it must always be borne in mind [that] the law of property does not deal with the legal relationships between persons and things alone, but with the reconciliation of conflicting social interests in regard to things."[3] Olivier *et al* explain the central position afforded to the concept of "ownership" in a given legal system as follows:

> "The prevailing point of view regarding the concept of ownership that a specific community supports, is evidently based on the political and juridical system used in such a community. In this way the difference between western capitalism, western socialism, eastern socialism, communism and African communalism is to a large extent concerned with the various points of view on ownership. [...] Although ownership is determined among others by legal-sociological considerations, this complex juridical concept is influenced even further by historical, economic, religious and philosophical considerations and all of these are involved in the final evolution of a specific concept of ownership."[4]

Ownership could therefore be defined as

> "a legal relationship with an abstract nature which implies that there is a legal relationship between the owner and a thing (legal object) in terms of which the owner obtains certain rights (entitlements) to the thing and that there is a legal relationship between the owner and other legal subjects with regard to the thing."[5]

It is the way in which a particular legal system seeks to balance the interests of the owner with the interests of other members of the society that defines the content of "ownership" in any given society.

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[3] DG Kleyn & A Boraine *Silberberg and Schoeman's The Law of Property* 3ed (1992) 8.
[4] N J J Olivier, G J Pienaar & A J van der Walt *The Law of Property* (1989) 34-5.
[5] *Ibid* 40.

Ownership of immovable property, in particular, has always been an important issue – not only from an economic point of view, but also because of its emotional component. Land tenure could be seen as "a basis of material and psychological security"[6] which fulfils a pivotal role as a stabilising factor in the community. The property values of a particular society are not stagnant, but need to be constantly reassessed as society's needs may change. The recent amendments to our law relating to immovable property constitute a statutory intervention so as to balance the common law's emphasis on the owner's right of control, with the social demands which have necessitated greater protection of purchasers. The exact nature of these demands within the South African context will be examined in greater detail in chapter 3 below.

2.2 The common law definition

Traditionally, our law has supported an "absolute" definition of ownership, and stressed its importance as "that real right which affords the owner of a thing the most absolute entitlements regarding the thing."[7] Our case law has supported the notion of the owner's right of (almost) complete control with regard to a thing.[8]

Van der Merwe & De Waal[9] define "ownership" as follows:

> "Ownership is potentially the most extensive private right which a person can have with regard to a corporeal thing. Of all the real rights ownership potentially confers the most complete or comprehensive control over a thing. [...] In principle, ownership entitles the owner to deal with his thing as he pleases within the limits allowed by law."

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[6] Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) v.

[7] N J J Olivier, G J Pienaar & A J van der Walt *The Law of Property* (1989) 36.

[8] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1319; *Gien v Gien* 1979 (2) SA 113 (T) at 1120C.

[9] C G van der Merwe & M J de Waal *The Law of Things and Servitudes (*1993) 98 para 104.

Olivier *et al*[10] define the extent of ownership by examining the owner's entitlements regarding the object of ownership, and list the following entitlements:

(a) The entitlement to **control**, which entitles the owner to exercise physical control over the thing;

(b) The entitlement to **use** and derive benefit from the thing;

(c) The entitlement to **encumber** the thing by granting limited real rights in respect thereof;

(d) The entitlement to **vindicate** the thing, which refers to the unique entitlement of the owner to claim the thing back from another person; and

(e) The entitlement to **alienate** the thing or to transfer it to someone else.

It is the last-mentioned entitlement which forms the subject of this examination – more specifically, the regulation of the owner's right of disposal in the context of immovable property.

Regulation in this context, however, is not unusual. In her analysis of the modern concept of ownership of land, Lewis remarks as follows:

> "A careful examination of the institution of ownership will show that our courts do indeed attempt 'jealously' to protect ownership – but only against the intrusion of third persons. However, when one looks at the content of the right, particularly in relation to land, it will be seen that it is a paltry right so whittled away by legislation in the past century that it cannot be equated with the ownership of classical Roman law or even the right as it was envisaged by the Roman-Dutch writers."[11]

Kleyn and Boraine make the point that,

> "in the light of the present and future needs of the South African society, it is unrealistic to view and define ownership as an abstract notion without any regard to its socio-economic function, and that the idea of absoluteness has become

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[10] N J J Olivier, G J Pienaar & A J van der Walt *op cit* 38.

[11] C Lewis 'The Modern Concept of Ownership of Land' in Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) 241.

> intolerable. It has been suggested that ownership should be more functionalised and socialised."[12]

In other words, the extent to which the law allows an owner freedom of control of immovable property should depend on the needs of society at any given stage in the history of the development of that society. Certain historical considerations may call for statutory intervention so as to prevent the perpetuation of injustice that may have resulted either from having allowed an owner too much freedom in dealing with his property, or from having imposed statutory controls which created further social problems. In the South African context, statutory intervention has become necessary to redress the hardship which has been caused by discriminatory legislation such as the Group Areas Act[13], in terms of which certain persons were precluded from being purchasers of immovable property.

The limitations on ownership may have their origin in the following sources, or a combination of these sources:[14]

(a) public law restrictions, imposed on all owners of a particular kind of property either for the benefit of society as a whole or in the interests of certain sections of society;
(b) neighbour law restrictions, created by common law; or
(c) individual restrictions, usually created contractually, where the right to a thing happens to be vested in a particular person other than the owner (*ius in re aliena*).

Public law restrictions, in particular, are a powerful tool for the manipulation of land ownership. It is submitted that to regulate individual restrictions to a greater extent so as

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[12] *Op cit* 163.
[13] Act 41 of 1950, as replaced by the Group Areas Act 36 of 1966. See paragraph 2.3 below for a more detailed discussion of the historical limitations on the owner's freedom of alienation of land.
[14] D G Kleyn & A Boraine *op cit* 164-165.

to benefit a particular sector of society is not unacceptable, as long as society as a whole will ultimately benefit from the statutory regulation. Lewis makes the point that

> "[t]he way in which the institution of ownership has been manipulated is not a vice inherent in the right itself. [...] It is rather social, economic and political forces that have transformed the concept such that it no longer designates *plena in re potestas*. Some of these forces are plainly for the general good of the community (townplanning restrictions and environmental controls, for example); others are arguably beneficial (restrictions imposed on the landowner in the interest of the mining industry) whilst others are plainly morally unacceptable (such as the limitations imposed by racial legislation)."[15]

2.3 Historical limitations

The history of the restriction of the landowner's right of alienation in South Africa has shown the extent to which the legal definition of "ownership" could be manipulated for political purposes. The Group Areas Act[16] restricted, on the basis of race, the owner's right to alienate land to certain persons. Schoombie points out that "group areas legislation (was) undoubtedly one of the cornerstones of racial segregation in South Africa and, viewed from a wider perspective, also a cornerstone of the all-pervading government policy of 'separate development'".[17] His analysis of the impact of apartheid legislation could be summarised as follows:

(a) It had a profound psychological impact, and gave rise to "racial distrust and increasing violence in a compartmentalized and distrustful society"[18];

(b) The social costs were immense; "[t]he threat of the imposition of group areas and of relocation has undermined the morale of the disadvantaged 'target' communities, has given them 'a sense of rooflessness'"[19];

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[15] C Lewis 'The Modern Concept of Ownership of Land' in Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) 262.
[16] Act 41 of 1950, as replaced by the Group Areas Act 36 of 1966.
[17] J T Schoombie 'Group Areas Legislation – The political control of ownership and occupation of land' in Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) 77.
[18] *Ibid* 99.
[19] *Ibid.*

(c) It created a massive housing shortage. "Whole neighbourhoods have often been flattened in the course of the implementation of group areas. In 1977 it was stated that during the previous eight years 12 104 dwelling units had been demolished in South African cities, as part of this process."[20] In addition, it caused a drain on already inadequate public funds.

(d) Unfair financial burdens were placed on those who were forcibly removed, since disqualified persons were not adequately compensated for the loss suffered. "Moreover, group areas have contributed to the South African phenomenon that the poorest people end up living furthest from their work."[21]

(e) Public resources were wasted on "the cost of relocation and replacement of housing demolished to implement group areas."[22]

Many of the problems mentioned above were again cited in the White Paper[23] which was issued by the Department of Housing in 1994 and formed the basis for the reform of the law relating to ownership of land, which will be examined in greater detail in chapter 3 below.

Schoombie concludes that

> "[e]ven if it were accepted that the 'absolute' character of ownership is a matter of degree rather than a fixed yardstick, then group areas legislation resulted in a 'weak' model of ownership – the right of ownership to land is easily defeasible in furtherance of political ideology and the policies of the legislature. The same applies to the important rights flowing from such ownership, namely occupation and use. In terms of the legislation, ownership (and the other rights) can be terminated by the exercise of executive discretion. This has undermined the security traditionally associated with the 'absolute' ownership of land and the rights flowing from ownership."[24]

The previous government's imposition of restrictions on the alienation of land as part of its efforts to enforce racial segregation, has caused social problems which need to be addressed through active intervention, for which purpose guidelines are needed.

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[20] *Ibid.*
[21] *Ibid* 100.
[22] *Ibid.*
[23] Department of Housing White Paper: *A New Housing Policy and Strategy for South Africa* published in Government Gazette No. 16178 of 23 December 1994 para 3.3.8.
[24] J T Schoombie *op cit* 106-7.

2.4 A model for state intervention and restriction of ownership

In his examination of the relationship between ownership as a private law institution and public law, Van der Vyfer remarks as follows:

> "In totalitarian societies the state, proceeding on the assumption that all spheres of individual freedom and of apolitical social institutions were to be treated as constituent and subordinate parts of the body politic, took upon itself indisputable authority arbitrarily to dictate the encompassment of an owner's entitlements. A truly libertarian state should, on the other hand, respect the sovereignty of the owner within the sphere of his private enclave of entitlements and confine state intervention to actual conflict situations that might arise *(a)* in inter-individual relations, when an owner in the exercise of his entitlements encroaches on the rights of others, or (b) in the vertical relationship of authority and subordination, when the entitlements of ownership constitute a threat to community interests."[25]

He suggests that state intervention be guided by principles of "legal ethics", based on Kantian jurisprudence, which he explains as follows:

> "Immanuel Kant captured in his definition of (reasonable) law the essential directives that ought to determine the legally defined curtailment of ownership in relation to the rights of other legal subjects. The law, he said, is the sum total of all the conditions under which the volition of one person can coexist alongside the equal volition of others under a general law of freedom. Included in this definition, if one were to apply it to ownership, is the principle:
>
> (a) that the legislature should give the entitlements of ownership as much scope as possible;
> (b) that limitations upon the entitlements of ownership should be confined to those necessitated by the rights of other persons; and
> (c) that the constraints thus imposed should apply equally to all rights and all holders of rights.
>
> Limitations of ownership in the public interest must be conditioned, it is said, by the common-law directive *salus rei publicae suprema lex*. This adage could be a useful guide, provided community interests remain conditioned by the genuine province of the body politic, as determined by the structural destiny of a state."[26]

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[25] J D Van der Vyver `Ownership in Constitutional and International Law' in Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) 134.
[26] *Ibid* 134-5.

In his article on town-planning regulations, Milton[27] recognises the need for government intervention and justifies the curtailment of ownership in the context of land on the basis of the social obligations of land ownership. In his view, land ownership should not be defined on the basis of any "absolute" or "inviolable" components, but should rather be defined in terms of Bentham's conception of property as "a basis of expectation", which he summarises as follows:

> "This concept postulates that the right of ownership in property comprises nothing other than those expectations as to the use, enjoyment or exploitation of a thing which the prevailing social and economic order allows to the 'owner'. The law of property consists in those provisions of the legal system which enable the owner to enforce through the legal process the realization of the expectations which society has allowed to him."[28]

Similarly, the new legislation which regulates the owner's right to alienate land (which will be examined in greater in chapter 5 below) could be seen as creating a particular **structure of expectations** in relation to ownership of land, which balances the interests of the purchaser with those of the landowner.

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[27] J R L Milton 'Planning and Property' in Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) 276.

[28] J R L Milton *op cit* 276.

3 The need for the protection of purchasers of immovable property

The law needs to respond to the needs of the society within which it operates. It is therefore necessary to examine the contractual remedies of our common law within its socio-political context. Due to the history of land ownership in South Africa, unique circumstances exist which may not be adequately accommodated within the normal contractual framework. This means that the contractual remedies which have evolved during the course of the history of our legal system have to be assessed and supplemented by statutory intervention, if necessary, according to the current demands of the community which it seeks to regulate.

3.1 Social considerations

As was pointed out before, the ownership of land could be seen as "a basis of material and psychological security."[29] It goes further than fulfilling the basic need for shelter from the elements; ownership of land has connotations with stability and a sense of belonging which are key requirements for ensuring socio-political stability. One of the priorities of the Government of National Unity was to formulate a new housing policy for South Africa to serve as the basis for social reform, since it recognised the role of housing as a key point of departure for rebuilding social structures and regenerating the economy. This policy, set out in the 1994 White Paper of the Department of Housing, examined the country's housing needs in detail and laid the foundation for statutory intervention in this

[29] Bennett, Dean, Hutchison, Leeman & Van Zyl Smit (eds) *Land Ownership – Changing Concepts* (1986) v.

area of the law. The Paper proposed a national housing strategy which would allow all South Africa' s people "to have access on a progressive basis, to:

- A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and
- potable water, adequate sanitary facilities including waste disposal and domestic electricity supply."[30]

The Paper proposes a joint effort between the government, the private sector and the communities to eradicate "the blight of homelessness"[31] which it considered to be "one of the most visible and destructive legacies of the past."[32] It projected the urban housing backlog at approximately 1.5 million units in 1995, and pointed out that "[s]ocially and politically, this backlog gives daily impetus to individual and communal insecurity and frustration, and contributes significantly to the high levels of criminality and instability prevalent in many communities in South Africa."[33]

3.2 The housing crisis

In its Preamble, the White Paper points out that the difficulty in formulating a housing policy derived not only from the "enormous size of the housing backlog and the desperation and impatience of the homeless,"[34] but was further complicated by "the extremely complicated bureaucratic, administrative, financial and institutional framework inherited from the previous government."[35] It blamed the inefficient institutional framework which governed housing in the past, such as the duplication of housing

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[30] Paragraph 4.2.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid* para 3.2.1.
[34] *Ibid* para 1.
[35] *Ibid.*

institutions along racial lines, for present constraints in the housing delivery process. As part of the housing delivery drive of the Reconstruction and Development Programme, the government set a housing goal of delivering 1 000 000 houses in five years.[36] For this purpose, it was proposed that housing's share in the total State budget be increased to five percent so as to allow the construction of 338 000 units per annum.[37]

One of the problems which has arisen because of the large scale on which the provision of housing had to be undertaken was the emergence of "fly-by-night" contractors who exploit the opportunities which present themselves in the construction sector. The problem of defective workmanship has been one unfortunate by-product of the housing initiative, and was specifically addressed by the White Paper:

> "Defective workmanship and other product defects have, in the past, compromised housing consumers and contributed to payment stoppages and consequent losses by financial institutions. Government is of the view that contractors should be obliged to stand behind products delivered to vulnerable consumers without the necessary knowledge and expertise to assess the technical integrity of the product received. It is further believed that the construction industry as a whole should create a mechanism through which an accredited contractors' warranty will be backed by a central warranty mechanism in the event of such a contractor failing or not being able to meet his/her warranty obligations. The construction sector has responded positively to a proposal for self-regulation and the creation of such a warranty mechanism within the industry. A high level task team appointed by the construction and material supply sectors as well as the affected professionals are currently working on proposals in order to design a warranty scheme which will comply with criteria jointly developed between the Department of Housing and various affected parties."[38]

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[36] *Ibid* para 2.2.6.

[37] *Ibid* para 4.3.

[38] *Ibid* para 5.5.3.1(d). In addition to the legislation which is discussed in chapter 5 below, the following Bills which regulate the building industry and its allied professions have been published for comment recently:
Draft Council for the Built Environment Bill, 1999, (GN1496 in *GG* 20281 of 9 July 1999);
Draft Architectural Profession Bill, 1999, (GN1496 in *GG* 20281 of 9 July 1999);
Draft Construction Management Profession Bill, 1999, (GN1496 in *GG* 20281 of 9 July 1999);
Draft Engineering Profession Bill, 1999, (GN1496 in *GG* 20281 of 9 July 1999);
Draft Landscape Architectural Profession Bill, 1999 (GN1496 in *GG* 20281 of 9 July 1999);
Draft Property Valuation Profession Bill, 1999 (GN1496 in *GG* 20281 of 9 July 1999);
Draft Quantity Surveying Profession Bill, 1999 (GN1496 in *GG* 20281 of 9 July 1999).

The way in which the Legislature responded to this call will be discussed in detail in Chapter 5.

3.3 Poor consumer awareness

The White Paper recognised the fact that certain social features of South African society, such as the lack of consumer protection in the sphere of housing, and poor consumer education, posed important constraints and challenges to future housing policy.[39] However, poor quality workmanship was not the only problem in the housing sector that needed to be addressed. The White Paper also acknowledged that there was "inadequate protection for consumers against fraudulent and exploitative practices and behaviour by suppliers of housing products and services,"[40] which included theft of deposits and other malpractices caused by the seller's agents. It summarised the position as follows:

> "Many instances of malpractice around advertising and marketing of lower cost housing as well as fraud and the theft of deposits, have occurred in the recent past. It has become clear that relatively unsophisticated consumers have become the easy prey of the many unscrupulous operators in this market, not all of whom can be described as small or 'fly-by-night'. This situation is exacerbated by the relatively low entry barriers to the home building industry which attract opportunists who in many instances do not last long. In the process of their demise they often deprive families of vital savings accumulated for deposit purposes. The effects of this practice are compounded by the fact that such deposits are not considered as trust money (such as money paid to an attorney or registered Estate Agent.)"[41]

The White Paper suggested that greater protection for housing consumers should be a priority and floated the idea of a greater measure of government involvement:

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[39] White Paper para 3.3.8.
[40] *Ibid.*
[41] *Ibid* para 5.5.3.1(e).

> "Adequate measures to protect the rights of and inform housing consumers on the technical, legal and financial aspects of housing is a critical priority and should support the regulatory and delivery framework for housing. Many of the problems characterised with the current housing impasse stem from the fact that the State had previously failed to intervene on behalf of the consumer. This Government undertakes to improve its capacity in this regard, to ensure that ordinary people, driven by the desperation of homelessness, will not be at the mercy of unscrupulous operators in the market."[42]

To achieve this goal, it proposed that a National Housing Board (NHB) be established as a new national statutory advisory body to the Ministry for Housing for the purpose of monitoring the performance of the housing sector on an ongoing basis. In order to ensure that members of the Board are representative of all interest groups, the constitution of the Board would be as follows:

- One-third of the members was to be nominated by consumer organisations and community-based groups representing the interests of consumers of housing goods and services.
- One-third would be nominated by suppliers and financiers of housing goods and services; and.
- One-third would represent Government interests in housing, including organised local government and the State corporate housing sector.[43]

The 1998 Annual Report of the Housing Consumer Protection Trust offers the following summary of the South African position relating to housing as it stood at the end of that year:

> "[T]here are still fundamental problems within the low income housing market:-
>
> 1. The discrepancy between the demand and supply of housing
> 2. The inexperience of housing consumers
> 3. The lack of education and institutional support
>
> There is a significant need for a comprehensive education and information programme that focuses on low income consumers."[44]

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[42] *Ibid* para 4.5.7.

[43] White Paper para 5.2.4(a).

[44] Unpublished, page 3 of the Report, a copy of which is obtainable from the HCPT offices at PO Box 2289, Cape Town, 8000.

The enactment of the Housing Consumers Protection Measures Act 96 of 1998, which will be discussed in greater detail in paragraph 5.3 below, could be seen as the culmination of a process of increased protection for purchasers of immovable property which started with the publication of the White Paper in 1994.

4 The inadequacy of traditional contractual principles

Viewed against the background of the socio-political situation in South Africa, it is clear that a situation has developed in the housing sector which may require a drastic remedy. This raises the question of whether statutory intervention is absolutely necessary, or whether one could find a suitable answer by relying on the contractual remedies of our common law. What follows is a brief examination of the **traditional principles** of our law of contract in order to assess the extent to which our common law is equipped to respond to the current social, economic and political conditions.

4.1 *Pacta sunt servanda*

One of the consequences of the principle of freedom of contract is the fact that, once an agreement has been freely entered into, the parties should be firmly bound to its obligations. Van der Merwe *et al* summarise this principle as follows:

> "The view that a contract is constituted by agreement, signifies the recognition of individual autonomy as a philosophical premise. Certain principles which are derived from the notion of autonomy influence the doctrines, structure and content of the law of contract. Freedom of contract, for instance, means that an individual is free to decide whether, with whom, and on what terms to contract. The principle of consensuality requires, for the creation of a contract, concurrence of at least two such decisions. However, autonomy also entails that the decision-maker must accept responsibility for his considered actions. The principle of *pacta servanda sunt*, in turn, requires strict enforcement of contractual obligations created in circumstances which are consistent with freedom of contract and consensuality."[45]

[45] S van der Merwe, L F van Huyssteen, M F B Reinecke, G F Lubbe & J G Lotz *Contract General Principles (*1993) 10.

Our earlier case law shared the view that "[i]t is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."[46] The principles of *caveat emptor* and *caveat subscriptor* were strictly enforced in earlier cases. In *Anglo Carpets (Pty) Ltd v Snyman*[47] Coetzee J quoted with approval the *dictum* of Wessels JA in the early Appellate Division decision of *South African Railways and Harbours v National Bank of SA Ltd*[48] that "the law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds; that even if from a philosophical standpoint their minds did not meet the law will assume that their minds did meet if their acts indicate this and that they contracted in accordance with what they purported to accept as a record of their agreement."[49] Failure on the part of a contracting party to read certain terms is therefore irrelevant, or will at least be met with a difficult burden of proof. In the words of Fagan CJ in *George v Fairmead (Pty) Ltd:*

> "When a man is asked to put his signature to a document he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. [...] [T]he party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent. That must, in each case, be a question of fact to be decided on all the evidence led in that particular case."[50]

It is questionable whether "relatively unsophisticated consumers"[51] would receive adequate protection under such a strict approach, since it presupposes that individuals contract on an equal footing. Lubbe and Murray summarise the philosophy which underlies the notion of freedom of contract as follows:

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[46] *Burger v Central South African Railways* 1903 TS 571 at 578.
[47] 1978 (3) SA 582 (T).
[48] 1924 AD 704 at 715-716.
[49] *Anglo Carpets (Pty) Ltd v Snyman* 1978 (3) SA 582 (T) at 586.
[50] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472.
[51] White Paper para 5.5.3.1(e).

> "The notions of freedom of the individual and equality strongly influence legal thinking about contracts. This does not mean that the law requires individuals to be free to contract on an equal footing before it will uphold contracts. In South Africa, at least, it rather means that equality and freedom of choice are taken for granted and that legal rules are developed on the assumption that these values are realized. For instance, it is extremely seldom a defence to breach of contract that the 'guilty' party started from such a position of weakness that the contract hardly reflects his or her interests. On the other hand it is often agreed that a principle of contract law is sound because, in the abstract, it suggests an even-handed treatment of the parties. That the rule may lead to hardship in particular circumstances relating to the negotiating power of the parties is an issue that is not considered relevant. In other words, lawyers simply accept values such as freedom and equality as given and on such premises strive to develop a logical and consistent system." [52]

Viewed against the background of the poor level of consumer education in this country, it is easy for unscrupulous operators to exploit the ignorance of purchasers. Astute developers may, for instance, be allowed to escape liability for structural defects through the use of exclusion clauses. Initially the question whether an exemption clause excluding relief for gross negligence (*culpa lata*) would be enforceable was left open by our case law,[53] but subsequent cases have held that these clauses are not contrary to public policy.[54] The fact that the parties may be allowed to override the *naturalia* of an agreement[55]- or the "subsidiary allocation of rights and duties which the law regards as a fair point of departure"[56]- could be seen as an indication of the degree to which the notion of party autonomy is paramount in our law of contract. It could be seen as the manifestation of the "absolute" notion of ownership, which is seller-orientated in the sense that it allows the owner the freedom to alienate his property on terms that may be perceived to be grossly unfair to the purchaser.

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[52] *Farlam & Hathaway Contract Cases, Materials and Commentary* 3ed by G F Lubbe & C M Murray (1998) 2.

[53] See for example *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris* 1947 (1) SA 753 (A).

[54] See for example *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 807; *Van Deventer v Louw* 1980 (4) SA 105 (O).

[55] *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 763, *Rosenthal v Marks* 1944 TPD 172 at 176.

[56] G F Lubbe & C M Murray *op cit* 424.

4.2 The Doctrine of Privity of Contract

In terms of this doctrine, "(t)he legal consequences of an obligation are traditionally restricted to the parties to it; the rights derived from the obligation are viewed as personal, relative rights, operative against the debtor under the obligation and no-one else."[57] The implications of this doctrine are two-fold: in the first place, parties may not impose **obligations** on outsiders which could grant them a direct right of recourse against such outsiders. Secondly, an outsider does not automatically acquire a **right** against the two contracting parties – even if the contract was entered into for his benefit:

> "The premise that it is for each individual to decide whether and on what basis to assume contractual liability, is expressed in the notion of privity of contract. This entails that the legal consequences of a contract are in principle restricted to those participating in it as principals. Conversely put, it means that the parties concluding a contract are not at liberty to infringe upon the sphere of outsiders by imposing legal consequences on them (see *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 (1) SA 761 (A), *Thal v Baltic Timber Co* 1935 CPD 110). A contract, therefore, which attempts to impose duties on one who is not a party to it, is ineffective with regard to such a person (*Barclays National Bank Ltd v H J de Vos Boerdery Ondernemings (Edms) Bpk* 1980 (4) SA 475 (A), *Starkey v McElligot* 1984 (4) SA 120 (D))."[58]

However, due to the nature of modern agreements – especially in the case of construction contracts where subcontractors are often involved – one might feel that it would be more efficient to grant the person (usually the homeowner) who entered into an agreement with the main contractor a direct right of recourse against the subcontractor who was responsible for faulty workmanship.[59] It would certainly be an equitable solution in the

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[57] *Farlam & Hathaway Contract Cases, Materials and Commentary* 3ed by G F Lubbe & C M Murray (1988) 15.

[58] *Ibid* 407.

[59] Cases such as *Blore v Standard General Insurance Co Ltd en 'n ander* 1972 (2) SA 89 (O) and *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) suggest that a contractual

event of insolvency of the main contractor, for example. In his essay on Customers, Chains and Networks, Hugh Beale makes the point that "[m]odern contracting [...] is often also a phenomenon of 'dealing' with not only the individual with whom one happens to contract but with a group: a chain of distribution for example, or a network of parties who are between them providing the goods or services being purchased."[60] The consumer may reasonably expect to be able to institute an action against the person who was responsible for the defect. Chris Willett explains it as follows:

> "There may be expectations held by customers as to the responsibility of the manufacturer or sub-contractor (some of them generated by the manufacturer or sub-contractor); indeed there may, in entering into the main contract with the retailer of the product or the main contractor, have been reliance upon the skill and expertise of the manufacturer or sub-contractor. However, it will be unusual for the law to say that there is a contractual relationship between manufacturer and customer, or sub-contractor and customer, giving rise to contractually enforceable obligations in respect of the quality of the product or service. This is due to contract law's focus on an agreement between two parties which is 'intended' to create legal relations. [...] There will often not be a relationship or set of circumstances between the customer and the manufacturer or sub-contractor which could be said to involve an agreement. Whatever promise has been made by either a manufacturer or sub-contractor will often not be held to amount to an intention to be bound contractually."[61]

In his examination of the chain of delivery,[62] Hugh Beale proposes that, as an alternative to reform of the doctrine of privity of contract, specific rules could be enacted so as to give consumers a right of recourse against the manufacturer of faulty goods. He points out that, in Belgian and French law, "the *garantie des vices cachées*[63] is treated as

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agreement between two parties may also impose a legal duty on the two parties to protect the interests of third parties, and may grant a third party who suffered damages a **delictual** claim against the defaulting party in certain circumstances.

[60] H Beale 'Customers, Chains and Networks' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 138.

[61] C Willett 'Introduction' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 10.

[62] H Beale 'Customers, Chains and Networks' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 140.

[63] *Ie* a warranty against latent defects.

running with the goods and giving the owner a remedy against any seller in the chain, provided the defects are of a certain seriousness."[64] The 1993 European Commission Green Paper on Guarantees for Consumer Goods also proposed that the manufacturer and seller should be jointly liable for certain guarantees.[65] Similar provisions were contained in the 1994 draft of Article 2 of the Unites States' Uniform Commercial Code, which would not only be limited to consumer products, and provides as follows:

> "2-318. EXTENSION OF WARRANTIES EXPRESS OR IMPLIED.
> A seller's express or implied warranty, made to an immediate buyer, extends to any person who may reasonably be expected to buy, use or be affected by the goods and who is damaged by the breach of warranty. In this section, 'seller' includes manufacturer..."[66]

The UK Law Commission's 1996 Report on Privity of Contract examined the position of the doctrine in English law, which, according to its succinct definition meant that "a contract cannot confer rights or impose obligations arising under it on any person except the parties to it."[67] The Commission was only concerned with the first part, *ie* that part of the doctrine of privity of contract which lays down that a contract does not confer **rights** on someone who is not a party to the contract (the so-called "third party rule"). In terms of the "fundamental doctrine of English law that only a party to a contract who had provided consideration could sue on it"[68], agreements for the benefit of a third party will, in the absence of the payment of consideration by such third party, not allow him to sue on the contract – despite the fact that the agreement might create reasonable expectations for the third party. The Law Commission concluded that "the third party rule produces the

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[64] H Beale *op cit* 143.
[65] *Ibid* 144.
[66] *Ibid* 145.
[67] The Law Commission's Report on Privity of Contract; Contracts for the Benefit of Third Parties of 19 June 1996 Section A Part II para 2.1 obtained from the Internet on 15/8/99 at http://www.gtnet.gov.uk/lawcomm/library/lc242/part-1.htm.
[68] *Ibid* Section A Part II para 2.6, with reference to the decision in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL).

perverse and unjust result that the person who has suffered the loss (of the intended benefit) cannot sue, while the person who has suffered no loss can sue."[69] It recommended that "[t]he rule of English law whereby a third party to a contract may not enforce it should be reformed so as to enable contracting parties to confer a right to enforce the contract on a third party."[70] Its proposals for reform of the English position would mean, for example, "that subsequent purchasers or tenants of buildings can be given rights to enforce an architect's or building contractor's contractual obligations without the cost, complexity and inconvenience of a large number of separate contracts."[71]

In South African law the "third party rule" or contract for the benefit of a third party is known as the *stipulatio alteri*. In *Crookes v Watson* Schreiner JA defined it as "a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two."[72] Lubbe and Murray point out that "(t)he ordinary rules of offer and acceptance are used to determine whether the third party has accepted the benefit of the stipulation in his favour. What is required, therefore, is an 'outward act of signification' and not merely a 'mental act of approbation': *Buttar v Ault* 1950 (4) SA 229 (T)."[73]

It is therefore possible that, due to the absence of such an "outward act of signification", a party could be deprived of a claim under our law – contrary to what might have been his reasonable expectations.

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[69] *Ibid* Section A Part II para 3.3.
[70] *Ibid* Section D Part XV para (1).
[71] *Ibid* Section A Part II para 3.2
[72] 1956 (1) SA 277 (A) at 291.
[73] *Farlam & Hathaway Contract Cases, Materials and Commentary* 3ed by G F Lubbe & C M Murray (1988) 408.

In New Zealand, the third-party's claim has been secured by statutory intervention in the form of the Contracts (Privity) Act of 1982, which reads as follows:

> "The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer."[74]

4.3 The absence of a general notion of "fairness"

Modern European legal systems show a great concern for protecting weaker parties, such as consumers, against abuses of power by stronger contracting parties. Academic writers have pointed out that, "[a]lthough there might be some occasions when those who deal as consumers happen to be better informed than business contractors, and although markets sometimes are weighted in favour of (consumer) buyers, in general consumers are seen as weaker parties and, thus, fit for protection." [75]

The "fairness principle" is entrenched in legislation in most of the European Union member states. In the Netherlands, for example, the principle of good faith in the deliberation process is expressed as follows:

> "1. A contract has not only the juridical effects agreed to by parties, but also those which, according to the nature of the contract, result from the law, usage or the requirement of reasonableness and equity.
>
> 2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity."[76]

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[74] Section 8.

[75] R Brownsword, G Howells and T Wilhelmsson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 25.

[76] Dutch Civil Code, Article 248 Book 6.

This is further supplemented by provisions relating to judicial intervention for the purpose of adjusting certain terms of the contract at the instance of one of the parties, which provide that –

> "[u]pon the demand of one of the parties, the judge may modify the effects of a contract, or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the co-contracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form. The modification or the setting aside of the contract may be given retroactive force."[77]

The European Community Council's Directive on Unfair Terms in Consumer Contracts of 1993,[78] is of great importance as a model for member states. It formalises the principle that "acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts."[79]

Article 3.1 provides that a contract term "shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance of the parties' rights and obligations arising under the contract, to the detriment of the consumer." This is amplified as follows by the Explanatory Memorandum:

> "In making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer."[80]

An indicative and non-exhaustive list of the terms which may be regarded as unfair is set out in the Appendix, which includes –

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[77] Dutch Civil Code Article 258 Book 6.

[78] Council Directive 93/13/EEC of 5 April 1993.

[79] R Brownsword, G Howells and T Wilhelmsson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 25 – 26.

[80] E Hondius 'European Approaches to Fairness in Contract Law' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 61.

"1. terms which have the object or effect of:

(a) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; [...]

(c) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract; [...]

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."[81]

Effect was given to the Council Directive on Unfair Terms in Consumer Contracts in the United Kingdom by the Unfair Terms in Consumer Contracts Regulations of 1994. Schedule 2 of the Regulations provides that, "in assessing good faith, regard shall be had in particular to:

(a) the strength of the bargaining positions of the parties;

(b) whether the consumer had an inducement to agree to the term;

(c) whether the goods or services were sold or supplied to the special order of the consumer; and

(d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer."[82]

Such notions of "fairness" or equity do not form part of the notion of freedom of contract or *pacta sunt servanda.* Only in exceptional circumstances would an agreement be set

[81] Appendix: Directive on Unfair Terms in Consumer Contracts – Terms Referred to in Article 3(3) as being indicatively unfair.

[82] R Brownsword, G Howells and T Wilhelmsson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 48.

aside for reasons of public policy. Willett is conscious of the fact that there may be a dichotomy between the notions of "freedom" and "fairness":

> "The positive freedom which is often spoken of as being in conflict with fairness is the freedom of contract. This is the freedom from the law's interference with the terms which, on objective appearances, have been agreed to by the parties. So that while there may be a fairness instinct to set aside a term, or add a term to protect one of the parties, this is in conflict with the freedom of contract principle because it involves an interference with what was freely contracted for. So the rules on control of unfair terms, penalties, etc., come into conflict with a traditional view of the freedom of contract principle. This is because they involve interfering with the terms which (at least formally) have been freely agreed to by the parties."[83]

However, he offers the following justification for the more interventionist approach of European countries:

> "[A]lthough the law is imposing obligations which have not been voluntarily agreed to, we might justify this compromise of party freedom on the utilitarian grounds that the greater good is served by the fact that a more efficient distribution of resources has been achieved. It may also be possible to justify regulation of terms such as exemption clauses in terms of efficiency. It can be argued that there is often insufficient information about the meaning and implications of exemption clauses. As such the customer may not make a rational decision as to whether the exemption clause is in his or her best interests; and so the risks may not be allocated according to who is in the best position to bear them (i.e. who is the best cost avoider)."[84]

In a way, the principle of fairness could be justified on the basis that it forms a natural extension of the consensual theory, which lies at the heart of our law of contract. It is already a recognised principle of our law that factors such as minority, misrepresentation, duress and undue influence may impact on the quality of the consent given by one of the parties to the extent that it cannot be said that consensus was properly reached. Similarly, by focusing on the **quality** of the consent, it is possible to recognise **other** factors which might have influenced a party to enter into an agreement. Willett points out that

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[83] C Willett 'Introduction' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* 1996 17.

[84] *Ibid* 19.

> "a more liberal approach inspired by a conception of social justice may wish to give recognition to a wider range of factors which might be said to compromise the quality of the consent given by one of the parties. [...] In addition we could argue that if there is a great disparity of bargaining strength between two parties then the quality of the consent given by the weaker party is more limited than it might otherwise be. So this approach sees the autonomy of one of the parties as being compromised by intransparent terms, lack of alternatives and weaker bargaining power. The mission is to re-instate this autonomy by giving greater recognition to these factors. Great value is placed upon this reinstatement of autonomy and the resulting compromise of the other party's freedom can therefore be justified."[85]

Another argument for the introduction of a greater notion of "fairness" into the law of contract is one which focuses not so much on the autonomy of the party benefitting from the rules of fairness, but rather on the blameworthiness of the defaulting party. Our law recognises the fact that, when dealing with delictual liability, a higher duty of care is placed on someone who professes to have certain skills, such a doctors or lawyers, based on the reasonable expectations of the community.[86] According to the maxim *imperitia culpae adnumeratur*, a person who undertakes an activity for which expert knowledge is required while such person knows (or should reasonably know) that he lacks the necessary skills, will be deemed to be negligent.[87] Willett frames his alternative justification for a greater measure of judicial intervention in contractual matters along similar lines, by focusing on what could be reasonably expected from business professionals:

> "By operating as a business one sends out certain signals. It can be argued that business status suggests a general sense of decency and responsibility towards customers: a professionalism of sorts. In addition businesses build upon these signals by advertising, presentation etc. and by the specific things which are said to customers in the course of enquiries, negotiations etc. Finally, businesses operate within a particular market, which has certain typical performance norms.

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[85] *Ibid* 20.
[86] See the long list of cases quoted by J Neethling, J M Potgieter & P J Visser *Law of Delict* 3ed (1999) 135.
[87] See, for example, *Simon's Town Municipality v Dews* 1993 (1) SA 191 (A).

> [...] It seems to me that all of the above signals come together to raise a certain level of expectation as to the performance which will take place; and the general balance of the relationship. [...] In conclusion then it can be argued that those who consciously raise expectations and then seek to avoid responsibility in respect of them are punished by the law refusing to grant them full freedom of contract."[88]

This type of reasoning is particularly convincing in the context of building contracts, where one is also dealing with people who profess to have certain skills that would allow them to render certain services. From the point of view of delictual liability, however, it must also be borne in mind that the customs, usages and opinions of the community might allow a wrongdoer to succeed with a defence against an allegation of negligence by proving that his actions were in line with the normal practice in a particular industry.[89] Neethling *et al*[90] refer specifically to the building industry, where our common law has in the past refused to ascribe delictual liability to building contractors if their conduct was in agreement with the general practice of the trade.[91] What is required from the consumer's point of view, though, is to ensure that what has previously been accepted as "normal practices" should be made subject to closer scrutiny and more efficient monitoring. If it can be established that the conduct complained of "also wrongfully and negligently infringes *a legally recognised interest which exists independently of the contract*"[92], the purchaser of a poorly constructed house might succeed with a delictual claim against the building contractor, although our courts will not readily construe such an interest in cases of pure economic loss.[93]

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[88] C Willett 'Introduction' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* 1996 20 – 21.

[89] See, for example, the decision in *Van Heerden v SA Pulp & Paper Industry* 1946 AD 382.

[90] *Op cit* 146.

[91] See, for example, the decision in *Colman v Dunbar* 1933 AD 141 at 158, where Wessels CJ pointed out that "in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business".

[92] J Neethling, J M Potgieter & P J Visser *op cit* 265, with reference to the principle established in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

[93] *Lillcrap*'s case at 499-500.

Due to the scale of the housing crisis, coupled with the hardship caused by ruthless property developers, the introduction of a general notion of fairness into our law of contract may offer suitable relief. Unfortunately, however, the inability to grant effective relief for purchasers stems not only from the theoretical basis of our law of contract, but because of practical problems which present obstacles to the implementation of contractual principles.

4.4 No effective remedies on breach

In addition to the above-mentioned conceptual problems encountered in the sphere of contract law, certain practical problems relating to the **enforcement** of contractual remedies contribute to the inability of current legal institutions to offer real protection for purchasers of immovable property. Although our law of contract recognises the principle that a party should be placed in the financial position that he would have been had the contractual obligations been properly fulfilled,[94] the practical problems relating to the enforcement of the contractual remedies often fall foul of this ideal. When dealing with immovable property, however, the hardship which results from a breach often goes further than pure patrimonial loss and involves the disruption of the living circumstances of families or even whole communities. The need for effective remedies in this context is thus so much greater. The failure of traditional contractual remedies to provide effective relief in practice could be ascribed to the factors set out below.

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[94] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 8.

4.4.1 Insolvency of Seller

As was pointed out in the above, one of the problems associated with the housing crisis is the fact that "the relatively low entry barriers to the home building industry" is often exploited by opportunists who see it as an opportunity to get rich quickly. Without the necessary experience in the construction industry, however, these property developers often run into cash-flow problems when weather conditions or a shortage of materials cause delays in the building process. This may prompt developers with insufficient reserve funds to use the deposits received from purchasers to pay their workers or purchase materials, until a point is reached where liquidation is the only solution. Usually the secured creditors, such as the financial institutions with a mortgage bond over the land, are the only creditors who can expect a dividend on insolvency. The individual purchasers are left with the cold comfort of a concurrent claim which usually means that they will not receive a cent. To add to their frustration, it is not uncommon for such developers to start operating in the name of another company shortly afterwards and thus to be untouchable by the individual purchaser, but at the same time to be able to begin the inevitable cycle anew. Due to the very real danger of insolvency in the construction industry, one solution would be to pre-empt the problem of insolvency through the introduction of a screening process for building contractors,[95] or an insurance scheme to protect purchasers.[96]

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[95] Whereby the track record of a building contractor would determine his right to continue to operate as a registered builder. See the introduction of such a screening process in terms of the new Housing Consumers Protection Measures Act 95 of 1998, discussed in para 5.3 below. In terms of section 9 of the Act, the implementation of a database with information on registered home builders is envisaged.

[96] The Housing Consumers Protection Measures Act similarly seeks to protect purchasers against latent defects in buildings by establishing a fund in terms of section 15 of the Act to assist housing consumers who suffer damages due to the builder's failure to rectify such defects because of insolvency, for example.

4.4.2 No speedy remedy available

Claims for damages occasioned by faulty workmanship usually give rise to a factual dispute, which means that a party who wishes to enforce his claim against a builder would have to follow the action procedure, and would rarely succeed with a simple application to court. The normal waiting period for a trial date in an opposed matter in the High Court is approximately eighteen months; in the case of urgency, where there is a dispute of fact, the period may be shortened to approximately three months, which is still a long period to wait if one does not have suitable accommodation. In the case of claims involving immovable property, the amount of the claim often exceeds the R100 000 limit to the Magistrates' Court jurisdiction. And even in the lower court the wheels of justice grind slowly; a waiting period for a trial date in the Magistrates' Court is rarely under six months. The delay in the implementation of contractual remedies thus often causes severe hardship to families.

4.4.3 Cost of legal intervention

Another difficulty facing buyers who wish to institute a claim for damages against a developer, is that the former may not be able to match the developer when it comes to the money needed to pursue the dispute. The buyer, who is in the unenviable position of having parted with his money and being in possession of a defective building, often does not have extra funds available for costly litigation. The fact that he may recover his costs should his claim be successful, is not very helpful, because most attorneys would insist on a sizeable deposit before embarking on litigation – especially in High Court cases which usually involves the appointment of advocates. And the danger always exists that the

construction company might go into liquidation after an unsuccessful trial, which would mean that the consumer is left with an award that is of no practical value.

Statistics provided by the Housing Consumer Protection Trust (the "HCPT"), Lawyers for Human Rights and other consumer groups clearly show the extent to which the legal remedies available to consumers have failed to provide adequate relief. "For example in 1994 the HCPT received 40 000 complaints from consumers. Over 60% of complaints related to problems with developers and homebuilders. This led to 11 000 files being opened. Only 60 of these led to summons being issued and only two of these had a successful outcome."[97]

Lubbe and Murray made the point in 1988 that

> "[p]rofound social changes, such as a marked tendency towards economic concentration in business, the rise of collective bargaining in the labour field, a tremendous expansion of state activities accompanying the rise of the welfare state and fundamental changes in public and commercial morality have resulted in various commentators in different legal systems proclaiming the death of the classical system of contract law."[98]

Although the traditional contractual theories, and especially the notion of freedom of contract, still influences the way in which our courts judge the existence of obligations between parties, those theories have been eroded by legislative intervention. Protection for purchasers in the area of movable property has come in the form of the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980.

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[97] Memorandum on the Objects of the National Home Builders Registration Council Bill, 1998 par 3. Athough the writer directed enquiries to the HCPT as to the reason for the poor success rate, statistics for 1994 were no longer available. However, it has been pointed out that statistics for 1999 should be more positive because the HCPT has been able to intervene at an earlier stage in the dispute since the introduction of a toll-free helpline, which offers advice and assistance to consumers on all matters relating to housing.

[98] *Farlam & Hathaway Contract Cases, Materials and Commentary* 3ed by G F Lubbe & C M Murray (1988) 25.

The next chapter will focus in greater detail on the substantive provisions of our law relating to immovable property, where, due to the failure of the courts to respond adequately to the needs of purchasers, recent enactments have made further inroads into traditional theories.

5 Statutory protection for purchasers

The first part of this chapter will look briefly at the position in our law prior to the passing of additional housing consumer legislation in 1998.

5.1 The Alienation of Land Act 68 of 1981

The Act, which replaced the Formalities in Respect of Contracts of Sale of Land Act 71 of 1986 and the Sale of Land on Instalments Act 72 of 1971, is the primary source of statutory protection for purchasers of immovable property. The provisions of the Alienation of Land Act apply not only to land, but also to sectional title units. The 1998 amendments, which are examined in paragraph 5.2 below, have not affected the sections which are discussed in this paragraph.

In terms of section 2 of the Act, no alienation of land effected after 19 October 1982 is valid unless contained in a written deed of alienation and signed by the parties thereto (or by their agents acting on their written consent). Chapter 2 of the Act regulates the sale of land on instalments, and seeks to prevent the fraudulent alienation of land by a seller to whom the purchase price is to be paid in more than two instalments over a period exceeding one year.[99] The Act provides that the purchaser of such an agreement shall be entitled to choose the language of the agreement,[100] which agreement must contain the detailed information required by section 6 of the Act. By providing for the registration of

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[99] See the definition of "contract" in section 1 of the Alienation of Land Act 68 of 1981.

[100] Section 5. Although section 6 of the Constitution of the Republic of South Africa Act 108 of 1996 lists 11 official languages, it has been the writer's experience that the Registrar of Deeds at Cape Town still calls for a sworn translation into English or Afrikaans where the document which is to be recorded has been created in one of the other official languages.

a *caveat* against the title deed of the property, this chapter also seeks to prevent a seller from passing further bonds over the property from the date of conclusion of an instalment sale agreement.[101] In the absence of such provisions, a purchaser who has paid the full purchase price might find that he is unable to obtain transfer of the property in his name because the seller has used the property as security for a loan. The mortgagee would typically insist on receiving full settlement prior to granting permission for the cancellation of the bond, which is a *sine qua non* for registration of transfer.[102]

Section 20 sets out the protection mechanism for the sale of land on instalments by obliging the seller under such a contract to record the contract against the title deed of the relevant property within ninety days from its conclusion. The purchaser under a contract which has thus been recorded enjoys a preferent claim on insolvency of the owner, such claim ranking immediately after any claim of the mortgagee of a bond which was registered *prior to* the date of recording of the contract.[103] In terms of the definition of "land" in section 1(c)(i) of the Act, the provisions of this chapter are only applicable to land which is used (or intended to be used) mainly for residential purposes. Agricultural land is specifically excluded from its operation.[104]

Section 26 of the Act contains important provisions for the protection of purchasers who buy newly subdivided erven or sectional title units in a new development. Since purchasers would not be able to obtain registration of ownership in their names unless all

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[101] Sections 7 -9 and 20.

[102] In terms of section 56(1) and Regulation 63(2) of the Deeds Registries Act 47 of 1937.

[103] Section 20(5).

[104] Section 1(c)(ii)(aa). The reason for this particular exclusion is not clear, although it might have been felt that agricultural land has been sufficiently dealt with in the Subdivision of Agricultural Land Act 70 of 1970, the repeal of which through the introduction of the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 has not yet come into operation. It is submitted that the purchasers of agricultural land – especially emerging farmers - may be in need of similar protection to that which is offered in respect of residential property.

conditions of subdivision imposed by the local authority have been fulfilled, and the subdivisional diagrams or sectional title plans have been approved by the Surveyor-General, it is necessary to ensure that developers only receive payment of the purchase price once these technical (and very costly) requirements have been met. The section reads as follows: "Section 26 -

(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until –
(a) such erf or unit is registrable; and
(b) in case the deed of alienation is a contract to be recorded in terms of section such, such recording has been effected."

The only exception is if the money is held in trust by an attorney or estate agent,[105] or if the seller furnishes the purchaser with an irrevocable and unconditional guarantee of a bank, building society or insurer to repay the money if the erf or unit is not registrable (or the contract not recorded under section 20) within a specified period.[106] Contravention of the provisions of section 26 may attract a fine of R1 000 or imprisonment for up to one year or both.[107]

Apart from the general protection which purchasers of immovable property enjoy under the Alienation of Land Act, other pieces of legislation cover more specific forms of ownership.[108] The Sectional Titles Act 95 of 1986, for example, contains various disclosure provisions which are aimed at limiting the risk from a purchaser's point of view, of which section 32(2)(b),[109] section 32(4)[110] and section 25(14)[111] are the most

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[105] Section 26(3)(a).
[106] Section 26(3)(b).
[107] Section 26(2).
[108] Such as provisions for disclosure and marketing relating to other forms of housing which are contained in the Property Time Sharing Control Act 75 of 1983; the Share Blocks Control Act 59 of 1980 and the Housing Schemes for Retired Persons Act 65 of 1988.
[109] Which section deals with the disclosure of the participation quota of a unit which is sold prior to the opening of the sectional title register.
[110] Which requires disclosure of any amendment to the value of the vote or liability for contributions that may be imposed on a particular unit prior to the opening of the register.
[111] Dealing with the reservation of a real right to extend a scheme by the developer or body corporate.

important. In his analysis of the protection of purchasers under the Sectional Titles Act, compared to the Uniform Condominiums Act (1980) of the United States, Van der Merwe makes the point that

> "[t]he best 'consumer protection' that the law can provide to any purchaser is to ensure that he has sufficient opportunity to comprehend the nature of the products which he is purchasing. [...] The assumption is that disclosure will force developers to proceed more carefully in planning and selling units and enable buyers to make an informed decision before entering into a purchase."[112]

Sections 10 and 4(3) of the Sectional Titles Act contain additional disclosure provisions for purchasers who are also tenants in a building which is to be converted into a sectional title scheme. A further protective mechanism in the context of sectional titles is the fact that a sectional title register may not be opened (and no payment may be paid to the developer) unless the building has reached such a state of completion so as to permit the preparation of a draft sectional plan from *actual measurements* undertaken by a land surveyor (or specially qualified architect) so as to ensure *accurate* results.[113]

In the case of conventional developments, a measure of protection is offered by the relevant subordinate legislation, such as the Cape Land Use Ordinance 15 of 1985[114] which requires developers to comply with certain conditions of subdivision before the local authority would be prepared to grant the necessary clearance certificate which is a *sine qua non* for registration of transfer (or receipt of payment) in respect of a newly subdivided erf.

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[112] C G van der Merwe 'The Sectional Titles Act in the light of the Uniform Condominium Act' 1987 *CILSA* 38.

[113] Section 6(1) of the Sectional Titles Act 95 of 1986, read with section 26 of the Alienation of Land Act 68 of 1981.

[114] Although the Ordinance has been repealed by the Western Cape Planning and Development Act 7 of 1999, which was published in Provincial Gazette no. 5348 of 9 April 1999, this Act has not yet come into operation due to the need to finalise the Regulations to the Act.

5.2 The Alienation of Land Amendment Act 103 of 1998

This Act introduced the new s 29A – commonly referred to as the "cooling-off" clause - to the Alienation of Land Act 68 of 1981, which constitutes a controversial novelty in the context of the alienation of immovable property. The substantive provisions of the Act will be examined below.

5.2.1 History

The idea of a "cooling-off" clause – similar to that contained in section 13 of the Credit Agreements Act 75 of 1980 – was introduced by Professor Louise Tager in her capacity as chairperson of an *ad hoc* Technical Committee on Consumer legislation, established in the Department of Trade and Industry, in 1991.[115] The Property Transactions with Consumers Bill of 1995 (which proposed to consolidate the Alienation of Land Act, the Share Blocks Control Act, the Property Timesharing Control Act and the Housing Development Schemes for Retired Persons Act into a single Act) contained the first reference to such a clause. Although the Bill was withdrawn during the middle of 1995, the Department of Trade and Industry and the Technical Committee continued the efforts to confer the right of termination of the contract to purchase on certain purchasers of land.[116]

A draft Estate Agents Amendment Bill, which introduced a number of important amendments to the Estate Agents Act 112 of 1976 was published for general information and comment on 17 January 1997. The Bill also contained a "cooling-off" clause, which

[115] (July 1997) 64 *AGENT: The Official Newsletter of the Estate Agents Board* 2.
[116] (July 1998) 68 *AGENT: The Official Newsletter of the Estate Agents Board* 1.

would confer the right to terminate a sale agreement within five days after signature thereof on every purchaser of residential property who did not view the property before signing a sale agreement. However, the majority of interested parties who were invited by the Department of Trade and Industry to comment on its proposals were opposed to the wording of the clause. The objections forwarded by the Estate Agents Board were the following:

> "It is a debatable question whether a cooling-off right, limited in this manner, will have any material impact in practice. On the one hand it would be of no benefit to purchasers who buy 'off plan' and discover more than five days later that the finished product differs from the agreed specifications and/or a model show house. On the other hand, where the purchaser's house has already been built the seller/developer can easily by-pass the cooling-off clause by simply showing the property to the buyer without disclosing material defects and/or other shortcomings. Having viewed the property, the purchaser enjoys no cooling-off right even if he discovers the defects immediately after signature of the sale agreement." [117]

In addition, "[i]t was specifically pointed out to the Department that the correct place for a cooling-off clause was not the Estate Agents Act 112 of 1976, but the Alienation of Land Act 68 of 1981."[118]

The Estate Agents Amendment Bill 40 of 1998, which was introduced in the National Assembly early in 1998, contained a cooling-off clause (clause 13) which was confined to purchasers who "(i) bought residential property from (presumably that had to be 'through') an estate agent and (ii) did not inspect the property before signature of the sale agreement."[119] Again the Bill attracted opposition from interested parties:

> "It was pointed out to the Department that the cooling-off clause as contained in the Bill (clause 13) was of very limited application (very few people buy residential property through/from an estate agent without inspecting it) and that

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[117] (July 1997) 64 *AGENT: The Official Newsletter of the Estate Agents Board* 3.
[118] (July 1998) 68 *AGENT: The Official Newsletter of the Estate Agents Board* 1-2.
[119] *Ibid* 2.

the clause, as worded in the Bill, would give rise to interpretation problems and many other technical difficulties."[120]

On 25 May 1988 the Portfolio Committee approved a reworded clause 13, which corresponded to a large degree with the suggested rewording put forward by the Estate Agents Board.[121] In terms of clause 13, a new section 28A was to be introduced in the Estate Agents Act 112 of 1976, of which subsection (2) would provide as follows:

> "(2) subject to the provisions of subsection (6), a purchaser or prospective purchaser of land may within five days after signature by him or her, or by his or her agent acting on his or her written authority, of
>
> (a) an offer to purchase land; or
> (b) a deed of alienation in respect of land
>
> revoke the offer or terminate the deed of alienation, as the case may be, by written notice delivered to the seller or his or her agent within that period."

Subsection (4) set out the formal requirements of the notice of termination:

> "(4) the written notice contemplated in subsection (2) shall be effective only if it
>
> (a) is signed by the purchaser or his or her agent acting on his or her written authority;
> (b) clearly identifies the offer or deed or alienation that is being revoked or terminated, as the case may be; and
> (c) is unconditional."

The right of termination of the agreement would not be available if the purchase price was to exceed R250 000; if an option to purchase of five days or longer was granted to the purchaser; if the sale was by way of public auction, or if the parties had previously entered into a deed of sale in respect of the same land on substantially the same terms.[122] The amount of R250 000 was set because it was felt that "there were many persons,

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[120] *Ibid.*

[121] An attempted rewording of the cooling-off clause appears in (July 1997) 64 *AGENT: The Official Newsletter of the Estate Agents Board* 5-8.

[122] In terms of the proposed section 28A(6)(a) to (d).

particularly the historically disadvantaged persons, entering the property market at this level."[123]

However, the proposed section 28A(9) placed the duty for the inclusion of the "cooling-off" clause on the purchaser:

> "(9) A purchaser who has the right to revoke an offer or terminate a deed of alienation in terms of subsection (2) shall in the offer or deed of alienation concerned, as the case may be, disclose such right to the seller."

In addition, section 28A(10) would read as follows:

> "(10) A person who wilfully or negligently fails to comply with the provisions of subsection (9), or who makes a statement as contemplated in subsection (9) which is false, shall be guilty of an offence and upon conviction liable to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

These provisions are difficult to reconcile with the rationale for the introduction of this right of cancellation, which is to protect unsophisticated consumers from exploitation. Surely people who are new to the property market are not very likely to know the provisions of the Estate Agents Act, and the provisions of the proposed sections 28A(9) and (10) are indeed difficult to comprehend. The Estate Agents Board criticised the Bill because it lent itself to exploitation by purchasers:

> "The cooling-off clause in the Estate Agents Amendment Bill does not stand in the way of a purchaser who wants to buy more than one property within a five day period. Such purchaser is not automatically deemed to have cooled off in respect of an earlier transaction if he later concludes a second transaction within the five day period. Naturally, this would make it possible for a purchaser to enter into multiple transactions, realising that he has the right to cool off in respect of each of them. For example, a purchaser would be able to conclude (say) 20 sale agreements over a weekend and thereby in effect remove those properties from the market."[124]

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[123] Hansard Debates of the National Assembly col 7104 (23 September 1998).
[124] (July 1998) 68 *AGENT: The Official Newsletter of the Estate Agents Board* 6.

The calls for the removal of the clause from the Estate Agents Act and inclusion in the Alienation of Land Act were finally heeded, and on 8 May 1998 a draft Alienation of Land Amendment Bill was published in the *Government Gazette.*[125].

5.2.2 Substantive provisions

The Alienation of Land Amendment Act 103 of 1998 was promulgated on 27 November 1998.[126] It entrenches the controversial "cooling-off" clause as part of our law through the introduction of a new section 29A to the Alienation of Land Act 68 of 1981.

The wording of the cooling-off clause, as it appeared in the draft amendment to section 28(A)(2) of the Estate Agents Act 112 of 1976, has been repeated *verbatim* in the new section 29A(1) of the Alienation of Land Act. The five-day cooling-off period is calculated "with the exclusion of the day upon which the offer was made or the deed of alienation was entered into, as the case may be, and of any Saturday, Sunday or public holiday."[127] In practice, this gives the purchaser at least a week to consider the implications of the agreement. However, some confusion may arise as to when exactly the five-day period starts running since an offer, if accepted, constitutes an agreement. If the buyer made an offer which is open for acceptance for a period of, say, three days, does the period start running from the date of the offer or the date of the sale agreement? It has been suggested that, since the Act allows the buyer to exercise a cooling-off right within five days "after signature **by him or her**" of an offer or a sale agreement, the period should be calculated as from the date of signature by the buyer.[128]

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[125] No. 18882.
[126] *Government Gazette* No. 19517.
[127] Section 29A(2).
[128] (July 1999) 72 *AGENT: The Official Newsletter of the Estate Agency Affairs Board* 9.

The new paragraph (d) of the definition of "*land*" in section 1 of the Alienation of Land Act reads as follows:

> (d) "(*Land*) in section 29A –
>
> (i) includes –
> (aa) land, whether or not registrable, used or intended to be used mainly for residential purposes;
> (bb) any housing interest as defined in section 1 of the Housing Development Schemes for Retired "Persons Act, 1988 (Act No. 65 of 1988, and any proposed housing interest;
> (cc) any share in a share block company as defined in section 1 of the Share Blocks Control Act, 1980 (Act No. 59 of 1980), and any proposed share, which confers on the holder of such share the right to occupy land owned or leased by the share block company and which is used or intended to be used mainly for residential purposes;
> (dd) any unit as defined in section 1 of the Sectional Titles Act, 1986 (Act No. 95 of 1986), and includes any proposed unit;
>
> (ii) excludes agricultural land."

"*Agricultural land*", defined as "any land used or intended to be used mainly for commercial farming operations"[129] is specifically excluded from the ambit of the Act.[130] The Memorandum on the Objects of the Alienation of Land Amendment Bill explains the requirement of "residential purposes" on the basis that "(p)ersons who buy commercial and industrial properties can reasonably be expected to know what they are doing and/or to obtain independent advice before entering into a property transaction. There is therefore no need to make the cooling-off right available to such persons."[131] Unfortunately the way the Act is worded, however, seems to suggest that the buyer of a commercial unit in a sectional title scheme – as opposed to a conventional property – would also enjoy protection under the Act, which, in the light of the explanatory memorandum, could surely not have been the intention of the Legislature.

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[129] Section 1 (definitions) of Act 68 of 1981.
[130] Section 1(d)(ii).
[131] Memorandum on the Objects of the Alienation of Land Amendment Bill, 1998 *Government Gazette* No. 18882 (8 May 1998) 7.

As far as the exclusion provisions are concerned, subsection (5) of section 29A contains all the proposed exclusions that appeared in the Estate Agents Act Amendment Bill, and goes further by introducing subsections (b) and (e) below:

Section 29A

(5) Subsection (1) shall not apply if –

(a) the purchase price of the land, or the price offered for the land by the prospective purchaser contemplated in that subsection, exceeds R250 000 or such higher amount as the Minister may prescribe in order to counter the effect of inflation;

(b) the purchaser or prospective purchaser contemplated in that subsection is a trust or a person other than a natural person;

(c) the purchaser or agent contemplated in that subsection has purchased the land at a publicly advertised auction;

(d) the seller and purchaser contemplated in that subsection have previously entered into a deed of alienation of the same land on substantially the same terms;

(e) the purchaser or prospective purchaser contemplated in that subsection has reserved the right in terms of the deed of alienation or offer, as the case may be, to nominate or appoint another person to take over the rights and obligations of the purchaser as stipulated in the offer or deed of alienation in question;

(f) the purchaser contemplated in that subsection purchases the land by the exercise of an option which was open for exercise for a period of at least five days calculated *mutatis mutandis* in the manner prescribed in subsection (2).

The new inclusions make sense if the purpose is to protect less sophisticated buyers. The reasoning behind the exclusion property bought on an auction is that "arranging a public auction can be an expensive undertaking and the whole object of the auction could be frustrated if the purchaser at an auction later decides to cool off."[132] As far as s 29A(5)(d) is concerned, however, it could easily be circumvented by persuading the purchaser to enter into an agreement, which is then immediately cancelled and a new agreement drawn up. The Estate Agency Affairs Board is clearly aware of this scheme which would deprive a purchaser of protection under the Act, and has responded as follows:

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[132] *Ibid* 9.

> "The Estate Agency Affairs Board considers it to be a species of fraud for an estate agent to assist in cancelling a sale agreement and to draw up a fresh agreement for the parties, if this is done purely to bypass the buyer's cooling-off right. If a buyer enjoys a cooling off right in respect of a particular transaction, an estate agent may assist in cancelling that transaction and negotiating a fresh agreement for the parties on similar terms only if
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> *(a) there is a sound reason why the agreement has to be cancelled and cannot merely be amended; and*
>
> *(b) the estate agent discloses to the buyer in writing, before the agreement is cancelled, that he or she will not have a cooling off right in respect of the second transaction if the terms thereof are similar to the cancelled transaction."*[133]

The Memorandum explains that the reasoning behind the inclusion of section 29A(5)(e) is

> "to prevent a situation where a third party (legal *persona*) uses a natural person as a front to buy land. A deed of alienation can be entered into on the basis that the purchaser has the right to nominate a third party as the purchaser. It is not the intention to confer a cooling-off right on a nominee who is not a natural person, but which may for example be a company or close corporation. The paragraph is also intended to prevent a circumvention of subclause (8) in that it is not the purpose to confer a cooling-off right on a purchaser who uses other persons as fronts to enter into a number of transactions in terms of which they reserve the right to appoint the first purchaser as the true purchaser."[134]

However, the protection afforded under that section could easily be neutralised by an estate agent who includes a nominee clause in a pre-printed sale document. In practice, the purchaser would be described as *"(Full Names)* or Nominee". Many purchasers may not even know the legal import of the nominee clause, or should they raise queries, they may easily be convinced that it is in their own best interests to make the agreement more flexible. Again, the Estate Agency Affairs Board has responded to this practice:

> "It must be stressed, however, that the Estate Agency Affairs Board has taken the view that although it cannot prohibit the inclusion of nominee clauses in standard

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[133] (July 1999) 72 *AGENT: The Official Newsletter of the Estate Agency Affairs Board* 6.

[134] Memorandum on the Objects of the Alienation of Land Amendment Bill, 1998 *Government Gazette* No. 18882 (8 May 1998) 10.

> documents used by estate agents, it does not recommend the inclusion of such clauses in documents where buyers enjoy a cooling-off right. The inclusion of a nominee clause in a standard document to by-pass the cooling-off right is regarded to be contrary to the code of conduct. The Board's ruling is that if a buyer enjoys a cooling-off right, a nominee clause may be included in a standard sale agreement only if it is contained in a separate addendum to the agreement and such addendum clearly states that the inclusion of the nominee clause has the effect that the buyer no longer enjoys a cooling-off right. There must also be a good reason why the nominee clause has to be included in the agreement."[135]

Subsection (6) excludes claims for estate agent's commission or other financial penalties[136] pursuant to the exercise of a right of termination. In terms of section 29A(7)(b), "[a]ny waiver by a purchaser of the rights conferred upon him or her in terms of this section shall be void."[137]

Section 29A(8) addresses the criticism that had been levelled against the Estate Agents Act Amendment Bill, namely that purchasers might exploit the right of cancellation by entering into multiple agreements. The section now reads as follows:

> "A purchaser or prospective purchaser who signs an offer to purchase land or a deed of alienation in respect of land (hereinafter referred to as the later transaction) within five days [...] after having signed an offer or a deed of alienation in respect of other land (hereinafter referred to as the earlier transaction) and before he or she has exercised his or her right as contemplated in terms of subsection (1) in respect of the earlier transaction, shall –
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> (a) on signature of the later transaction be deemed to have exercised his or her right in terms of subsection (1) to revoke or terminate the earlier transaction; and
>
> (b) forthwith after signature of the later transaction in writing notify the seller of the earlier transaction of the revocation or termination, as the case may be, of that transaction."

The Memorandum justifies the inclusion of this section on the following basis:

> "It is not the intention that the cooling-off right be misused by purchasers to stifle competition or to monopolise the market. Unless the cooling-off right is restricted in the manner set out in this subclause, it would be possible for a person to buy all the properties that are for sale in a particular town, knowing that he or she has the right to terminate each of those agreements within five days. By doing so such

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[135] (July 1999) 72 *AGENT: The Official Newsletter of the Estate Agency Affairs Board* 8.
[136] Section 29A(7)(a).
[137] This provision was also intended for inclusion as a new section 28A(8)(b) in the Estate Agents Act:-

> person can in effect obtain option on all available properties in an area, making it impossible for other purchasers to enter into enforceable sale agreements in respect of such properties before the cooling-off period has expired. This is clearly undesirable."[138]

Section 29A(9) provides for penalties in the event that a purchaser should "wilfully or negligently" fail to comply with the provisions of section 29A(8)(b), while subsection (10) offers protection to purchasers who have a *bona fide* wish to purchase both the land which forms the object of the earlier transaction, as well as the land to which the later transaction relates. The provisions of sections 29A(8) to (10) seek to balance the interests of the purchaser with those of the seller, who himself might be interested in purchasing a new property and would therefore need to know if the sale of his property has been finalised as soon as possible. Since the conveyancing process is only likely to commence upon the expiration of the deliberation period, the seller is likely to suffer the financial burden of having to pay an extra week's interest on his mortgage loan. It is submitted that to place an obligation of notification on the purchaser is not unfair in the light of the new subsection (2A) which has been introduced to section 2 of the Alienation of Land Act, according to which the purchaser should be made aware of the existence of a cooling-off right through its inclusion in the deed of sale:

> "Section 2
>
> (2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A."

Technically, the way that section 2(2A) is formulated would seem to indicate that in future, **all** deeds of alienation of immovable property must contain a reference to the right of rescission of s 29A – whether the agreement falls within the ambit of that section or

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[138] Memorandum on the Objects of the Alienation of Land Amendment Bill, 1998 *Government Gazette* No. 18882 (8 May 1998) 10.

not. Most attorneys and estate agents, however, seem to include a reference to that section only if it is applicable to the agreement, based on the purchase price. In the light of the more general wording of section 2(2A), however, it is submitted that this practice is not correct. *

5.2.3 Conclusion

The introduction of a right of cancellation is a controversial one and has met with great scepticism from certain operators in the property industry, who fear that the right of termination might be exploited by purchasers and even force some estate agencies out of business. From what has emerged so far, these fears seem to be unfounded:

> "Although the cooling-off right has only been in operation for a relatively short period, the feedback received by the Estate Agency Affairs Board thus far certainly does not suggest that the new law has brought the estate agency industry to its knees. True, allegations have been made that certain purchasers are misusing the cooling-off right but these seem to be isolated cases. Estate agents working in the upper end of the market have not been affected at all, given the fact that the cooling-off right applies only in respect of properties up to R250 000. At the lower end of the market there have been reports that sales were 'lost' because buyers exercised their cooling-off right, but this does not seem to be a widespread phenomenon. Estate agents appear to have adapted well to the cooling-off right and have taken the attitude, generally, that in cases where buyers have cooled off there would probably not have been a sale in the first place, had the law not introduced the cooling-off right."[139]

The Memorandum on the Alienation of Land Amendment Bill justifies the introduction of the cooling-off clause in the light of the socio-political demands which exist in this country:

> "The purchase of land for residential purposes is one of the basic needs of South Africans and it is necessary that the acquisition of such a basic need does not result in great hardships. South Africa is currently experiencing an unprecedented demand in land ownership, especially for residential purposes. Many people in South Africa, especially those from previously disadvantaged background, are not

[139] (July 1999) 72 *AGENT: The Official Newsletter of the Estate Agency Affairs Board* 7.

> experienced in property transactions. For instance many purchasers are not aware that a signed offer to purchase is legally binding once the seller accepts it."[140]

It would appear that the Legislature wished to change the common law position only to the extent that would be absolutely necessary so as to redress the imbalance between the interests of the seller and those of the purchaser:

> "A cooling-off right erodes the common law rule that all contracts validly entered into are enforceable and should be adhered to (*pacta sunt servanda*). Accordingly it is not in the public interest to introduce a cooling-off right for every person who enters into a deed of alienation. The right should be confined only to persons who are truly in need of statutory protection. For this reason the Amendment Bill does not confer a cooling-off right on *sellers* of land. A seller, as a general rule, is not acquiring a basic need by entering into a long-term financial obligation. He is furthermore not subjected to questionable marketing techniques."[141]

However, it has been pointed out[142] that since the seller is *disposing* of a 'basic need', such disposal may cause as much hardship as that suffered by a person who acquires a basic need; and the seller, too, may be equally pressurised by persuasive marketing techniques. Professor Delport argues that

> "if one takes the view that a cooling-off clause should be confined to *first time home buyers,* then of course there is no room for sellers to enjoy a cooling-off right. On the other hand, if one's point of departure is that a cooling-off clause is aimed at protecting persons who are inexperienced in property transactions, there seems to be no reason why sellers should be excluded from the cooling-off clause, except if one can argue that a seller has already acquired a property and the sale is therefore not the first property transaction entered into by such seller, accordingly the seller is not really `inexperienced' in the true sense of the word. This seems to be a rather forced argument."

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[140] Memorandum on the Objects of the Alienation of Land Amendment Bill, 1998 *Government Gazette* No. 18882 (8 May 1998) 7.

[141] Memorandum on the Objects of the Alienation of Land Amendment Bill, 1998 *Government Gazette* No. 18882 (8 May 1998) 8.

[142] H Delport `Analysis: "Cooling-off" clauses in the (Draft) Alienation of Land Amendment Bill 1998 and The Estate Agents Amendment Bill 1998' (1998) 16 *Commercial Law Information Service Bulletin* 20.

The burden of financial obligations linked to the purchase of immovable property has been recognised by institutions such as the Estate Agency Affairs Board as justification for affording more protection to the party who on whom the burden will be imposed:

> "Because the purchase of land is a major decision involving a huge long-term financial commitment, a cooling-off right is under the circumstances desirable to give purchasers the further opportunity to carefully and rationally reconsider the transaction and its implication, if necessary to obtain independent advice as to whether or not they should proceed therewith. Such a major decision if made under pressure or irrationally and which turns out to be wrong cannot be rectified easily and may cause great economic, financial and social hardship such as over-indebtedness."[143]

The effect of the Act is that certain purchasers of immovable property will for the first time in South African legal history enjoy a statutory right to revoke an offer or terminate a sale agreement relating to immovable property or other forms of housing interests.

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[143] (July 1998) 68 *AGENT: The Official Newsletter of the Estate Agents Board* 7-8.

5.3 The Housing Consumers Protection Measures Act 95 of 1998

5.3.1 History

The Department of Housing's White Paper of 1994 referred to the inadequate protection of consumers against "fraudulent and exploitative practices and behaviour by suppliers of housing products and services"[144] and supported the need for the introduction of a comprehensive home builders' warranty fund, through which an accredited contractor's warranty would be backed by a central warranty mechanism.[145] The Objects Memorandum which accompanied the publication of the National Home Builders Registration Bill[146] pointed out that, prior to the implementation of legislation in 1998, "consumers had no way of distinguishing `fly-by-night' contractors from solid, reliable builders. Fly-by-night contractors could enter and leave the industry with considerable ease. It was very common for companies to close their doors one day and re-open under another name the next."[147] This also had serious implications for the banking sector, since "the mortgage lending industry in the early 1990s was faced with large-scale bond boycotts where construction defects and irresponsible behaviour by certain home builders were primary contributing factors."[148] Consumers seemed to believe that by refusing to pay their monthly bond instalments, the relevant financial institution could be persuaded to take action against the contractor who was to blame for the poor quality work. The unfortunate result was that the banks were forced to institute action against the consumers and proceeded to sell the property in execution, leaving the consumer destitute.

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[144] White Papar para 3.3.8.
[145] *Ibid* para 5.5.3.1(d).
[146] Promulgated in *Government Gazette* No. 18092 of 27 June 1997.
[147] Para 5 of the Objects Memorandum in its pre-publication form, which was kindly made available to the writer by Mr M Makhari of the Portfolio Committee on Housing.
[148] *Ibid* para 6.

In an attempt to regulate the position, a Record of Understanding[149] was reached between the Department of Housing and the Association of Mortgage Lenders in 1994, which was designed to protect the interest of purchasers who relied on mortgage bonds to finance the acquisition of new units. The Council for Construction in South Africa (COCOSA) established a steering committee, consisting of the major interest groups in the home building and associated industries, which compared foreign warranty schemes and held national workshops over a period of fifteen months, resulting in the official launch of the National Home Builders Registration Council (NHBRC) as a national consumer protection body within the building industry on 5 June 1995.

The NHBRC in its original form was a private, non-government and non-profit company registered under section 21 of the Companies Act.[150] Home builders and sectional title developers were not legally obliged to register with the NHBRC. However, in terms of the Record of Understanding, the Association of Mortgage Lenders agreed that it would not finance the purchase of homes with a selling price of R250 000 or less unless the developer was registered with the NHBRC and the home had been enrolled under its warranty scheme.[151] An enrolment fee of 1,3% of the purchase price of the home had to be paid by the contractor to the NHBRC.[152] The NHBRC enforced its standards by entering into standard agreements with contractors who applied for registration. It formulated a set of Rules and Minimum Specifications for building operations which, together with the registration application form completed by the contractor and the registration certificate issued pursuant thereto, constituted the agreement between the

[149] Unpublished; referred to in the *NHBRC Newsletter* of 25 June 1998 p 1.
[150] Act 61 of 1973. The company registration number is 95/08647/08.
[151] NHBRC Information pamphlet for contractors 2.
[152] Rule 2.11.

contractor and the Council. In terms of the Rules, the contractor would be obliged to conclude a warranty agreement with the purchaser of a newly-constructed house or sectional title unit.[153] The legal relationship between the contractor and the NHBRC, on the one hand, and the contractor and the purchaser, on the other, was regulated by the law of contract. Since there was no statutory duty on contractors to register with the NHBRC or to conclude a warranty agreement with a purchaser, however, this meant that in practice only those purchasers who required mortgage loans received protection. Banks would typically insist that proof of registration of the contractor with the NHBRC, and enrolment of the home under its warranty scheme be presented to conveyancers prior to registration of bonds in respect of newly-constructed homes.

The Housing Consumers Protection Measures Act 95 of 1998 was approved by Parliament on 20 October 1998. Implementation of the Act will take place in three phases.[154] The first phase of the Act, which establishes the NHBRC as a statutory body, came into effect on 4 June 1999.[155] Further implementation will be as follows:

> "The second phase of the Act will make it an obligation for all builders operational in the above R20 000-category[156] of the home building industry, to be registered. The regulations of this phase will be published for comments. This phase will be effective from 1 November 1999. Registered home builders will be obliged to enroll all new homes under the NHBRC's Defects Warranty Scheme. It will also be law for banks to insist on home builder registration and enrolment, whilst conveyancers will also have to ensure that builders are registered and houses are enrolled.
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> The final implementation phase of the Act will apply to builders in the subsidy-only category of the home building industry. Home builders in this sector will

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[153] Rule 4.3.

[154] (August 1999) Vol 2 No 2 *NHBRC Builders Bulletin* 1; see also section 7 of the Housing Consumers Protection Amendment Act 27 of 1999 (GN 508 in *GG* 19976 of 28 April 1999).

[155] Government Gazette No. 20122 of 4 June 1999, in terms of which all sections, with the exception of sections 9-11; 13; 14; 18; 19 and 21 came into effect on that day.

[156] Homes below R20 000 are subsidised by Provincial Housing Boards and are subject to the provisions of the Housing Act 107 of 1997 (GN 1661 in *GG* 18521 of 19 December 1997).

> have to be registered with the NHBRC before Provincial Housing Boards may award any housing projects to such builders. This portion of the Act also requires Provincial Housing Boards to enroll every home under construction with the NHBRC on a project basis."[157]

The purpose of the Act, as set out in the preamble, is "to make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council." Although the Act was initially introduced as the "National Home Builders Registration Council Bill", the name was changed to its current form because it was felt that more emphasis needed to be placed on the fact that this is essentially a piece of consumer protection legislation.[158]

5.3.2 Substantive provisions

The Act establishes the National Home Builders Registration Council as a juristic person[159] created by statute to act as a regulatory body in the building industry and to afford protection to purchasers against defects in new homes or sectional title units. The Council is specifically empowered to establish, maintain and administer a fund[160] to provide assistance to housing consumers under circumstances where home builders fail to meet their obligations which are set out in the Act. It is empowered to make rules by publication in the Gazette; to prescribe procedures for the registration of home builders and to regulate the conduct of registered home builders.[161] In terms of Chapter II of the Act, registration with the NHBRC will, from the date of coming into operation of this section, no longer be voluntary, but **obligatory**. Section 10 of the Act provides as follows:

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[157] (August 1999) Vol 2 No 2 *NHBRC Builders Bulletin* 1.
[158] Hansard National Assembly Debates col 6713 and 6724 (21 September 1998).
[159] Section 2 of Act 95 of 1998.
[160] Section 5(4)(d) and 15(4).
[161] Section 7(1)(a).

"(1) No person shall –

(a) carry on the business of a home builder; or
(b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,

unless that person is a registered home builder."

A "*home*" is defined as *"any dwelling unit constructed or to be constructed by a home builder, after the commencement of this Act, for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister".*[162] A *"home builder"* is defined as *"a person who carries on the business of a home builder".*[163]

Registration criteria provided for in the Act take account of the financial, technical, construction and management capacity of the home builder in order to limit the risk to which housing consumers and the Council may be exposed.[164] Failure by a home builder to comply with any obligation imposed by the Act may lead to the withdrawal of the home builder's registration or suspension thereof.[165] More importantly, failure to comply with the provisions of section 10(1) does not only mean that the sale of a home which is constructed by a builder who is not registered may not be financed by a loan secured by a mortgage bond over the property; but in addition, it is backed by the sanction of criminal prosecution and the possibility of severe penalties. In terms of section 21, "*any person who contravenes that section, and every director, trustee, managing member or officer of a home builder who knowingly permits such contravention, shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period*

[162] Section 1(xiii).
[163] Section 1(xiv).
[164] Section 10(3)(c).
[165] Section 11.

not exceeding one year, on each charge". In addition to the imposition of a penalty, the Council may apply to court for an interdict to ensure compliance with the provisions of the Act; to stop the construction of a home, or to obtain any other assistance that may be appropriate.[166]

Chapter III of the Act contains the substantive provisions for the protection of housing consumers. The contractor's duties of disclosure in the agreement of sale, which were previously set out in Clause 4 of the Rules issued by the NHBRC, are governed by section 13(1) of the Act:

> "A home builder shall ensure that the agreement between the home builder and a housing consumer for the construction or sale of a home by that home builder –
>
> (a) shall be in writing and signed by the parties;
>
> (b) shall set out all the material terms, including the financial obligations of the housing consumer; and
>
> (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body."

The terms of the Standard Home Builders Warranty, formerly imposed on the basis of a contractual arrangement between the contractor and consumer, have been superseded by statutory deeming provisions relating to the quality of the building. Section 13(2) provides as follows:

> "The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that –
>
> (a) the home, depending on whether it has been constructed or is to be constructed –

[166] Section 20.

(i) is or shall be constructed in a workmanlike manner;
(ii) is or shall be fit for habitation; and
(iii) is or shall be constructed in accordance with –
  (aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and
  (bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1)."

These deeming provisions constitute an important inroad into the traditional notions of freedom of contract, in terms of which the contractor would have been able to exclude liability by the inclusion of *voetstoots* clauses. In addition, section 13(2)(b) of the Act imposes a duty on the home builder to rectify structural defects resulting from non-compliance with the Technical Requirements for a minimum period of five years from the occupation date; to rectify non-compliance with the plans and specifications for a minimum of three years, and to repair roof leaks for a minimum period of 12 months. A developer who demands or receives a deposit from a purchaser without having included a reference to the provisions of section 13(1) and (2) in the agreement, may in future face the harsh penalties imposed by section 21 of the Act.

Section 14 contains the provisions relating to the enrolment of a home with the NHBRC. The developer is obliged to enrol a home falling within any category of home that may be prescribed by the Minister of Housing before the construction of the home commences.[167] Failure to do so constitutes a punishable offence in terms of section 21(1). The developer must provide the purchaser with a copy of the enrolment certificate. Should the developer be provisionally liquidated prior to the occupation date, the enrolment of a home shall be deemed to have been cancelled.[168] This would mean that a purchaser would not be allowed to finance the purchase of a unit with a mortgage bond over the unit unless the enrolment is reinstated by the Council, since section 18 now makes the enrolment

[167] Section 14(1).
[168] Section 14(5)(a).

certificate a statutory *sine qua non* for the registration of a bond over such building. Section 18(1) provides as follows:

> "No financial institution shall lend money to a housing consumer against the security of a mortgage bond registered in respect of a home, with a view to enabling the housing consumer to purchase the home from a home builder, unless that institution is satisfied that the home builder is registered in terms of this Act and that the home is or shall be enrolled with the Council and that the prescribed fees have been or shall be paid."

The consequences of these provisions for financial institutions are far-reaching, since a contravention of section 18(1) could attract a fine of R25 000 or imprisonment for one year.[169] In addition, conveyancers who attend to the registration of a mortgage bond over the property are obliged to ensure that the developer is registered in terms of the Act; that the enrolment fee has been paid, and that the enrolment certificate has been issued.[170]

Should a home builder fail to meet his obligations under section 13(2)(b)(i), which relates to **major** structural defects which are to be covered for a five-year period, the Council is obliged to compensate the purchaser from funds which have to be made available in terms of section 15(4). Section 17 provides as follows:

"(1) subject to subsection (2), the Council shall pay out of the fund established for that purpose in terms of section 15(4), an amount for rectification where –

(a) a major structural defect has manifested itself in respect of a home within five years of the date of occupation and has been notified to the home builder within that period and as a result of non-compliance with the NHBRC Technical Requirements;

(b) the home builder is in breach of the home builder's obligations in terms of section 13(2)(b)(i) regarding the rectification of such defect;

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[169] Section 21(1).

[170] Section 18(2). This section met with opposition from the Law Society of South Africa during the debates on the Bill, since it was felt that it placed an unfair obligation upon conveyancers in the absence of accurate and up-to date statistics regarding the registration of home builders: A Botha 'New Housing Act places duty on conveyancer' January 1999 *De Rebus* 38. However, since section 9 of the Act provides for the establishment of an information database on registered home builders, these objections may not create too much of a problem in practice, depending on the efficiency of the database.

(c) the relevant home was constructed by a registered home builder, had been enrolled with the Council and, at the occupation date, the home was enrolled with the Council subject to section 14(4),[171] (5)[172] and (7);[173]

(d) the home builder no longer exists or is unable to meet his or her obligations; and

(e) in the case of a home that has been enrolled with the Council on a project basis in terms of section 14(2), the application has been made by the provincial housing development board pursuant to an agreement in terms of section 15(4)(c).

(2) Subject to subsections (3), (4) and (5), if money is not available or is expected not to be available for that purpose due to future demands on the fund, the Council may reduce any amount, subject to section 7(2)(e), that may be expended in terms of subsection (1) or refuse such claims."

The Minister of Housing is required to prescribe the minimum and maximum amounts which may be paid as compensation.[174] The developer is obliged to reimburse the Council with the amount thus expended.[175] After consultation with the Minister of Housing, the Council may also establish a fund to repair roof leaks which are covered for a period of twelve months in terms of section 13(2)(b)(iii),[176] or where a developer has misappropriated the deposit received from a purchaser.[177]

The upper limit of R250 000 which was imposed by the Rules of the NHBRC[178] when it still functioned as an Association not for gain in terms of section 21 of the Companies Act, has been removed from the Act. The Memorandum[179] explains this omission as follows:

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[171] Which section allows the Council to cancel the enrolment of a home under circumstances such as non-compliance with its Technical Requirements.

[172] Which section deems the enrolment to have been automatically cancelled in the case of insolvency of a home builder or the cancellation of his registration, where this occurs prior to the occupation date.

[173] Which section obliges the Council to repay the enrolment fees in cases where the enrolment is not reinstated.

[174] Section 7(2)(e). This has to be read in conjunction with section 17(2), though, which provides that the Council may also **refuse** a claim if money is not available or is expected not to be available for that purpose due to future demands on the fund.

[175] Section 17(7).

[176] Section 15(5)(a).

[177] Section 15(5)(c).

[178] Rule 2.18.

[179] Memorandum on the Objects of the National Home Builders Registration Council Bill, 1998 par 5.

"The upper limit was introduced as an interim measure to allow the NHBRC to become established and to develop appropriate good building practices for homes above R250 000. The limit will be removed on enactment of this Bill. This is necessary to –

(a) provide the same level of consumer protection to all new home buyers;
(b) provide effective regulation of home builders;
(c) avoid discrimination;
(d) spread he cost and risk of the scheme across the industry as a whole; and
(e) make the scheme affordable for all new home buyers."

Section 14(1) of the Act does, however, allow the Minister to prescribe the category of home that must be enrolled by home builders in order to enjoy protection under the Act, which leaves the possibility for future exclusions.

5.3.3 Conclusion

The Housing Consumers Protection Measures Act has been welcomed as a "groundbreaking piece of legislation that ensures equity and fairness between consumers and home builders" in the pre-enactment debates.[180] It has created a much-needed statutory watchdog over the home building industry. The NHBRC has evolved from a section 21 company which relied on contractual remedies to enforce compliance with its rules, to a legal person established by legislation and supported by statutory penal provisions so as to ensure compliance with its standards. The comprehensive disciplinary procedure with which developers who fail to register or enrol units will be met, is a laudable innovation in the Act. In addition, section 9 obliges the Council to keep an information database on the home builders who are registered, and who have been suspended and deregistered in terms of the Act. This information will be made available

[180] Hansard National Assembly Debates col 6717 (21 September 1998).

to housing consumers free of charge,[181] and could therefore fulfil an important screening function.

It must be remembered, though, that the Act only provides protection against structural defects in **new** buildings. Furthermore, the Act is only applicable to new buildings in **residential** developments. The power of the NHBRC to reduce or even **refuse** claims in the event of a lack of funds[182] or on the other grounds which have been set out in section 17 above, has been criticised for offering a "second-class solution" only.[183] The Bill was not received favourably by the Building Industries Federation South Africa (BIFSA) since it was criticised for creating a monopolistic situation for the NHBRC which precludes the involvement of competitive insurance products. Instead, BIFSA proposed a warranty scheme which would not limit the cover to structural defects only, but would be operating on a "no fault" basis.[184]

However, the Act should definitely be seen as a step in the right direction and an attempt which was long overdue on the part of the Legislature to protect the majority of housing consumers from unscrupulous developers. As with any piece of new legislation, the provisions of the Act will have to be tested in practice and refined over time so as to ensure that faith in the building industry is restored.

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[181] Section 9(3). In terms of section 9(2)(e) the database shall include "any other information deemed appropriate by the Council to assist housing consumers to assess the track record of a home builder."
[182] Section 17(2).
[183] Hansard National Assembly Debates col 6736 (21 September 1998).
[184] BIFSA "Submissions to the Portfolio Committee on Housing" (Unpublished) p 4.

5.4 The Estate Agents Amendment Act

In the parliamentary debates on the Estate Agents Amendment Bill[185] the point was made that

> "(t)he purchase of property, and particularly the purchase of a home, is probably one of the biggest and most complicated transactions that an individual makes during his lifetime. It is not always easy for a lay person to assess the value of a property or the complications of the contract into which he is entering, and the scale of that, which involves mortgage bonds, purchases and commitments of various kinds, is a very important step for any individual."[186]

Since unsophisticated purchasers could easily be lured into making financial commitments that they cannot really afford, it has become necessary for the legislature to intervene so as to ensure that

> "there should be special protection for individuals; that the agent that they use to guide them and lead them into that particular situation should be beyond reproach, and should there be any deficiency in that person's performance; should they be let down, or should there be any dishonesty, [...] the purchaser [should be] entitled to some form of compensation."[187]

The White Paper identified certain problems in the housing context which could be ascribed to actions of the seller's agents and made the point that "[m]any instances of malpractice around advertising and marketing of lower cost housing as well as fraud and the theft of deposits, have occurred in the recent past."[188] The main problems which necessitated government intervention so as to regulate the involvement of estate agents in property transactions were, firstly, the fact that the Act had no mechanism for protecting purchasers whose deposits in respect of **building contracts** were misappropriated by the

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[185] No. 40 of 1998.
[186] Hansard Debates of the National Assembly col 6871 (22 September 1998).
[187] *Ibid.*
[188] White Paper para 5.5.3.1(e).

estate agent who negotiated the transaction. Since the Act only allowed the fidelity fund to compensate purchasers lost their deposits in respect of sales[189] of land – and not also **improvements** on land – such deposits were not covered by the fidelity fund. Secondly, consumers who lost money as the result of improper conduct by estate agents first had to exhaust civil remedies before they could seek compensation from the Estate Agents Board.[190] Consumers who could not find the resources to fund litigation would be left without an effective remedy. The disciplinary committee only had the power to investigate improper conduct, and if it found a registered estate agent to have been guilty thereof, it could impose a maximum fine of R1 000.[191]

During the course of 1996, the Estate Agents Board initiated changes to the Act in an effort to "broaden the consumer protection measures contained in the Act and to streamline certain procedures."[192] As a result of its efforts, the Estate Agents Amendment Bill[193] was approved by the Portfolio Committee on Trade and Industry on 25 May 1998. The Estate Agents Amendment Act 90 of 1998, which introduced a number of important amendments to the Estate Agents Act 112 of 1976, was promulgated on 30 October 1998.[194] It changed the name of the principal Act to the Estate Agency Affairs Act, 1976.[195] Its most important provisions, from the point of view of purchasers, are briefly set out below.

The amendment Act has inserted a definition of "*trust money*" into section 1 of the main Act, which reads as follows:

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[189] Section 18(1)(a)(ii) of the Estate Agents Act No. 112 of 1976 prior to the 1998 amendments.
[190] Section 19 of Act 112 of 1976 prior to the 1998 amendments.
[191] Section 30(3)(b) of the Act prior to the 1998 amendments.
[192] (July 1998) 68 *AGENT: The Official Newsletter of the Estate Agents Board* 7.
[193] No. 40 of 1998.
[194] Government Gazette No. 19413.
[195] In terms of the new section 37 of Act 112 of 1976.

"'*trust money*' means –

(a) money or other property entrusted to an estate agent in his or her capacity as an estate agent;

(b) money collected or received by an estate agent and payable in respect of or on account of any act referred to in subparagraph (i)[196], (ii)[197],(iii)[198] or (iv)[199] of paragraph(a) of the definition of 'estate agent';

(c) any other moneys, including insurance premiums, collected or received by an estate agent and payable in respect of any immovable property, business undertaking **or contract for the building or erection of any improvements on immovable property**."

Read with s 18(1)(a) of the Act (which obliges the fidelity fund to pay compensation to a person who suffered a loss by reason of theft of trust money by an estate agent), consumers whose deposits in respect of building contracts have been misappropriated by the estate agent who negotiated the contract, will in future be compensated by the fidelity fund. Section 30(3) authorises the Estate Agency Affairs Board[200] to investigate any charge of "conduct deserving of sanction"[201] against any estate agent and empowers the Board to impose a fine of up to R25 000 on an agent if found guilty.[202] In addition, the Board may order that up to 80% of the fine be applied towards the payment of compensation to any person who suffered a pecuniary loss as a result of the conduct of the estate agent in question.[203] Should such compensation still be insufficient, it will at least be a useful contribution to cover the legal costs of a consumer who wishes to institute civil proceedings against the agent.

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[196] Which section deals with the sale, purchase or public exhibition for sale of immovable property.
[197] Which section deals with the letting or hiring or public exhibition for hire of immovable property.
[198] Which section deals with the collection of any moneys payable on account of a lease of immovable property.
[199] Which section deals with the rendering of any other service specified by the Minister of Trade and Industry.
[200] As the Estate Agents Board will be known in future in terms of Section 2 of Act 112 of 1976.
[201] Section 30(2) introduces this new phrase instead of "improper conduct".
[202] Section 30(3)(b).
[203] Section 30(7)(b).

The new section 34B prohibits an estate agent from drafting or completing any document relating to the sale or lease of immovable property, or from conferring a mandate, unless such agent has complied with the prescribed standard of training. In the light of the recent changes to the law of the alienation of immovable property, by the introduction of a cooling-off clause,[204] for example, it is essential that the person who negotiates an agreement should have sufficient knowledge of the law so as to be able to explain and record the parties' rights and obligations correctly.

The new section 28(7) of the Act prohibits a person whose fidelity fund certificate has been withdrawn (or has lapsed) from participating in the management of any business carried on by an estate agent in his capacity as such, or from being employed, directly or indirectly, in any capacity in such business, except with the written consent of the Board and subject to such conditions as the Board may determine. The rationale behind the introduction of this section is as follows:

> "It is in the public interest that a person whose fidelity fund certificate has lapsed or been withdrawn on the ground of improper conduct should play no further role in the carrying on of any estate agency activity. However, it has come to the attention of the Board that where an estate agent's fidelity fund certificate is withdrawn the agent in question sometimes simply continues to work as an estate agent using someone else as a front. Typically, the person whose certificate has been withdrawn registers his wife as the principal of an estate agency firm but for all intents and purposes he continues to run the affairs of the estate agency."[205]

Since "estate agents, as intermediaries in property transactions, play crucial and sensitive role in consumers' decisions to buy houses or any other form of immovable property," these recent amendments have to be welcomed.[206] It constitutes a recognition on the part

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[204] Cf para 5.2 *supra.*
[205] (April 1997) 63 *AGENT: The Official Newsletter of the Estate Agents Board* 9.
[206] Hansard Debates of the National Assembly col 6859 (22 September 1998).

of the legislature that "[t]he provision and extension of property rights to all South Africans are important priorities"[207] and that

> "the attainment of these priorities should take place in a suitable legal framework that seeks, in a practical and flexible way, to keep fraud and abuse of consumers to a minimum and, as far as possible, without imposing excessively stringent or inflexible controls that discourage the development of the estate agent industry."[208]

The Act would appear to have found a more acceptable balance between the interests of the estate agent, on the one hand, and the protection of the housing consumer, on the other.

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[207] *Ibid* col 6860.
[208] *Ibid.*

6 Conclusion

In the light of the history of our law relating to ownership of immovable property, and more particularly the prohibition based on race on freedom of alienation which existed in the not so distant past, legislative intervention in this field has to be approached with a great measure of circumspection.

The recent changes to our law of the alienation of immovable property constitute a drastic departure from the traditional notion of freedom of contract in favour of a more consumer-oriented approach. However, in the light of the magnitude of the housing crisis which has prompted a hitherto unknown scale of housing development, a need has arisen for more efficient control measures to prevent building contractors and property developers from exploiting the ignorance of housing consumers. Because of the social function of housing, with its connotations of stability and a sense of belonging which are essential for ensuring socio-political stability, it has become necessary for the law to respond to the needs of the society within which it operates. It would appear that the traditional principles of the law of contract have not succeeded in providing an adequate response to the crisis. The notion of absolute freedom of contract presupposes that the contracting parties have equal bargaining power and are able to negotiate the terms of the agreement freely which, unfortunately, does not correspond with the reality of the "desperation and impatience of the homeless"[209] in this country. The large scale on which exploitation has occurred in the past necessitates a re-assessment of the underlying principles that inform our theory of contract.

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[209] White Paper para 1.

From the comparison of our law of contract with that of foreign jurisdictions,[210] it would appear that our common law has been slow in recognising the need for the protection of weaker contracting parties. In the absence of a general notion of "fairness", which seems to be firmly entrenched in most European legal systems, it has become necessary for the Legislature to intervene in a way that will ensure a more equitable distribution of rights and obligations between seller and purchaser. However, such intervention may be regarded being unfair by its very nature, since one of the parties will be singled out as being more worthy of protection than the other. Willett points out that

> "[w]hen the law disallows a term, one of the parties (at least in the immediate contractual context) is in a better position than he would have been in if the term had not been disallowed. He is in this position not because of anything which he has done to protect his own interests at the time when the contract was made, but because the law has taken the view that the term is in some way unacceptable. When the law implies a term into a contract, or gap-fills by the use of some legal norm, whoever benefits from the implied term or legal norm does so without having had to bargain the term into the contract in the first place."[211]

The introduction of the Housing Consumers Protection Measures Act certainly does favour the purchaser in a way that could be regarded as "unfair", *ie* by denying the home builder the option of including a *voetstoots* clause in the agreement. However, the introduction of this type of legislation is justifiable in the light of the mischief which it seeks to remedy. Society has called for greater responsibility on the part of property developers, since the provision of suitable well-constructed homes has been recognised as a priority. If one were to relate it to Bentham's conception of property as a basis of expectation, one might say that, from the point of view of a property developer as owner of a piece of land, the expectations of the owner as to the terms on which the alienation of

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[210] See paragraph 4.2 and 4.3.

[211] C Willett 'Introduction' in C Willett (ed) *Law in its Social Setting: Aspects of Fairness in Contract* (1996) 10.

the land may take place have been readjusted so as to conform to the expectations which the prevailing social order allows him.[212]

The desire to grant housing consumers a greater measure of protection constitutes a significant interference with the owner's right of alienation. It has shown again that "(ownership) is not absolute and individualistic in the sense that it grants unlimited and exclusive control to the owner, rather that the entitlements to control and dispose of the thing must always be exercised in the interests of the community."[213] What distinguishes the recent amendments to our law of property from the limitations on alienation which were introduced by the Group Areas Act, however, is the fact that the legislature has not singled out a minority group for protection on the basis of race, or because such minority group reflects the interests of the ruling political party only. Society as a whole can be expected to benefit from legislation which seeks to limit the exploitation of weaknesses of parties at the negotiation stage – something which our common law has failed to do.

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[212] See paragraph 2.4 above.
[213] N J J Olivier, G J Pienaar & A J van der Walt *Law of Property* (1989) 41.

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