



A long-term lease agreement as a trigger event for a right of pre-emption

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ABSTRACT

A *lacuna* in the South African law exists with regard to whether the registration of a long-term lease agreement over property (a real right) triggers the operation of an existing pre-emptive right (personal right) over the same property. In this study, a legal analysis is conducted with reference to the English law, German law and Dutch law regarding their approach to competing interests of pre-emptive rights and a lessee's rights under a long-term lease agreement. The aggrieved party's remedies are also considered.

It is necessary to establish whether a long-term lease agreement is considered as a "trigger event" for pre-emption. The trigger event is usually the owner's desire to sell the property. It may happen that a third party approach the owner with a desire to purchase the property, but due to the right of pre-emption the owner's right of ownership (to sell) is limited. To avoid the operation of the pre-emptive right, the owner and the third party may consider concluding a long-term lease agreement, with or without the third party's knowledge of the pre-emptive right.

The problem that arises is where a long-term lease agreement is concluded with the aim to circumvent the operation of the pre-emptive, and whether this agreement triggers the pre-emptive right, alternatively, will this transaction, which conceals the true nature and purpose of the agreement, constitute a simulated contract? Will the aggrieved party have a remedy at their disposal in a situation where their personal right of pre-emption is infringed by a third party and against whom can they enforce its remedy?

The application of the doctrine of notice, i.e., whether the third party had knowledge of the pre-emptive holder's rights, affects the position, This doctrine of notice will determine against whom the respective parties have remedies at their disposal.

Regardless of this doctrine and whether the subsequent contract is considered as a simulated contract, the aggrieved party will have a remedy at their disposal.

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CHAPTER 1: INTRODUCTION

1.1 Background information and topic introduction

The term “immovable property” occurs in various Acts¹ relating to property. However, the specific term “immovable property” is only defined in the Insolvency Law Act 24 of 1936 as “land and every right or interest in land or minerals which is registerable in any office in the Republic intended for the registration of title to land or the right to mine”. Land as defined in the Alienation of Land Act 68 of 1981 “... means any land used or intended to be used mainly for residential purposes ...” The law of property is important, because it defines which rights a person has with regard to property.² A distinction is drawn between real rights and personal rights in respect of immovable property (“*property*”).³ The reason for this is that real rights bind a particular immovable property, and, consequently, such rights bind the successors in title of the property (all other persons), whereas personal rights bind a particular person, and such rights are only enforceable *inter partes*.⁴

Section 63(1) of the Deeds Registries Act 47 of 1937 provides that personal rights cannot be registered over property. However, in the matter of *Ex parte Zunckel* 1937 NPD 295 the court held that any condition restricting the exercise of a right of ownership is capable of registration where the people, who are entitled to enforce it, are ascertainable.⁵ A pre-emptive right restricts an owner’s ability to exercise its right of ownership in respect of the property and is capable of registration.⁶

¹ Alienation of Land Act 68 of 1981; Deeds Registries Act 47 of 1937; Immoveable Property (Removal or Modification of Restrictions) Act 94 of 1965; Formalities in respect of Leases of Land Act 18 of 1969.

² Nagel, C. J. Kuschke, B. & Barnard, J. (2019). *Commercial Law* (6th ed). Lexis Nexis at para 1.23.

³ *Ibid.*

⁴ *Ibid* at para 3.02.

⁵ *Ibid* at page 299.

⁶ Badenhorst, P. J. (2001). *Erroneous omission of real rights from subsequent title deeds* Cape Explosive Works Ltd; *AECI Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) at para 12; *Erlax Properties (Pty) Ltd v Registrar of Deeds* [1991] ZASCA 187; 1992 (1) SA 879 (A) at 885B..

In the matter of *Rodgers v Philips* 1985 (3) 183 ECD the court found that a pre-emptive right, which is a personal right, upon registration thereof in the relevant Deeds Office, remains a personal right in favour of the holder. A long-term lease agreement is, without registration thereof, a personal right between the lessor and the lessee.⁷ Upon registration of a long-term lease agreement the lessee is granted with a real right.⁸

The traditional view is that a real right prevails over a personal right, even if such personal right came into existence or was registered prior to registration of the real right.⁹

Whenever a real right in land is created, the competing interests of the parties involved must be reconciled by law.¹⁰ Ownership in respect of property is the greatest real right a person (the owner) can have with regard to the property,¹¹ which can be burdened by the registration of another real right or limited real right over the property of the owner in favour of a third person.¹² A pre-emptive right, which is personal in nature, can, as mentioned above, be registered over a property restricting the owner's ability to deal independently with the property. For instance, should the owner decide to sell the property, consent has to be obtained from the holder of the pre-emptive right to sell the property.

This dissertation will deal specifically with the personal right of pre-emption and the real right upon registration of a long-term lease agreement. A pre-emptive right (or right of first refusal) is referred to in *Hirschowitz v Moolman* 1985 (3) SA 739 (A) as a right affording the holder of such a right a preference to buy a particular property should the owner wish to sell it.¹³

⁷ Section 1(a) of the Formalities in respect of Leases of Land Act 18 of 1969.

⁸ *Ibid.*

⁹ *Hassam v Shaboodien* 1996 (2) SA 720 (C) 724H-I.

¹⁰ Caterina, R. (2012). *Setting the scene*. In C. Van Der Merwe & A.-L. Verbeke (Eds.), *Time limited interests in land*. Cambridge: Cambridge University Press at page 6. doi:10.1017/CBO9781139206709.004

¹¹ Van Der Walt, A. A. & Dhliwayo, P. (2017). The notion of absolute and exclusive ownership: doctrinal analysis. *South African Law Journal*, 134(1), at page 42; *Gien v Gien* 1979 (2) SA1113 (T) at pages 1120C-1122C.

¹² *Ex parte Zunckel* 1937 NPD 295.

¹³ *Hirschowitz v Moolman* 1985 (3) SA 739 (A) at page 743; Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed). Lexis Nexis at para 4.67 and para 15.11; *Owsianick v African*

Circumstances may arise where the owner is tempted to sell the particular property to a third party rather than the holder of the pre-emptive right. In an attempt to avoid the operation of the pre-emptive right the owner may consider concluding a contract, other than a sale agreement, with a third party to achieve this. An option in this regard is to conclude a long-term lease agreement, which is not a sale agreement, but, in essence, has the same effect as a sale agreement depending on the intentions of the contracting parties and the length of the long-term lease agreement. Whether it is the true intention of the owner and the third party to avoid the operation of the pre-emptive right will depend on the circumstances in terms of which the subsequent contract is concluded.

The contract's genuineness will determine whether a contract is simulated.¹⁴ The law allows people to arrange their contractual and business affairs in a such a way as to derive a benefit from a circumstance where a different arrangement would not be allowed or be permitted by law.¹⁵ The court will, however, give effect to its genuineness and if it is concluded to conceal an underlying transaction, the court will give effect to the underlying transaction.¹⁶ That is to say, if the purpose of the contract is only to achieve an outcome that allows the avoidance of the operation of the pre-emptive right, then it will be regarded as simulated.¹⁷ Parties may not enter into agreements to conceal the true nature of their transaction. In the matter of *Michau v Maize Board*¹⁸ the appellant concluded two agreements with Rainbow Chickens Farms (Pty) Ltd ("Rainbow"). The first being an agreement in terms of which the appellant hires a broiler site for a specific summer season from Rainbow. Rainbow, in return, sells its entire stock of chickens to the appellant at the beginning of the season and repurchases its stock at a higher price at the end of the season. The second agreement was concluded in terms of which Rainbow was appointed as a manager to

Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A) at page 343; Sonnekus JC (2018) *Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regsobjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar* Journal of South African Law, 2018(3) at page 630.

¹⁴ *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* (2014) 2 All SA 654 (SCA) at para 26.

¹⁵ *Ibid* at para 26.

¹⁶ *Ibid* at para 27.

¹⁷ *Commissioner of the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA).

¹⁸ [2003] JOL 11475 (SCA).

manage the broiler operation and to take proper care of the chickens for the season. In essence, the appellant used their own maize to feed their chickens. The reason for the conclusion of these contracts was that should the appellant utilise or sell the maize to the respondent in this matter or anyone who deals in the course of trade with maize, levies are imposed by the Summer Grain Scheme. But should the appellant utilize the maize for their “own household consumption or farming operations”, no levies are payable. The court found that the “obvious intention” of the appellant was to avoid the payment of the levies and in fact sold their maize to Rainbow in terms of which levies were payable.

1.2 Research problem

The research problem to be investigated is whether the registration of a long-term lease agreement over property (a real right), upon which a pre-emptive right is registered (personal right), triggers the operation of the pre-emptive right, alternatively which right will prevail in this regard. Controversy exists with regard to which right will prevail, the real right or the personal right.

With regard to the operation of the pre-emptive right, it is necessary to establish what is meant by a “trigger event”. The trigger event is usually the owner’s manifestation of a decision to sell,¹⁹ in other words, the owner’s intention to sell his/her property. The operation of the pre-emptive right is entirely in the control of the owner of the particular property pertaining to his/her willingness to sell. Once an owner manifests a desire to sell, the right of pre-emption takes effect.²⁰

To avoid the operation of the pre-emptive right, the owner and the third party may consider concluding another transaction that is not a sale, like a long-term lease agreement. The critical question which arises is whether this long-term lease agreement will trigger the pre-emptive right or will it constitute a simulated contract by disguising the true intentions of the parties to the long-term lease agreement. In the

¹⁹ Bhana, D. (2008). The contract of pre-emption as an agreement to agree. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 71(4), 568 at 571.

²⁰ Bhana, D. (2010). The enforcement of pre-emption: proposed new form of specific performance. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 73(2), 293 at 297.

event that a simulated contract is concluded in respect of the property to the detriment of the pre-emptive right holder, what are the consequences and alternatively, what remedies do the respective parties have against each other?

In the matter of *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA), which will be dealt with in detail later, the court held that the test whether a transaction is simulated should be by considering the contract's real substance and purpose²¹ and not only the intention of the contracting parties. If the only purpose of the contract is to achieve an object that allows the evasion of a peremptory law, it will then be regarded as simulated. In *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) the court held that motive and purpose differ from intention and that a distinction should be made in order to determine the genuineness of a contract.

The application of the doctrine of notice regarding whether the third party had knowledge of the holder's rights, affects the position. In the matter of *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267,²² the Court held that where a party bears knowledge of the existence of a prior personal right, the third party should adhere thereto even if such personal right is not registered against the land. The application plays an evident role as to determine what the respective parties' remedies are in a situation where the third party had knowledge and a situation where the third party had no knowledge.

In *Reynders v Rand Bank Bpk* 1978 (3) All SA 43 (T) the court held that where a real right is in competition with a personal right, the basic principle of the South African law is that the real right prevails even if the personal right existed prior in time.²³ With regard to the question whether the third party had knowledge of the existing personal right, the court was unpersuaded that either in principle or on authority that the doctrine of notice was extended to destroy the validity of a subsequent acquired real right where the third party had knowledge of the prior personal right.²⁴ The court, however, held

²¹ *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA), at para 55.

²² *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 at page 280.

²³ *Reynders v Rand Bank Bpk* 1978 (3) All SA 43 (T) at page 47.

²⁴ *Ibid* at page 54.

further that it does not leave the holder of the personal right without a remedy and the holder can claim damages from the (then) owner.²⁵

Contrary to the above matter, the court in *Hassim v Shaboodien and Others* 1996 (1) All SA 182 (C) questioned the correctness of the decision in the *Reynders* matter. The court held that the traditional view that a real right is stronger than a personal right, but it regards it inequitable to grant a person's right preference where that person acquired a real right with the knowledge of the existence of an earlier personal right.²⁶ The reason for this view is that it is regarded as fraud if a person attempts to defeat such a holder's rights.²⁷ Another question arises regarding the application of the doctrine of notice, which is if mere knowledge on the third party's part of the holder's personal right is sufficient, or should a "fraudulent conspiracy" be present.²⁸ In this case the court held that the holder of the right can rightfully claim damages from the person who caused the transfer, being the conveyancer, who had knowledge of the personal right and nevertheless proceeded with transfer of the property.²⁹ Further, in the matter of *Cussons v Kroon* 2002 (1) All SA 361 (A) the court emphasised that knowledge by the third party of a mere personal right is sufficient for the operation of the doctrine of notice.³⁰

This dissertation will deal with a hypothetical situation where A, the owner of a property, registered a pre-emptive right over the said property in favour of B. B does not agree to waive its pre-emptive right and accordingly, C cannot purchase the property. In an attempt to avoid the operation of the pre-emptive right, A and C conclude a long-term lease agreement over the property. To what extent is the pre-emptive right enforceable against C who now wishes to register a long-term lease agreement over the property? The parties' competing interests in the property will be the existing pre-emptive right (personal right) registered over the property and the long-term lease agreement (real right upon registration) to be registered over the same property.

²⁵ *Ibid* at page 55.

²⁶ *Hassim v Shaboodien and Others* 1996 (1) All SA 182 (C) at page 187-188.

²⁷ *Ibid* at page 188.

²⁸ *Ibid* at page 188.

²⁹ *Ibid* at page 191.

³⁰ *Cussons v Kroon* 2002 (1) All SA 361 (A) at Page 11.

1.3 Research questions

- Which right is stronger when a prior personal right and a real right come into competition with each other?
- What triggers the operation of a pre-emptive right, with specific reference to the registration of a long-term lease agreement?
- Can a long-term lease agreement be concluded between the owner and a third party to avoid the operation of the pre-emptive right?
- What are the consequences of concluding a long-term lease agreement in competition with a prior personal right and what are the respective parties' remedies?

1.4 Methodology

The proposed research entails a literature study of books, journal articles, theses, legislation and case law. The study is specific with regard to the competing interests of a party's personal right and the other party's real right, in property. Comparative elements will be presented throughout the investigation.

There is not much case law regarding the specific hypothetical scenario.³¹ The basic principles of law of property and the basic principles of law of contract must be reconciled, which will be done by considering the law and the approaches of other countries in this regard.

South African law will be the starting point and an extensive investigation of other law regimes will be followed so as to consider whether such approaches can be implemented to potentially improve or benefit the South African system. A comparative study will be undertaken by investigating relevant aspects with reference to the English law, German law and Dutch law. South African law is influenced by English law and Dutch law and these systems have been improved over time. The South African law has also been developed and therefore the relevance to consider their approach in this regard. Both the legal systems of South Africa and Germany are of civilian origin

³¹ The hypothetical scenario stated in para 1.2 above pertaining to the research problem.

and follow an abstract system of acquiring ownership.³² However, German law is a codified system, whereas South African law is an uncodified system and the High Court has to be approached to intervene in order to resolve disputes.³³

³² Sonnekus, J. C. (2018), Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3), 624

³³ Otto, M. (2004). Germany and South Africa: a comparative study of their concepts of contract law and mistake. (Master's dissertation). Retrieved on 15 June 2021 from <https://scholar.sun.ac.za/handle/10019.1/49976>.

CHAPTER 2: PERSONAL RIGHTS AND REAL RIGHTS

2.1 Introduction

Efficient exploitation of land can be achieved by leases, pre-emptive rights and *emphyteusis*, which are met by the law of contract.³⁴ Contracts only create personal rights, which introduces an element of risk if the land is alienated and is not enforceable against the new owner.³⁵ “The law plays an important role in reconciling the competing interests of the parties involved”.³⁶

Different legal systems engage with the distinction between personal rights and real rights and the effects of these respective rights. Instead of personal rights, German law refers to obligatory rights, but for purposes of this paper, it will be referred to as personal rights. As mentioned earlier, the effect of pre-emptive rights compared to long-term lease agreements will be dealt with.

2.2 Pre-emptive rights

2.2.1 Introduction

A pre-emptive right affords the holder thereof the first opportunity to purchase a property from the owner before it is offered to a third party, alternatively where the property in question is put up for sale by offering it first to the holder of the pre-emptive right.³⁷ The registration of a pre-emptive right, if possible, depending on the jurisdiction, does not create a real right, but it has practical consequences similar to

³⁴ Caterina, R. (2012). *Setting the scene*. In C. Van Der Merwe & A.-L. Verbeke (Eds.), *Time limited interests in land*. Cambridge: Cambridge University Press at page 3. doi:10.1017/CBO9781139206709.004

³⁵ *Ibid* at page 3.

³⁶ *Ibid* at page 6.

³⁷ Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed). Lexis Nexis at para 4.67 and para 15.11; *Hirschowitz v Moolman* 1985 (3) SA 739 (A); Naude T (2006) Which transactions trigger a right of first refusal or preferential right to contract? *South African Law Journal*, 123(3), 461; Bhana, D. (2010). The enforcement of pre-emption: proposed new form of specific performance. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 73(2), 293 at 289.

that of real rights,³⁸ like protecting the holder of the pre-emptive right should a third party wish to purchase the same property.³⁹

2.2.2 South African law

Pre-emptive rights in South Africa are a contractual right affording the holder the first opportunity to purchase the property before offering it to a third party.⁴⁰ Registration of this contractual right does not affect its enforceability against others, it remains a personal right, but it does restrict the owner's exercise of right of ownership. Limited real rights (pre-emptive rights) are an *ius in re aliena* based on two relationships, namely, in this instance, a relationship between the property and the pre-emptive right holder, and a relationship between the pre-emptive right holder and all third parties, including the owner of the property.⁴¹

In law of contract, a personal right is binding *inter partes*, meaning it is not enforceable against third parties.⁴² Only the parties to the contract creating the personal right are protected under the contract. A real right, on the other hand, is binding against successors in title, meaning it is binding against third parties and not only with regard to the parties to the contract.⁴³ Dividing personal rights and real rights, or registration of time-limited interests in the relevant deeds office as the overriding factor, will attribute more weight than is justified in circumstances where these rights come into competition with one another.⁴⁴

In South African law the basic principle is that real rights prevail over personal rights when they come into competition with one another, even if the personal right was

³⁸ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3), 633.

³⁹ *McGregor v Jordaan* 1921 CPD 301 at page 309.

⁴⁰ *Hirschowitz v Moolman* 1985 (3) SA 739 (A).

⁴¹ Pienaar, G. (2015). The effect of the original acquisition of ownership of immovable property on existing limited real rights. *Potchefstroom Electronic Journal*, 18(5) at pages 1489-1490. doi:10.4314/pej.v18i5.07

⁴² Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed). Lexis Nexis at para 3.02.

⁴³ *Ibid.*

⁴⁴ Van der Merwe, C. (2012). *General Introduction*. In C. Van Der Merwe, & A.-L, Verbeke (Eds.), *Time limited interests in land* (pp. 12-18). Cambridge: Cambridge University Press at page 14. doi:10.1017/CBO9781139206709.005

registered prior to the real right.⁴⁵ Time-limited interests in land extend to both the law of contract and property law, and is embodied in the fundamental distinction between personal rights and real rights.⁴⁶ The doctrine of notice provides that if the acquirer of the real right had knowledge of the prior existing personal right and which real right will be in competition with the prior existing personal right, effect must be given to the prior existing personal right.⁴⁷ Consequently, it is an exception to the basic principle as aforesaid.

2.2.3 English law

In English law a pre-emptive right over a property provides the holder thereof priority to any other buyer to purchase the property.⁴⁸ A pre-emptive right is an “estate contract” in law and can be registered against the property whereafter the property cannot be sold to a third party if the pre-emptive right is not cleared.⁴⁹

In the matter of *Pritchard v Briggs*⁵⁰ the Court of Appeal held that a pre-emptive right was not an interest in land which is capable of protection by registration. However, the right “matures” into a “proprietary interest” when the obligation to make the offer arises. The obligation to make an offer is then seen as the trigger event of the pre-emptive right. The aforesaid matter was adjudicated before the implementation of the Land Registration Act 2002, which now provides clarity in this regard.

Section 115 of the Land Registration Act 2002 provides that a pre-emptive right has effect from the date the interest is created in relation to registered land and is capable of binding successors in title. This section is, however, only applicable to pre-emptive rights created after 13 October 2003, the date upon which the said Act came into

⁴⁵ *Hassam v Shaboodien* 1996 (2) SA 720 I 724H-I.

⁴⁶ Van der Merwe, C. (2012). *General Introduction*. In C. Van Der Merwe & A.-L Verbeke (Eds.), *Time limited interests in land* (pp. 12-18). Cambridge: Cambridge University Press at page 12. doi:10.1017/CBO9781139206709.005

⁴⁷ *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24B.

⁴⁸ Unknown. (2020). *Options, conditional contract and pre-emption rights*. Net Lawman, UK-IA-PR04. Retrieved 8 November 2021 from <https://www.netlawman.co.uk/ia/options-pre-emption-rights#A%20right%20of%20pre-emption>; section 115 of the Land Registration Act 2002.

⁴⁹ *Ibid.*

⁵⁰ [1980] Ch 338.

effect. The effect of this section is that the holder's pre-emptive right would have priority over a subsequent right (to be) registered over the property, subject thereto that the pre-emptive right is registered prior to the registration of the subsequent right.

The position before the commencement of the Land Registration Act 2002 is that the holder of the pre-emptive right has to register such right against the owner's title to prevent the owner from transferring the property.⁵¹ Section 29 of the Land Registration Act 2002 provides that if the pre-emptive right is not protected by notice (registration) in the Land Register, the third party to a subsequent contract with the owner will not be bound thereto because of the effect of dispositions on priority.

Therefore, a pre-emptive right is a personal right and only bind the parties to the contract but has the effect of a real right upon registration thereof in the Land Register.

2.2.4 German law

German law provides that a pre-emptive right is a right granted to the holder to purchase a property in question when it is put up for sale.⁵² A pre-emptive right can be given as a personal right to a person or to the owner of another real property.⁵³ A distinction is therefore made where the right is executed by a real property or by a person.⁵⁴ This distinction will also determine whether the right is classified as a real right or as a personal right. Where the right is executed by a real property and beneficial to ownership of the dominant real property, such right is a real property right.⁵⁵ Where the right is executed by a person and it limits the right of ownership so that the owner must tolerate certain conditions, such right is then a personal right.⁵⁶ Further rights of pre-emption under the German legal system include a municipal pre-

⁵¹ Unknown. (2019). *Does a right of pre-emption run with the land and bind all successors-in-title if it is not expressly set out in the transfer and then noted against the title as a restriction or notice?* LexisPSL 18 February. Retrieved on 8 November 2021 from <https://www.lexisnexis.co.uk/legal/guidance/does-a-right-of-pre-emption-run-with-the-land-bind-all-successors-in-title-if-it-is-not-expressly-set>

⁵² German Civil Code (BGB), section 473; Paasch, J. (2005). *Modelling Dutch Rights and Restrictions for Real Property Transactions* COST Scientific Report at page 59.

⁵³Section 1094 of the BGB.

⁵⁴ Paasch, J. (2005). *Modelling Dutch rights and restrictions for real property transactions* COST Scientific Report at page 59. KTH (Royal Institute of Technology), Stockholm, Sweden.

⁵⁵ BGB, section 1103(1).

⁵⁶ BGB, section 1103(2).

emption right,⁵⁷ a pre-emption right in a hereditary building right⁵⁸ and a pre-emption right between co-heirs when one of the co-heirs wants to sell his/her share of the estate.⁵⁹ The basic principle under the German Law is that the right of pre-emption is not transferable and does not pass to the heirs of the holder.⁶⁰ The legal relationship between the person entitled and the person obliged is governed by the provisions of the German Civil Code (hereinafter referred to as the “BGB”).

The right of pre-emption can be given real effect against third parties by prior notice in the Land Register.⁶¹ The registration of the priority notice does not create a real right, but it protects the holder’s pre-emptive right against third parties to purchase the property.⁶² The aforesaid is confirmed in the matter of *BverfGE* 83,201 – 1991 NJW 1807 where the German Constitutional Court held that the holder of the pre-emptive right is not granted a real right or real remedy from the pre-emptive agreement.

2.2.5 Dutch law

Book 5 of the Dutch Civil Code provides an exhaustive list of real property rights, being easement,⁶³ long leasehold,⁶⁴ right of superficies⁶⁵ and apartment rights.⁶⁶ A pre-emptive right is not regarded as a real property right. In the Netherlands private pre-emptive rights are not provided for in law, but are performed by a contractual agreement between parties.⁶⁷ The law, however, does make provision for municipal pre-emptive rights.⁶⁸ Municipal pre-emptive rights are executed by the municipality on

⁵⁷ Federal Building Code (Baugesetzbuch, BauGB), sections 24 to 28.

⁵⁸ Hereditary Building Right Law.

⁵⁹ BGB, section 2034(1).

⁶⁰ BGB, section 473.

⁶¹ Van Der Merwe, C. & Verbeke, A.-L. (Eds.). (2012) The effect of an option to purchase and an obligation to maintain in land development. In *Time limited interests in land* (pp. 431-447). Cambridge: Cambridge University Press at page 432. doi:10.1017/CBO9781139206709.005

⁶² *Ibid* at page 440.

⁶³ Title 5.6 of the Dutch Civil Code.

⁶⁴ Title 5.7 of the Dutch Civil Code.

⁶⁵ Title 5.8 of the Dutch Civil Code.

⁶⁶ Title 5.9 of the Dutch Civil Code.

⁶⁷ Hertel, C. and Wicke, H. (2005). *Real property law and procedure in the European Union: General report* at page 18. European University Institute (EUI) Florence / European Private Law Forum / Deutsches Notarinstitut (Dnotl) Würzburg. Retrieved 19 May 2021 from <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Germany.PDF>

⁶⁸ Paasch, J. (2005). Modelling Dutch rights and restrictions for real property transactions COST Scientific Report at page 61. KTH (Royal Institute of Technology), Stockholm, Sweden.

property for sale within their boundaries in terms of The Municipal Pre-Emption Rights Act, provided that the right is claimed by the municipality before the sale.⁶⁹ Personal pre-emptive rights are created between the parties by way of concluding a contract to the effect, which is regulated by the content of Book 7 of the Dutch Civil Code. In principle, a personal pre-emptive right only provides a personal right by virtue of the contractual agreement between the parties and cannot be registered, but municipal pre-emption legislation makes provision that contracts containing pre-emptive rights in favour of the municipality can be registered.⁷⁰

Consequently, a private pre-emptive right which is exercised by a person constitutes a personal right.

2.3 Lease agreements

2.3.1 Introduction

Lease agreements with regard to property entered into between parties create reciprocal obligations in terms of which the lessor undertakes to give the lessee the temporary use and enjoyment of the property in exchange for a counter-performance from the lessee.⁷¹ It is a lesser form of ownership. The lessor's duties are to deliver the property to the lessee and to maintain the property throughout the duration of the lease in order to protect the lessee's undisturbed possession or occupation and compensation to the lessee for attachments and improvements.⁷² The lessee's duties are to pay rent and to take proper care and use of the property and to deliver it to the lessor upon expiry of the lease agreement.⁷³

⁶⁹ *Ibid.*

⁷⁰ Ploeger, H., van Velten, A., & Zevenbergen, J. (2005). *Real property law and procedure in the European Union: Report for the Netherlands*. Retrieved on 24 September 2021 from <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/TheNetherlands.PDF>.

⁷¹ Nagel, C. J. Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 16.11.

⁷² *Ibid* at para 17.03.

⁷³ *Ibid* at para 17.43.

In most jurisdictions leases are enforceable against third parties, irrespective of the potential new owner's knowledge to the existence of the lease.⁷⁴ In South Africa, the potential new owner will only be bound if he/she had knowledge of the lease on transfer of the property, but it does not leave the aggrieved party without a remedy.⁷⁵ In Germany and the Netherlands where leases cannot be registered, the enforceability of the lease is based on the maxim "sale does not supersede hire" or "hire trumps sale", or a more familiar term "huur gaat voor koop", together with possession of the property.⁷⁶ Also in these circumstances, it does not leave the aggrieved party without a remedy in the event of non-disclosure.⁷⁷ English law regulates lease agreements by virtue of the Law of Property Act 1925 and provides for certain formalities in terms of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 in creating a lease. With regard to the definitions under the Law of Property Act 1925, a lease is included under the terms 'conveyance' and 'disposition' and lease has a corresponding meaning under the Law of Property (Miscellaneous Provisions) Act 1989. Registration of the time-limited interest in the Land Register, where possible, provides notice to third parties and third parties cannot raise ignorance as a defence in this regard, regardless of non-disclosure of the lease by the owner of the property.⁷⁸ However, German land registers are not available for public inspection, but a person who can establish a "legitimate interest" in the property can have access to the land register and documents filed with the land registry office.⁷⁹

2.3.2 South African law

Lease agreements in South Africa are distinguished between short-term lease agreements and long-term lease agreements. Formalities are laid down in respect of long-term leases.⁸⁰ Short-term leases are leases with lease periods of less than ten

⁷⁴ Van Der Merwe, C. & Verbeke, A.-L. (Eds.). (2012). What happens if land subject to a time-limited interest is conveyed to a third party? In *Time limited interests in land* (pp. 132-156). Cambridge: Cambridge University Press at page 132. doi:10.1017/CBO9781139206709.005

⁷⁵ *Ibid* at page 133.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid* at page 134.

⁷⁹ Bonhage, J. & Lang, T. (2021). *The real estate law review: Germany*. *The Law Reviews*. Available on 13 June 2021 from: <https://thelawreviews.co.uk/title/the-real-estate-law-review/germany>.

⁸⁰ Formalities in respect of Leases of Land Act 18 of 1969.

years whereas long leases are leases with lease periods of more than ten years.⁸¹ Short-term lease agreements cannot be registered against the title deed(s) of the property but provide the lessee nonetheless with a real (limited) right for the first (less than) 10 years in respect of the property in question, provided that the lessee is and stays in possession of the property for the lease period.⁸² Short-term lease agreements do not form part of this dissertation, but it is worth mentioning that a short-term lease is valid against a successor of the lessor, if the successor knew of the lease.⁸³ Long-term lease agreements are regulated by the Formalities in respect of Leases of Land Act 18 of 1969 and prescribe certain formalities for the validity thereof. Lease of land does not have to be in writing for it to be valid.⁸⁴ If the lease between the parties is entered into for a period of ten years or more, or for the natural life of the lessee, it will be valid against creditors or successors under onerous title of the lessor if it is registered against the title deed(s) of the leased land.⁸⁵ Accordingly, once the long-term lease agreement is registered against the title deeds of the property, the lessee is granted a real (limited) right in respect of the property.

2.3.3 English law

The most common way under the English law in which time-limited interests are created over land is by way of a lease.⁸⁶ A distinction has to be made between leases that are entered into by a contract and which must be in writing in terms of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (“*LPMP lease*”) and leases that are granted by a deed in terms of section 52 of the Law of Property Act (“*LP lease*”). With regard to the last mentioned leases, these can be entered orally if the lease period does not exceed three years, but, for purposes of evidence of such leases, they are usually accompanied by a written contract.⁸⁷

⁸¹ Nagel, C. J. Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 17.32.

⁸² *Ibid*.

⁸³ *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Yuonus Moosa N.O. and Others* Case number: 4063/2018D [Judgment: 12 October 2020] at para 47.

⁸⁴ Section 1(1) of the Formalities in respect of Leases of Land Act 18 of 1969.

⁸⁵ Section 1(1)(a) of the Formalities in respect of Leases of Land Act 18 of 1969.

⁸⁶ Van Der Merwe, C. & Verbeke, A. (Eds.). (2012). Various instances of time-limited interests. In *Time limited interests in land* (pp. 59-131). Cambridge: Cambridge University Press at 79. doi:10.1017/CBO9781139206709.005

⁸⁷ *Ibid* at page 81.

An LPMP lease is enforceable at equity, which constitutes an equitable lease.⁸⁸ Equitable leases are protected from third parties when notice thereof is placed on the registered title of the land in respect of which the lease is granted.⁸⁹ If such notice is not placed on the registered title of the land, the lessee can still be protected if the lessee is still in occupation of the land at the time of the purchase.⁹⁰

An LP lease, which is granted by deed and which lease duration does not exceed seven years, is enforceable against third parties.⁹¹ If such lease, however, exceeds seven years it has to be registered under its own title. If it is not registered it will not bind third parties and will only have effect at equity and it will provide the same protection as LPMP leases stipulated above.

The English law does not speak specifically of personal or real rights with regard to leases, but it is self-evident that where the lease is protected from third parties it is similar to that of a real right under the South African, German and Dutch law. Consequently, a lease under the English law establishes a real right in favour of the lessee against the lessor and third parties.

2.3.4 German law

No distinction is made between short-term- and long-term lease agreements under the German law. However, if the parties' intentions are to conclude a lease agreement of residential property for less than one year, that agreement must be in writing.⁹² By failure, the lease agreement will apply for an indefinite period of time and termination thereof must be in accordance with statutory provisions.⁹³ Writing is not a strict legal requirement to constitute a valid lease agreement of property.⁹⁴ A right of lease is not recognised as a real right and is not capable of registration in the Land Register.⁹⁵

⁸⁸ *Ibid* at page 80.

⁸⁹ *Ibid* at page 81.

⁹⁰ *Ibid* at page 81.

⁹¹ *Ibid* at page 82.

⁹² Section 550, BGB.

⁹³ *Ibid*.

⁹⁴ Van Der Merwe C and Verbeke A (eds) (2012) *Various instances of time-limited interests in Time Limited Interests in Land* (pp. 59-131). Cambridge: Cambridge University Press at 91.

⁹⁵ *Ibid*.

Although it is not a real right, the right of lease does have certain proprietary effects and is subject to the “huur gaat voor koop”.⁹⁶

2.3.5 Dutch law

Dutch law does not provide for any formal requirements to constitute a lease agreement. No fixed period for leases is prescribed to distinguish between short-term- and long-term lease agreements. Although lease agreements do not have to be in writing and registration thereof in the Land Register is not required or possible, a lease is nonetheless enforceable against third parties.⁹⁷ Therefore, leases provide the lessee with a real (limited) right.

2.4 *Emphyteusis*

The term *emphyteusis* has been known since 1618.⁹⁸ The emphyteutic lease is well established in Greek law⁹⁹ and its legal term means “a perpetual right in a piece of another’s land”.¹⁰⁰ It grants the holder of the perpetual right the enjoyment of the property, subject to improving and maintaining the property as well as paying a minimum rent. *Emphyteusis* differs from a lease agreement in that a lease agreement must be for a fixed and definite period of time¹⁰¹ whereas *emphyteusis* is a lease for an indefinite period for as long as rent is paid and subject to further conditions as mentioned above.¹⁰² This form of lease is now seldom used in practice in South Africa and legislation provides for existing hereditary land leases to be converted to full ownership.¹⁰³

⁹⁶ Section 566(1) of the BGB.

⁹⁷ Book 7, Title 7.4.4, Article 7:226(1) of the Dutch Civil Code.

⁹⁸ Shirlaw, L. (1979). *Emphyteusis*. *British Medical Journal*, 2, 502. <https://doi.org/10.1136/bmj.2.6188.502-a>

⁹⁹ Johnston, W. R. (1940). *Emphyteusis: A Roman “Perpetual” Tenure*. *The University of Toronto Law Journal*, 3(2), 323–347. <https://doi.org/10.2307/824317>

¹⁰⁰ Shirlaw, L. (1979). *Emphyteusis*. *British Medical Journal*, 2, 502. <https://doi.org/10.1136/bmj.2.6188.502-a>

¹⁰¹ *The Transvaal Silver Mines v Le Grange, Jacobs N.O. and Fox* (1891-1892) 4 SAR TS 13.

¹⁰² *The Transvaal Silver Mines v Le Grange, Jacobs N.O. and Fox* (1891-1892) 4 SAR TS 13.

¹⁰³ Van Der Merwe C and Verbeke A (eds) (2012) *Various instances of time-limited interests in Time Limited Interests in Land* (pp. 59-131). Cambridge: Cambridge University Press at page 126.

Germany still makes use of hereditary building rights and such a right is recognised as a real right.¹⁰⁴ Consequently, for the recognition of this right it must be executed notarially and registered in the Land Register to be valid.¹⁰⁵ The Netherlands also recognises a hereditary land lease (*emphyteusis*), which must be embodied in a notarial deed, indicating the parties' intention to create the right, and must further be registered in the Land Register to be valid.¹⁰⁶ There is no room for *emphyteusis* under English law. Section 1(1) of the Law of Property Act 1925 provides that “the only estates in land which are capable ... of being conveyed are (a) an estate in fee simple absolute possession”, which is ownership, and “(b) a term of years absolute”, which is a lease. A lease can only be valid if the duration of the lease is certain¹⁰⁷ and, accordingly, the English law does not provide for indefinite leases.

¹⁰⁴ Law on heritable building rights (Erbbaurechtsgesetz-heritable building RG)]

¹⁰⁵ Van Der Merwe C and Verbeke A (eds) (2012) *Various instances of time-limited interests in Time Limited Interests in Land* (pp. 59-131). Cambridge: Cambridge University Press at page 93.

¹⁰⁶ *Ibid* at page 105.

¹⁰⁷ *Ibid* at page 80.

CHAPTER 3: WHAT TRIGGERS A PRE-EMPTIVE RIGHT?

3.1 Introduction

Under a contract of pre-emption, it is assumed that an enforceable obligation to make an offer arises upon the occurrence of a “trigger event”.¹⁰⁸ A “trigger event” is defined as a “manifestation of a decision to sell”.¹⁰⁹ This may be something less than an offer by the owner to a third party and prior to the actual conclusion of a contract.¹¹⁰ A lesser manifestation of a desire to sell implies a situation such as where the owner notifies an estate agent or valuator of his/her desire to sell.¹¹¹ An ordinary advertisement does not constitute an offer in terms of contract law, but Melvin Eisenberg argues that most people would believe that advertisements are offers, contrary to the technical rule of contract law.¹¹² Where both parties subjectively believe that a contract was concluded between them, it is sufficient, under modern American contract law, that a contract came into existence.¹¹³ The respective actions of the parties can be seen as an offer and acceptance by the parties, but an interpretive question should be asked as to the parties’ intent and expectations.¹¹⁴ A mere utterance of a promise, alternatively an offer and acceptance, are not sufficient; greater sensitivity to the parties’ actions should be considered.¹¹⁵ Third party contracts exist which create uncertainty as to whether the trigger event occurred, because the parties’ intentions are difficult to determine in the preference agreement. These third party contracts are, for example, a sale in execution (an involuntary sale), a non-arm’s length sale between

¹⁰⁸ Naude, T. (2011). Pre-emption agreements and the myth of the “trigger event” as any manifestation of a decision to sell: a response to Deeksha Bhana *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 74(1), at page 90; Naude T (2006) Which transactions trigger a right of first refusal or preferential right to contract? *South African Law Journal* , 123(3), 462; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 345.

¹⁰⁹ Naude, T. (2011). Pre-emption agreements and the myth of the “trigger event” as any manifestation of a decision to sell: a response to Deeksha Bhana. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 74(1), at page 88.

¹¹⁰ *Ibid* at page 88; Bhana, D. (2010). The enforcement of pre-emption: proposed new form of specific performance. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 73(2), 293 at 291.

¹¹¹ *Ibid* at page 89.

¹¹² Bayern, S. J. (2015). Offer and acceptance in modern contract law: a needless concept. *California Law Review*, 103, 67-102. at page 72. Retrieved on 13 June 2021 from <https://ir.law.fsu.edu/articles/40>.

¹¹³ *Ibid* at page 74.

¹¹⁴ *Ibid* at pages 76 and 86.

¹¹⁵ *Ibid* at page 98 and 101.

commercially related parties or a relative, or a 99-year lease agreement.¹¹⁶ The types of transactions that trigger the pre-emptive right is a matter of interpreting the contract and the intention of the contracting parties. In the matter of *Bellairs v Hodnett*¹¹⁷ Bellairs sold his shares (at cost price) in Northcliff Townships (Pty) Ltd (“*Northcliff*”) to Picked Properties (Pty) Ltd (“*Picked*”). Hodnett had a right of pre-emption pertaining to the said shares. Bellairs *bona fide* regarded Picked as his company, as sole shareholder, who merely holds his shares. When Picked proposed to sell the shares to a third party, these were first offered to Hodnett in terms of the pre-emptive right, which offer Hodnett accepted. Hodnett argued that the initial sale between Northcliff and Picked breached his right of pre-emption and claimed that he was entitled to purchase the shares at the same (low) price that Picked purchased the shares initially from Northcliff and accordingly, claimed damages. The court did not rule on the breach of the pre-emptive right, but it did treat a sale to a company in which the seller was the sole shareholder of that company, as different to a sale to any other party. Whether an event gives rise to the right of pre-emption, could and should only be determined “upon the proper construction of the terms of the contract between the parties”.¹¹⁸ It is necessary to look at other law systems to answer the question whether the registration of a (long-term) lease agreement triggers the operation of a prior pre-emptive right. Only one matter under the South African case law could be found dealing with this specific scenario,¹¹⁹ which will be dealt with in detail below.

With long-term lease agreements, the desire to sell does not exist, meaning that the registration of a long-term lease agreement does not trigger the operation of the pre-emptive right. Alternatively, a lesser manifestation of a desire to sell can imply that the actions and intentions of the owner should be considered to determine whether the owner is in fact desired to sell his/her property, but to avoid the operation of the pre-emptive right enters into another contract (a long-term lease agreement) to circumvent the trigger event. A pre-emptive contract is a mere undertaking that the holder will be

¹¹⁶ Naude, T. (2006). Which transactions trigger a right of first refusal or preferential right to contract? *South African Law Journal*, 123(3), 463.

¹¹⁷ 1978 (1) SA 1109 (C).

¹¹⁸ *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 350.

¹¹⁹ *The Transvaal Silver Mines v Le Grange, Jacobs N.O. and Fox* (1891-1892) 4 SAR TS 10.

preferred above other buyers in the event that the owner desires to sell his/her property.¹²⁰

3.2 South African law¹²¹

The Appellate Division in the *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Bäckereien (Pty) Ltd*¹²² only allowed positive enforcement of the pre-emptive right upon clear breach by the owner by concluding a contract with a third party, who had knowledge of the existing pre-emptive right, without offering the property to the holder first. The court found that a lesser manifestation of a desire to sell was not sufficient. In the matter of *Ah Ling v Community Development Board*¹²³ the applicant is the registered owner of five properties. The applicant wrote five letters to the second respondent offering these five properties for sale at a specific price. The second respondent replied with an offer to purchase the properties at a lower price. The first three respondents contended that the applicant's offer i.e., the letters he wrote, triggered the pre-emptive right over the property in favour of them, because he had shown a desire to sell the properties. The court had to consider whether the letters written by the applicant triggered the pre-emption clause. The court held that the applicant's letters were nothing more than a "manifestation of a desire to dispose of the properties on a qualified basis, namely at a specific price".¹²⁴ The court cautioned that if anything less than a contract would trigger the pre-emptive right, the owner would be wary all the time of his/her conduct or statements which could be construed as a desire to sell.¹²⁵ Consequently, the court found that the writing of the letters did not trigger the operation of the pre-emptive right.¹²⁶ One should remember that the

¹²⁰ Naude, T. (2006). Which transactions trigger a right of first refusal or preferential right to contract? *South African Law Journal* 123(3), at pages 461 and 475; Nagel, C. J. Kuschke, B. & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 4.67 and para 15.11; *Hirschowitz v Moolman* 1985 (3) SA 739 (A); Bhana, D. (2010). The enforcement of pre-emption: proposed new form of specific performance. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 73(2), 293 at 289.

¹²¹ There is no legislation that protects the rights of the pre-emptive holder. Reference to case law is made to determine the position of the pre-emptive right holder where a possible of breach of the pre-emptive right exists.

¹²² 1982 (3) SA 893 (A).

¹²³ 1972 (4) SA 35 €.

¹²⁴ *Ibid* at page 39 H.

¹²⁵ 1972 (4) SA 35 € at page 40 A-D; Naude, T. (2004). The rights and remedies of the holder of right of first refusal or preferential right to contract. *South African Law Journal*, 121(3) at page 647.

¹²⁶ *Ibid* at page 40 F.

pre-emptive right is not to burden the owner's ability to deal with his/her property, it is merely granted to the holder to be offered to purchase the property first on any terms acceptable by the owner.¹²⁷ The manifestation of a willingness to sell or an obvious indication of a definite decision to sell, will usually be the "trigger event".¹²⁸ A pre-emptive right does not limit the owner's ability to deal with the property as they deem fit, as long as the owner does not contract with or make an offer to a third party for purchasing the property prior to the holder's opportunity to buy it first on the same terms.¹²⁹ In the matter of *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd*,¹³⁰ a third party sent Tiekiedraai Eiendomme (Pty) Ltd ("Tiekiedraai") an offer to purchase the property in an e-mail, together with the wording that certain terms still had to be agreed upon. A pre-emptive right in favour of Shell South Africa Marketing (Pty) Ltd ("Shell") was agreed upon between the parties by virtue of their lease agreement with terms stating that upon receipt of an offer from a third party, such offer must be presented to Shell. Tiekiedraai sent the offer to Shell to enable Shell to exercise its pre-emptive right within 30 days as agreed upon in terms of the lease agreement. The complete sale agreement was forwarded later to Shell. The dispute between the parties was related to when was the 30 day period to exercise the pre-emptive right triggered? The court held that the pre-emptive right was triggered on the day upon which the terms of the sale was complete and sent to Shell, not the day the e-mail was forwarded to Shell with the incomplete details. This case proves that each case must be considered with regard to its own facts as to when the operation of a pre-emptive right is triggered.

From the aforesaid, it is safe to conclude that under the South African law the mere conclusion of a long-term lease agreement does not trigger the operation of a pre-emptive right. The owner does not have the desire to sell its property and there is no definite indication that the owner wants to sell its property. The registration of a long-term lease agreement merely grants the lessee with a real right, which real right is subject to the conditions the parties agree upon, but is still lesser than ownership.

¹²⁷ Naude, T. (2011). Pre-emption agreements and the myth of the "trigger event" as any manifestation of a decision to sell: a response to Deeksha Bhana. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 74(1), at page 97.

¹²⁸ *Ibid* at page 94.

¹²⁹ *Ibid* at page 98.

¹³⁰ 2019 (7) BCLR 850 CC.

3.3 English law

English law, by way of case law, provides that pre-emption provisions will be enforced strictly and in accordance with their terms.¹³¹ The common trigger events are to assign, transfer or sell an interest in the property.¹³² This has given rise to various disputes because a party's intention is a subjective test.¹³³

English law makes specifically provision for the registration of certain dispositions in section 27 of the Land Registration Act 2002. Section 27(2)(d) of the said Act provides that "the express grant or reservation of an interest of a kind falling within section 1(2)(b) of the Law of Property Act 1925 are required to be completed by registration. Section 1(2)(b) of the Law of Property Act states a rent charge in possession issuing out of or charged on land being either perpetual or for a term of years absolute". Consequently, lease agreements for a period of longer than three years are required to be completed by registration.¹³⁴

Section 205(1)(ii) of the Land of Property Act 1925 provides that "conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning". Accordingly, a lease as well as a pre-emptive right (interest in property) are regarded as a disposition. The basic rule is that the priority of an interest affecting a registered estate is not affected by a disposition of the estate¹³⁵ and it makes no difference whether the

¹³¹ *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWCA Civ 179; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

¹³² Unknown. (2016). *Pre-emptive rights – do they add value*. Ashurst 1, August. Retrieved on 18 May 2021 from <https://www.ashurst.com/en/news-and-insights/legal-updates/pre-emption-rights-do-they-add-value/>

¹³³ *Ibid.*

¹³⁴ Section 33(2) of the Land Registration Act 2002.

¹³⁵ Section 28(1) of the Land Registration Act 2002.

disposition or interest is registered or not.¹³⁶ The priority of interests is determined by their date of creation.

There are conflicting views with regard to the trigger event of pre-emptive rights. In the matter of *Lyle & Scott v Scott's Trustees*¹³⁷ a company's articles of association contained pre-emption provisions, which were triggered by a shareholder "who is desirous of transferring his ordinary shares". By taking the series of steps taken by the shareholders into consideration, the House of Lords concluded that the shareholders intended to transfer their shares and were consequently "desirous" of transferring their shares, which triggered the right of pre-emption. In contrast to the matter of *Scotto v Petch*,¹³⁸ the Court of Appeal held in essence that pre-emption provisions will not be triggered if the parties enter into an agreement to circumvent the operation of the pre-emption provision, because the trigger event has not occurred. In this regard, the intention of the parties of the aforesaid matter was not taken into consideration, which is inconsistent with the first mentioned matter as well as the views of other legal systems.

In terms of section 115 of the Land Registration Act 2002, a pre-emptive right is an interest capable of binding successors in title, subject thereto that the right was created first in time and accordingly, will acquire priority over a subsequent right, like a lease for instance. The question still remains: will the registration of a lease after the registration of a pre-emptive right trigger the operation of the pre-emptive right?

3.4 German law

Section 463 of the BGB provides that "a person entitled to the right of pre-emption in respect of an object may exercise the right as soon as the person obliged by it has entered into a purchase agreement relating to the object with a third party". The trigger event is, accordingly, the moment when a purchase agreement is concluded with a third party. This stipulation provides the exact trigger event, as well as the exact terms of the purchase agreement acceptable to the owner (my emphasis). In this regard the

¹³⁶ Section 28(2) of the Land Registration Act 2002.

¹³⁷ [1959] AC 763 HL.

¹³⁸ [2001] BCC 889 CA.

German law is distinguishable from the South African law. South African law stipulates that if the holder's rights are only enforceable upon actual breach by the owner, it would largely impede the commercial effectiveness of a right of pre-emption.¹³⁹

Due to the trigger event being prescribed under German law, a (long-term) lease agreement does not trigger the operation of the holder's pre-emptive right. Accordingly, a (long-term) lease agreement can be concluded over a property where a pre-emptive right is agreed upon.

3.5 Dutch law

Pre-emptive rights are created by virtue of a contractual agreement between parties and are not regulated by the Dutch Civil Code or legislation.¹⁴⁰ With the incorporation of a pre-emptive right in a contract, the right cannot be enforced against a third party who was not a party to the contract.¹⁴¹ It is a personal right which does not have any effect on third parties.¹⁴² Long-lease agreements are provided for in Article 5.85 of the Dutch Civil Code and provide the lessee with a limited property right, which is established by a notarial deed. Unfortunately, no case law could be found with regard to what is considered as a trigger event of a pre-emptive right.

¹³⁹ *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 342.

¹⁴⁰ Hertel, C. and Wicke, H. (2005). *Real property law and procedure in the European Union: General report* at page 18. European University Institute (EUI) Florence / European Private Law Forum / Deutsches Notarinstitut (Dnotl) Würzburg. Retrieved 19 May 2021 from <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Germany.PDF>

¹⁴¹ Unknown. (2012). *Case 11 the effect of an option to purchase and an obligation to maintain in land development*. In C. Van Der Merwe & A.-L. Verbeke (Eds.), *Time limited interests in land*. Cambridge: Cambridge University Press at page 442. doi:10.1017/CBO9781139206709.004

¹⁴² *Ibid.*

CHAPTER 4: SIMULATED CONTRACTS

4.1 Introduction

Simulated contracts are contracts which disguise the true nature of the contract. Parties enter into a simulated contract to disguise another type of contract to achieve a certain goal. An example of this is the scenario upon which this dissertation is based: A has a pre-emptive right over the property of B. C wishes to purchase the property from B, but due to A's right over the property it is not possible and, accordingly, B and C conclude a long-term lease agreement to achieve the goal of purchase, despite the contract being titled as a long-term lease agreement. Joubert¹⁴³ states that often there is another type of contract that has as a typical purpose, precisely the purpose which the parties pursue. What happens then is that contractors who want to achieve object A, make use of contract type X, which contract is typically used to achieve object B, while there is another contract type Y to typically achieve object A. Contract type X is entered into in such instances instead of contract type Y because the terms applicable to contract type X are more favourable to the parties than the aggravating terms set out in contract type Y and therefore, using contract type Y will make it difficult for the parties to achieve their goal. Contract type X is then used in such a case instead of contract type Y with the intention to "circumvent" the aggravating terms of contract type Y. These circumstances are where the principles of simulation and the principles of *agere in fraudem legis* come into play. The application of these principles often prevents the parties from concluding contracts with more favourable terms.¹⁴⁴ The matter of *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) will be dealt with hereunder, providing an example where parties conclude a certain type of agreement which has more favourable terms.

The question as to why parties anticipate entering into a long-term lease agreement is demonstrated by Joubert above. If a property cannot be purchased by a third party due to a pre-emptive right over the property, another type of contract can be concluded

¹⁴³ Joubert, N. L. (1992). Simulasie, fraus legis en nuwe verkeerstipiese kontrakte. *South African Mercantile Law Journal*, 4(2), 137.

¹⁴⁴ *Ibid.*

between the parties to achieve the owner's and third party's objective, such as a long-term lease agreement. The only difference between a purchase agreement and long-term lease agreement, in this instance, is that the lessee will never obtain ownership, but ownership is not the main goal for the purpose of which the lessee want to use the property. In these circumstances, what are the consequences of the parties' actions? If the parties' sole intention were that the property cannot be sold due to the preemptive right and therefore the only way to circumvent the right is to conclude a long-term lease agreement, the subsequent long-term lease agreement can be seen as a simulated contract (my emphasis).

A general rule regarding the burden of proof in cases of alleged illegality is laid down in South African, English, German and Dutch law. In South African law, in the matter of *Michau v Maize Board*,¹⁴⁵ the court held that the party who alleges a contract to be simulated bears the *onus* of proving same. Also, in the matter of *Pratt v First Rand Bank Ltd*¹⁴⁶ it was found that the person seeking a declaration of invalidity of a contract due to its illegality bears the *onus*. In this matter the appellant and respondent concluded a loan agreement in terms of which the respondent lent an amount to the appellant. The amount was on the instructions of the appellant paid directly into an account held by a Trust in Jersey in the Channel Islands. The appellant failed to adhere to the terms of the loan agreement and the respondent indicated to take steps to enforce the terms of the agreement. The appellant took a preventative step and issued summons seeking a declaratory order that the agreement between the parties is null and void. The reason being is that the capital exported was in contravention of certain sections of the Exchange Control Regulations. The court concluded that the agreement was not in contravention of the Exchange Control Regulations. Consequently, the appellant did not discharge the *onus* of proving that the contract is invalid. German law also provides that a person alleging the illegality of a contract, bears the burden of proof.¹⁴⁷ Furthermore, in Dutch law it is provided that a party who raises a defence of "unreasonable" regarding contracts bears the *onus* of proving that the contract is unreasonable.¹⁴⁸ This is also confirmed in the English law in the matter

¹⁴⁵ 2003 JOL 11475 (SCA) – the facts of the matter is referred to above in para 1.1; *S v Coin Operated System (Pty) Ltd and Another* 1980 (1) SA 448 (T).

¹⁴⁶ 2009 (2) SA 119 (SCA) para 13.

¹⁴⁷ Section 138 of the BGB.

¹⁴⁸ Article 6:248(2) of the Dutch Civil Code.

of *Midland Bank Plc v Wyatt*.¹⁴⁹ The husband and wife purchased a house, which was registered in both their names. Later the husband started his own company and upon advice, entered into a trust arrangement with his wife in terms whereof he gave his equity of shares in the property to his wife and children. It was never the intention of the husband to endow his children with an interest in the property and this trust arrangement was merely done to protect his family from the commercial risk involving his company. The trust arrangement was legitimate and duly executed and therefore the court held that burden was then placed on the defendant to prove that the transaction was a sham and as such, the motives of the parties to the transaction were directly contested. A sham is defined as acts done or documents executed where parties say one thing but intend another.¹⁵⁰ The Cambridge Dictionary defines a sham as “something that is not what it seems to be and is intended to deceive people”.¹⁵¹

The position in the mentioned four legal systems is comparable with regard to who bears the burden of proof when it comes to illegality.

4.2 *Fraus legis*-rule

The term “*fraus legis*” is found in Dutch law¹⁵² and a contract in *fraudem legis* is defined as a contract that is contrary to the purpose, principle, spirit or meaning of the law, despite it being in accordance with the words of the law.¹⁵³ However, the term ‘*fraus legis*’ *per se* is not recognised in South African law, but the concept forms part of section 103(1) of the South African Income Tax Act.¹⁵⁴ Section 103(1) of the said Act states:

Whenever the Commissioner is satisfied that any transaction, operation or scheme (whether entered into or carried out before or after the

¹⁴⁹ [1996] BPIR 288.

¹⁵⁰ *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

¹⁵¹ Cambridge dictionary. Sham. Retrieved on 30 April 2022 from <https://dictionary.cambridge.org/dictionary/english/sham>.

¹⁵² Derksen, A. (1989). Die Nederlandse *fraus legis*-reël en belastingvermyding in Suid-Afrika. *South African Mercantile Law Journal*, 1(3), 299-321, at page 299.

¹⁵³ Joubert, N.L. (1992). *Simulasie*, *Fraus Legis* en Nuwe Verkeerstipiese Kontrakte. *South African Mercantile Law Journal*, 4(2) at page 140.

¹⁵⁴ Act 58 of 1962.

commencement of this Act, and including a transaction, operation or scheme involving the alienation of property) (a) has been entered into or carried out which has the effect of avoiding or postponing liability for the payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act, or of reducing the amount thereof; and (b) having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out (i) was entered into or carried out (aa) in the case of a transaction, operation or scheme in the context of business, in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit; and (bb) in the case of any other transaction, operation or scheme, being a transaction, operation or scheme not falling within the provisions of item (aa), by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; and (c) was entered into or carried out solely or mainly for the purposes of obtaining a tax benefit, the Commissioner shall determine the liability for any tax, duty or levy imposed by this Act, and the amount thereof, as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.¹⁵⁵

The purpose of this section 103 is to prevent tax avoidance and is implemented to govern lawful agreements between parties with consequential tax benefits and provide a sanction to the Commissioner to claim tax, duty or a levy, as the case may be, in this regard. The matter of *South African Revenue Service v NWK Ltd*¹⁵⁶ will be discussed hereunder providing an example of the aforesaid. The *fraus legis* rule overlaps with

¹⁵⁵ Derksen, A. (1989). Die Nederlandse *fraus legis*-reel en belastingvermyding in Suid-Afrika. *South African Mercantile Law Journal*, 1(3) 1(3), 299-321, at page 301.

¹⁵⁶ 2011 (2) SA 67 (SCA).

the principles of simulation, but no rule in Dutch law exists that all contracts in *fraus legis* are void.¹⁵⁷ The contract will only be void if the sanction of the prohibition prescribes nullity of the contract.¹⁵⁸ Various case law, as referred to before, exist where the principle is confirmed that the true intentions of the parties is the decisive factor and not the simulated intention.¹⁵⁹

4.3 South African law

The South African courts consider the principles of *agere in fraudem legis* and the principles of simulation equivalent to each other.¹⁶⁰ Confirmation hereof is found in the matter of *South African Revenue Service v NWK Ltd*¹⁶¹ where the taxpayer arranged his transactions to remain outside certain provisions of the law in order to claim a deduction of certain amounts. The South African Revenue Service considered NWK's conduct as being a way to avoid tax. The court found that if the only purpose of the transaction was to achieve an object that allows the evasion of tax, it will be regarded as simulated.

The mere fact that a contract is drafted to conceal the true nature of the parties' agreement, does not render the contract unenforceable or invalid,¹⁶² but a simulated contract is legally inoperative.¹⁶³ The relevant maxim is *plus valet quod agitur quam quod simulate concipitur*, which means "what has actually been done has more force than what has been simulated and expressed in words".¹⁶⁴ The court in the matter of *The Transvaal Silver Mines v Le Grange, Jacobs, N.O., and Fox*¹⁶⁵ also referred with approval to the same rule.

¹⁵⁷ *Ibid* at page 314.

¹⁵⁸ *Ibid*.

¹⁵⁹ Joubert, N.L. (1992.) *Simulasie, Fraus Legis en Nuwe Verkeerstipiese Kontrakte*. *South African Mercantile Law Journal*, 4(2) at page 139.

¹⁶⁰ *Ibid*.

¹⁶¹ 2011 (2) SA 67 (SCA).

¹⁶² *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) at par 6.

¹⁶³ *Schlotter v Brandt* 1987 (11) EDC 79.

¹⁶⁴ Ger, B. (2013). High court challenges SCA's interpretation of simulated agreements. *De Rebus*, (Jan/Feb) DR 62. Retrieved 30 April 2022 from <https://www.derebus.org.za/high-court-challenges-scas-interpretation-simulated-transactions>; *Zandberg v Van Zyl* 1910 AD 302.

¹⁶⁵ 1891 4 ST 116.

Further, in *South African Revenue Service v NWK Ltd*¹⁶⁶ the court held that the test whether a contract is simulated is two-fold. The intention of the parties to the contract on the one hand, and an examination of the commercial sense of the transaction.¹⁶⁷ In the matter of *Hippo Quarries Hippo Quarries (Tvl) (Pty) Ltd v Eardley*¹⁶⁸ the court again laid a two-fold test down to determine the genuineness of a contract. In this matter a cession agreement was concluded between the appellant and Hippo Quarries (Pty) Ltd (“Hippo”) in terms whereof the defendant’s assumed liability for its future indebtedness was ceded from Hippo to the appellant. This was done to enable the appellant to institute action against the defendant for the indebtedness due to Hippo. Upon recovery of the debt by the appellant from the defendant, the appellant will pay such recovery back to Hippo. The court considered the intention of the parties to the contract, as well as the motive and the purpose of the parties to what they want to achieve. “Motive and purpose differ from intention”.¹⁶⁹ If the purpose and motive is unlawful, immoral or *contra bonos mores* the contract will be invalid, despite the intention of the parties being genuine.¹⁷⁰ Also, if the intention of the parties is not genuine and the real purpose of the contract is other than what the parties give it to be, the contract will be invalid.¹⁷¹ If it is found that the contract is simulated, the simulation will be disregarded.¹⁷² The court will give effect to the genuineness of the transaction, alternatively to the underlying transaction which it sought to conceal.¹⁷³ Dishonesty is not a requirement for the conclusion of a simulated contract.¹⁷⁴ Irrespective of the parties’ honesty, motive and purpose of the contract will overrule the dishonesty element. The same applies in the instance of a person bearing knowledge of a pre-emptive right over a property and, nevertheless, proceeding to purchase the said property.

¹⁶⁶ 2011 (2) SA 67 (SCA).

¹⁶⁷ At par 55.

¹⁶⁸ 1992 (1) SA 867 (A).

¹⁶⁹ *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) at page 19.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid* at page 8.

¹⁷³ *Zandberg v Van Zyl* 1910 AD 302.

¹⁷⁴ *Commissioner for the South African Revenue Services v Bosch and another* 2015 (1) All SA (SCA) at page 17.

A court will examine the contract as a whole, taking into consideration the parties' intentions, motive and purpose and the surrounding circumstances under which the contract is concluded, before determining whether a contract is simulated.¹⁷⁵

Consequently, if the parties' intentions and sole purpose for entering into a long-term lease agreement are to circumvent the operation of the pre-emptive right, especially where both parties bear knowledge of the pre-emptive right over the property, it will be seen as a simulated contract.

4.4 English law

English law is familiar with simulated transactions, but these transactions are labelled as a "sham transaction".¹⁷⁶ In *Snook v London & West Riding Investments Ltd*¹⁷⁷ the court stated that "... if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". The parties' intention at the time of concluding the contract will be the decisive factor. A fraudulent motive, however, is not required to prove that the contract is a sham.¹⁷⁸ In the matter of *Miles v Bull*¹⁷⁹ it is said that a transaction which is merely carried out with a specific purpose or object does not label the transaction as a sham. A sham is not similar to fraud, but it will involve a species of dishonesty.¹⁸⁰ The history of the parties' dealings with the subject matter, will determine the nature of the transaction.¹⁸¹

A sham agreement is not necessarily null and void for all purposes.¹⁸² In the matter of *Bridge v Campbell Discount Co Ltd*,¹⁸³ the House of Lords held that when words used

¹⁷⁵ *Ibid* at page 18.

¹⁷⁶ *Midland Bank Plc v Wyatt* [1996] BPIR 288.

¹⁷⁷ [1967] 2 QB at 801.

¹⁷⁸ *Midland Bank Plc v Wyatt* [1996] BPIR 288.

¹⁷⁹ [1969] 1 QB 258.

¹⁸⁰ *National Westminster Bank plc v Jones* [2000] BPIR 1092.

¹⁸¹ *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

¹⁸² *National Westminster Bank plc v Jones* [2000] BPIR 1092.

¹⁸³ [1962] AC 600.

in a contract are not genuine and are not written to express the real nature of the transaction, but rather to disguise it, the court will give adherence to the reality and not the sham.

A matter, similar to that of the hypothetical situation,¹⁸⁴ is the matter of *Midland Bank Trust Co Ltd v Green (No. 1)*.¹⁸⁵ A father granted his son an option to purchase the farm. The option was not registered against the title of the land. To avoid the operation of the option the father sold that farm to his wife under value. The son sought a declaration that the option was binding on the mother's estate and raised an argument, amongst others, that the purchase was done in bad faith and therefore the father (and mother) should not be protected. The court held that there is no requirement that the purchaser should act in good faith and accordingly, it was not a sham just because the motive or reason for the transaction was disliked. However, it did not leave the son without a remedy.

It is possible that the court would have come to a different conclusion if the option was registered against the title of the land, but then again, it is likely that the purchaser knew of the existence of the option the father granted the son, and the court nevertheless concluded that the sale was not a sham.

Sham transactions are not considered null and void from the onset¹⁸⁶ and secondly, a contract to circumvent the operation of specific rights on a property is not necessarily regarded as a sham because the consequences are disliked by the aggrieved party.¹⁸⁷

4.5 German law

Reference to the "real" intention of the parties to contract is also found in German law. The German jurist, Savigny, wrote that "in effect, the will alone is important and effective; but being interior and unobservable, it needs an external sign to manifest

¹⁸⁴ The hypothetical scenario stated in para 1.2 above pertaining to the research problem.

¹⁸⁵ [1981] 1 AC 513.

¹⁸⁶ *Bridge v Campbell Discount Co Ltd* [1962] AC 600.

¹⁸⁷ *Midland Bank Trust Co Ltd v Green (No. 1)* [1981] 1 AC 513.

itself”.¹⁸⁸ This theory became known as the *Willenstheorie*. However, a balance had to be reached between the true intentions of the parties and the necessities of practical life.¹⁸⁹ In this regard it is the apparent intention that counts, which theory is known as *Erklärungstheorie*.¹⁹⁰ A distinction is drawn between the *Willenstheorie* and the *Erklärungstheorie*, namely “the will of the consequences that follow the declaration”.¹⁹¹

In drafting of the BGB, provision is specifically made with regard to simulated contracts which conceal the true nature of the parties’ intention. Section 116 of the BGB provides that “a declaration of intent is not void by virtue of the fact that the person declaring has made a mental reservation that he does not want the declaration made. The declaration is void if it is to be made to another person who knows of the reservation.” Section 133 of the BGB further states that “when a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration”. With further regard to section 117(2) of the BGB, it is stated that “if a sham transaction hides another legal transaction, the provisions applicable to the hidden transaction apply”. German law left no room for simulated contracts.

Accordingly, lease agreements entered into with the sole purpose to circumvent the operation of a pre-emptive right will be void where the subsequent contracting parties had knowledge of the pre-emptive right over the property.¹⁹² Alternatively, the underlying contract (or hidden transaction) will be given effect to.¹⁹³

4.6 Dutch law

With reference to the Roman Law, Justinian laid down the principle of “*plus valet quod agitur quam quod simulate concipitur*” where the true intentions of the parties to the contract is upheld irrespective of the content of the contract.¹⁹⁴ This principle cannot

¹⁸⁸ Chloros, A. A. (1958-1959). *Comparative aspects of the intention to create legal relations in contract*. *Tulane Law Review*, 33(3), at page 617.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* at page 618.

¹⁹² Section 116 of the BGB.

¹⁹³ Section 117(2) of the BGB.

¹⁹⁴ Chloros, A. A. (1958-1959). *Comparative aspects of the intention to create legal relations in contract* *Tulane Law Review*, 33(3), 608.

be applied lightly as extreme regard to the party's intention would jeopardise the whole concept of the contract.¹⁹⁵ To prevent the aforesaid, three criteria were laid down in considering the interpretation of a contract as to the parties' intentions. Firstly, the seriousness of the intentions of the parties to conclude a consensual contract as a whole; secondly, the existence of the true intention of each party to be bound by the contract; and thirdly, the rules of *simulatio* and *reservatio mentalis*.¹⁹⁶ Therefore, regard shall be given to the contract which the parties ought to conclude, being a sale agreement, rather than the contract they pretended it to be. If it is then regarded as a sale agreement, the owner will have breached its contract with the holder of the pre-emptive right, which in turn provides the pre-emptive holder with remedies at its disposal against the owner.

Regarding the *fraus legis* principle, there exists no rule that contracts in *fraudem legis* are void.¹⁹⁷ The authors state that the legal consequences that occur when this rule is applied are the legal consequences prescribed by the statutory provision, which provision is avoided, itself.¹⁹⁸ In practice, this means that where an aggravating provision is involved, the legal consequences that the provision prescribes take effect even though the provision, judging by its words, does not apply.¹⁹⁹ Consequently, with reference to the *fraus legis* principle, the lease agreement between the parties will not be void, but it will be considered as a sale agreement between the parties, because the intention of the owner was to sell the property, but due to the pre-emptive right over the property a lease agreement was concluded instead. Consequently, the owner is then in breach of his contract with the holder of the pre-emptive right, which leaves the holder with various remedies in this regard.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid* at page 610.

¹⁹⁷ Derksen, A. (1989). Die Nederlandse *fraus legis*-reel en belastingvermyding in Suid-Afrika. *South African Mercantile Law Journal*, 1(3), 299-321 at page 314.

¹⁹⁸ *Ibid* at page 313.

¹⁹⁹ *Ibid.*

CHAPTER 5: REMEDIES

5.1 Introduction

Nothing detracts from the owner's ability to act and conclude a valid subsequent agreement with a third party pertaining to a property where a pre-emptive right exists, except where the doctrine of knowledge is applicable.²⁰⁰ Ownership is regarded as an absolute right, in other words the most complete right that allows any use of the property (in so far as the law does not prohibit it).²⁰¹ The South African law corresponds with the German law under section 463 of the BCB and Dutch law under article 3:83(1) of the Dutch Civil Code, which likewise confirms the free and unimpeded power of disposal of the owner.²⁰²

5.2 Liability of the third party

When a *bona fide* third party enters into a (long-term) lease agreement over a property with the owner, which property is subject to a pre-emptive right, and the *bona fide* third party believes that nothing is short of the owner's ability to contract, the agreement will create a real right in favour of the *bona fide* third party.²⁰³ Even if a court agrees with the holder of the pre-emptive right that he enjoys preference above the third party, it will not affect the *bona fide* third party's right to demand cooperation from the seller in terms of the agreement and to claim specific performance.²⁰⁴ A valid agreement was

²⁰⁰ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3), at page 632; 634.

²⁰¹ Van Der Walt, A. A. & Dhliwayo, P. (2017). The notion of absolute and exclusive ownership: doctrinal analysis. *South African Law Journal*, 134(1), at page 42; *37iven v 37iven* 1979 (2) SA1113 (T) at pages 1120C-1122C.

²⁰² *Ibid.*

²⁰³ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3), at page 632 and 636; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereingte Bäckereien (Pty) Ltd and Others* 1982 (3) SA 893 (A) At page 905.

²⁰⁴ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3), at page 632.

concluded between the owner and the *bona fide* third party. The remedy that the pre-emptive holder may enjoy against the owner, under these circumstances, can never be a remedy *in rem*, it can only be a remedy against the owner in the event of a *bona fide* third party.²⁰⁵ The reason being that the holder of the pre-emptive right never obtained a real right.²⁰⁶ If the owner did not disclose the existence of the pre-emptive right to the third party, i.e., the third party was *bona fide*, the doctrine of notice does not find application.²⁰⁷

If a third party was aware of the pre-emptive right and has, nevertheless, entered into a long-term lease agreement with the owner, the holder of the pre-emptive right will be limited to the remedies under the law of delict,²⁰⁸ because he/she deliberately infringed the right enjoyed by the pre-emptive holder. No contract is concluded between the holder and the third party – therefore the holder will not have a contractual remedy at their disposal against the third party. All the requirements of delictual liability must be met to succeed with a delictual claim against the third party.

5.3 Liability of the owner

If the owner concludes a (long-term) lease agreement with a third party, the owner will be in breach of their contractual obligation towards the third party and/or the holder of the pre-emptive right and will have exposed themselves to contractual and/or delictual claims by the holder of the pre-emptive right and/or the third party, depending on the third party's knowledge of the pre-emptive right.²⁰⁹ Where the third party had no knowledge of the pre-emptive right over the property, there will exist two contractual agreements, being the contract between the owner and the holder of the pre-emptive right on the one hand, as well as a contract between the owner and the third party on the other hand.²¹⁰ These contracts will be in conflict with one another and the owner

²⁰⁵ *Ibid* at page 633; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A).

²⁰⁶ *Ibid* at page 630 and 633; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 3 SA 532 at page 537 H; *Ex parte Zunckel* 1937 NPD 295.

²⁰⁷ The doctrine of notice only operates against a third party who was unaware of the pre-emptive right at conclusion of the agreement. Naude, T. (2004). The rights and remedies of the holder of right of first refusal or preferential right to contract. *South African Law Journal*, 121(3) fn 98).

²⁰⁸ *Ibid* at page 634.

²⁰⁹ *Ibid* at page 634; Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 9.05.

²¹⁰ See para 5.1.

cannot perform in terms of both of the said two contracts. If the owner performs in terms of the contract concluded with the holder of the pre-emptive right, the third party will have a contractual claim based on breach of contract against the owner.²¹¹ If the owner performs in terms of the contract concluded with the third party, the holder of the pre-emptive right will have a contractual claim against the owner based on breach of contract²¹² and a delictual claim against the owner based on the laws of delict.²¹³ In the event that the third party had knowledge of the existing pre-emptive right, the third party will not be able to claim any damages from the owner if the subsequent contract be cancelled, because the third party deliberately entered into an agreement with the owner knowing that performance by the owner was not possible.²¹⁴

The remedy of specific performance is available to any party to a contract by virtue of the common law.²¹⁵ Voet's statement that "a seller cannot be absolutely forced into delivery of a thing sold but is freed by making good the damages" is not accepted by South African law.²¹⁶ In other words, instead of claiming specific performance, paying damages will also free the defaulting party from adhering to the contract. The court has a discretion to refuse specific performance where it would be "inequitable in all the circumstances".²¹⁷ In the matter of *Plattekloof RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd and Another*²¹⁸ the applicant has a pre-emptive right to purchase a portion of the property belonging to the owner. The applicant has previously offered to purchase the said portion for a specific price. The issue before the court is whether the pre-emptive right in respect of a portion of a property is triggered if the owner considers an offer by a third party to purchase the property as a whole (as a package deal). If the complicated effect of the package deal is ignored, the indicated remedy would be specific performance.²¹⁹ Evidence, in calculating the value of the portion and the value of the property as a whole, showed that the value of the portion was much higher than the price prayed for in the applicant's application. The court therefore, amongst other reasons, dismissed the application for specific

²¹¹ Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 9.05.

²¹² *Ibid.*

²¹³ *Ibid* at para 3.81.

²¹⁴ *Ibid* at para 9.138.

²¹⁵ *Ibid* at para 9.57.

²¹⁶ *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 351.

²¹⁷ *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 379A; *Stickney v Keeble* [1915] AC 386.

²¹⁸ (7836/2020) [2021] ZAWCHC 1 (4 January 2021).

²¹⁹ *Ibid* at para 26.

performance.²²⁰ Concluding a long-term lease agreement does not imply that the owner has any intent or desire to sell their property. In this event, the pre-emptive holder will not be able to claim specific performance from the owner; the results will be nonsensical as the property is not offered for sale by the owner.

In order to determine which remedies the respective parties are entitled to, it is necessary to establish what the exact intentions of the parties were when the subsequent contract was concluded with the third party, which also includes whether the third party had knowledge of the pre-emptive right over the property.²²¹

5.4 South African law

A simulated contract will be disregarded²²² and effect will be given to the underlying contract which it concealed.²²³ If the subsequent contract's only purpose is to circumvent the operation of a pre-emptive right, effect will be given to the contract the parties actually intended to conclude. A long-term lease agreement can be entered into to circumvent the operation of a pre-emptive right, because it will be considered that the owner does not have a desire to sell his property and the pre-emptive right will not be triggered. A long-term lease agreement can have the same effect as a sale agreement, with the only significant difference being that ownership is not transferred and the operation of a pre-emptive right is not triggered. The court will give effect to the underlying agreement, being a sale agreement, and consequently, the pre-emptive right will be triggered if the underlying contract is considered a sale agreement.

Under the common law the contractual remedies for breach of contract are specific performance and a claim for damages, as well as cancellation of the contract and a claim for damages.²²⁴ A claim for damages is the primary remedy in the event of contractual breach under the common law.²²⁵ In order to succeed with such a claim

²²⁰ *Ibid* at para 40.

²²¹ See paras 5.2 and 5.3.

²²² *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) at page 8.

²²³ *Zandberg v Van Zyl* 1910 AD 302.

²²⁴ Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 9.45.

²²⁵ Eiselen, S. (2015). Janwillem Oosterhuis specific performance in German, French and Dutch Law in the nineteenth century - remedies in an age of fundamental rights and

for contractual damages, the aggravating party must prove or quantify the damages it incurred as a result of the breach.²²⁶

Specific performance as a remedy with regard to a *bona fide* third party will be possible; a valid contract was concluded between the two parties, despite the fact that there existed a pre-emptive right which was unknown to the third party.²²⁷ In these circumstances, there are two remedies at the disposal of the holder of the pre-emptive right. The one is a claim for damages against the owner based on breach of contract, should the owner pursue the subsequent contract with the *bona fide* third party.²²⁸ The other alternative remedy is to interdict the owner from selling the property to the third party.²²⁹ If the latter remedy is utilized the *bona fide* third party will have a contractual claim based on breach of contract against the owner.²³⁰ Cancellation of the subsequent contract can also be prayed for by the holder of the pre-emptive right, which will have the same effect as an interdict.²³¹

Purchasing a property in contravention of a pre-emptive right where the purchaser is aware of the pre-emptive right is a species of fraud if the purchaser attempts to defeat the holder's rights,²³² because despite the purchaser's knowledge they proceeded to enter into an agreement with the owner knowing that this infringes the rights of the holder of the pre-emptive right.²³³ Fraud²³⁴ is not a requirement in this regard, mere

industrialisation. *Fundamina*, 21(1), 213-217. Retrieved on 7 November 2021 from <https://dx.doi.org/doi:10.17159/2411-7870/2015/v21n1a11>.

²²⁶ Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 9.49.

²²⁷ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regsobjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3) at page 632.

²²⁸ *Ibid* at page 635; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at page 349.

²²⁹ Naude, T. (2004). The rights and remedies of the holder of right of first refusal or preferential right to contract. *South African Law Journal*, 121(3) at page 637; *Platteklouf RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd and Another* (7836/2020) [2021] ZAWCHC 1 (4 January 2021) at para 30.

²³⁰ Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 9.31.

²³¹ *The Transvaal Silver Mines v Le Grange, Jacobs, N.O., and Fox* (1891-1892) 4 SAR TS 10.

²³² *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Bäckereien (Pty) Ltd* at page 910.

²³³ *The Transvaal Silver Mines v Le Grange, Jacobs, N.O., and Fox* (1891-1892) 4 SAR TS 10 at page 12.

²³⁴ Fraud as a factor was considered in the matter of *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigde Bäckereien (Pty) Ltd and Others* 1982 (3) SA 893 (A) at page 910 where a purchaser deliberately concluded a sale agreement with the seller knowing that a pre-emptive right existed over the property. The purchaser acted *mala fide* and with a fraudulent behaviour.

knowledge of the existence of the pre-emptive is sufficient to show that the purchaser's conduct was *mala fide*.²³⁵ The holder of the pre-emptive right only has to prove the existence of the right and knowledge thereof on the part of the purchaser.²³⁶ On registration of a pre-emptive right, both elements are proven as registration has the effect of written confirmation of the existence of the right and notice thereof to third parties.²³⁷

The owner of the property in the matter of *The Transvaal Silver Mines v Le Grange, Jacobs, N.O., and Fox*²³⁸ where a pre-emption right was held, granted a long-term lease over a portion of the relevant property in favour of a third party. The court held that the lease be cancelled, because the third party had knowledge of the holder's pre-emptive right over the property "and it was necessary to examine what the contract actually was, rather than what it was described to be (*"plus valere quod agitur quam quod simulate concipitur"*)".²³⁹ Consequently, it was found that the third party infringed the holder's right and therefor the contract between the owner and the third party was cancelled.²⁴⁰

Should the third party be a *mala fide* third party who had knowledge of the pre-emptive right, alternatively should have had knowledge of the said right by virtue of the registration thereof in the Deeds Office, and was in cahoots with the owner by concluding the long-term lease agreement, the owner as well as the *mala fide* third party face a claim for damages in respect of the law of delict.²⁴¹

²³⁵ *Kazazis v Georghiades and Others* 1979 (3) SA 886 (T) at 893.

²³⁶ *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Bäckereien (Pty) Ltd* at page 911.

²³⁷ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3) at page 633; *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Bäckereien (Pty) Ltd* at page 910.

²³⁸ 1891 4 SR 116.

²³⁹ *Ibid* at page 13.

²⁴⁰ *Ibid* at page 13.

²⁴¹ Sonnekus, J. C. (2018). Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regssubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede: Inhoudelik nie-verwarbaar. *Journal of South African Law*, 2018(3) at page 633; Nagel, C. J., Kuschke, B., & Barnard, J. (2019). *Commercial Law* (6th ed) Lexis Nexis at para 3.22.

It is interesting to note, from the aforesaid, as to against whom damages can be claimed in the event of a holder's pre-emptive right being infringed – knowledge of the pre-emptive right plays a fundamental role.

The trigger event of a pre-emptive right is considered as a manifestation of a desire to sell.²⁴² This does not mean that a sale agreement already had to be concluded for the enforceability of the pre-emptive right.²⁴³ Under circumstances where an owner speaks of their desire to sell, there is nothing preventing the holder from applying for an interdict restraining the seller from concluding a sale contract with a third party.²⁴⁴ However, there is no authority that the holder can interdict the seller to a sale of the property to themselves,²⁴⁵ in other words compelling the seller that the holder steps into the place of the third party, as this does not form part of modern South African modern law.²⁴⁶ Where a lease agreement has not yet been concluded between the owner and the third party, but the holder of the pre-emptive right becomes aware of the owner's intention to conclude such an agreement now or later, the holder can apply for an interdict to refrain the owner of entering into such an agreement. This remedy corresponds with the remedy of injunction under the English law and Dutch law, which will be discussed below.

5.5 English law

The contractual remedies, under English law, at the aggrieved party's disposal are damages, specific performance, injunction (which can be mandatory or prohibitory) and rescission.²⁴⁷

²⁴² Bhana, D. (2008). The contract of pre-emption as an agreement to agree. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 71(4), 568 at 571

²⁴³ See paras 3.1 and 3.2.

²⁴⁴ *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 346.

²⁴⁵ *Ibid.*

²⁴⁶ *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd and Others* 1982 (3) SA 893 (A) at page 906.

²⁴⁷ Allen & Overy. (2016). *Basic principles of English Contract Law*. Advocates for International Development. Retrieved 11 November 2021 from <http://www.a4id.org/wp-content/uploads/2016/10/A4ID-english-contract-law-at-a-glance.pdf>.

The interests of the parties to a sham²⁴⁸ agreement clashes where the one innocent party contends the agreement is genuine and the other innocent party contends that the agreement is a sham.²⁴⁹ In the matter of *National Westminster Bank plc v Jones*²⁵⁰ the bank granted a mortgage over the farm of Jones and Jones granted floating charges over their farm to the bank as security. Jones got into financial trouble and established a company to which they transferred their assets and granted a tenancy of the farm. The bank instituted proceedings to set aside the asset sale agreement and tenancy agreement in protection of their security. The court held that the transfer of assets and the granting of the tenancy were an attempt to avoid liability towards the bank and granted the bank with the relief it sought by rescinding the agreements concluded.

The rule of the common law in awarding a claim for damages under contract law is to put the innocent party in the position as if the contract had been performed.²⁵¹ The case law that exists in this regard is with reference to where a property is transferred to a third party in contravention of a pre-emptive right. In the matter of *Midland Bank Trust Co. v Green*²⁵² the court held that a transfer to a third party in breach of a pre-emptive right makes the owner liable in damages. Where the transfer is not yet finalised, the owner can be restrained by injunction,²⁵³ which is similar to an interdict under the South African law.

Where damages would be inadequate, the court may grant an order for specific performance to compel the defaulting party to adhere to the terms of the contract.²⁵⁴ Specific performance will only be granted if “under all the circumstances, it is just and equitable to do so”.²⁵⁵

²⁴⁸ In *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 a sham is defined as acts done or documents executed where parties say one thing but intend another.

²⁴⁹ *National Westminster Bank plc v Jones* [2000] BPIR 1092 at para 60.

²⁵⁰ *Ibid.*

²⁵¹ *Robinson v Harman* (1848) 1 Ex Rep 850, 154 ER 363.

²⁵² [1980] CH 590 611.

²⁵³ *Churchman v Lampon* [1990] 1 EGLR 211.

²⁵⁴ Allen & Overy. (2016). *Basic principles of English Contract Law*. Advocates for International Development. Retrieved 11 November 2021 from <http://www.a4id.org/wp-content/uploads/2016/10/A4ID-english-contract-law-at-a-glance.pdf>.

²⁵⁵ *Stickney v Keeble* [1915] AC 386 at page 418.

5.6 German law

In German law the owner's capacity to sell a property expires once the property is transferred to the new owner,²⁵⁶ and therefore, the court cannot grant specific performance in favour of the holder of the pre-emptive right that the property be transferred to the holder of the pre-emptive right.²⁵⁷

German law provides that a registered pre-emptive right leaves the transfer of the property, contrary to the pre-emptive right holder, invalid.²⁵⁸ The holder has the right to demand re-transfer of the property from the third party. In the event that the pre-emptive right is not registered, it is a mere personal right between the owner and the holder of the pre-emptive right and the owner can choose to which purchaser it transfers the property.²⁵⁹ However, the owner will be liable to pay damages due to non-performance in terms of the contract to either the holder of the pre-emptive right or the other purchaser, depending on who the owner wishes to transfer the property to.²⁶⁰ Liability towards the purchaser should be excluded in the purchase agreement where the purchaser had knowledge of the existing pre-emptive right.²⁶¹ According to a 2009 judgement of the German Federal Court of Justice ("*Bundesgerichtshof*") it was held that in the case of doubt whether the purchaser bears knowledge of the pre-emptive right, the purchase agreement should be interpreted that it is made subject to the exercise of the pre-emptive right.²⁶²

The aforesaid can also be interpreted in the event of a lease agreement concluded, which infringes the holder's pre-emptive right over the property. The lease agreement can be made subject to obtaining consent from the holder that the lease agreement may be concluded in respect of the relevant property.

²⁵⁶ Section 903 of the BGB

²⁵⁷ Section 2035 of the BGB.

²⁵⁸ Section 1098 read with section 883 para. 2 BGB.

²⁵⁹ Streng, J. & Krause, S. (2018). Exerted pre-emptive right in property purchase agreements. *Real Estate Newsletter*, June 2018, 3-4. Retrieved on 13 June 2021 from https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2018/06/real-estate-newsletter---summer-2018/files/english/fileattachment/newsletter_real_estate_engl_q2_2018.pdf

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

Section 123(1) of the BGB provides that “a person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration”. The German court interprets this section in such a way that fraud can also take the form of withholding information that must be disclosed, and fraud makes the contract void.²⁶³

Section 122 read with section 118 of the BGB provides that damages can be claimed by a *bona fide* third party and/or the holder of the pre-emptive right where the contract is void due to the lack of seriousness regarding the intent of the owner. The amount of damages is limited to the “total amount of interest which the holder or third party has in the validity of the contract”.²⁶⁴

If the third party had knowledge of the holder’s pre-emptive right, or should have known, the third party cannot claim damages from the owner.²⁶⁵ A contractual right that is violated is not sufficient to give rise to delictual liability under the German law.²⁶⁶

5.7 Dutch law

The Dutch law provides various remedies under their contract law, which includes specific performance (which is the primary remedy under Dutch law), damages, rescission of a contract, annulment of a contract, declaratory judgment, and injunction.²⁶⁷

Specific performance is the primary remedy under Civil law.²⁶⁸ This remedy, however, will be refused by the court where the contract concluded is illegal.²⁶⁹ This will be in

²⁶³ Eiselen, S. (2015). Janwillem Oosterhuis specific performance in German, French and Dutch Law in the nineteenth century - remedies in an age of fundamental rights and industrialisation. *Fundamina*, 21(1), 213-217. Retrieved on 7 November 2021 from <https://dx.doi.org/doi:10.17159/2411-7870/2015/v21n1a11>.

²⁶⁴ Section 122(1) of the BGB.

²⁶⁵ Section 122(2) of the BGB.

²⁶⁶ Von Marschall, W. F. (n.d.). *Modern tendencies in the German law of delict*. Retrieved 7 November 2021 from <http://www.nzlii.org/nz/journals/VUWLawRw/1981/1.pdf>

²⁶⁷ De Groot, J. W. (2021). *Specific performance of a contract under Dutch law*. Dutch Law Institute Retrieved 6 November 2021 from <https://dutch-law.com/remedies-dutch-law.html>

²⁶⁸ Eiselen, S. (2015). Janwillem Oosterhuis specific performance in German, French and Dutch Law in the nineteenth century - remedies in an age of fundamental rights and industrialisation. *Fundamina*, 21(1), 213-217 Retrieved on 7 November 2021 from <https://dx.doi.org/doi:10.17159/2411-7870/2015/v21n1a11>

²⁶⁹ De Groot, J. W. (2021). *Specific performance of a contract under Dutch law*. Dutch Law Institute Retrieved 6 November 2021 from <https://dutch-law.com/remedies-dutch-law.html>.

the instance where the contract is against public interest due to its contents or the intentions of the parties²⁷⁰ and is, accordingly, seen as null and void. As discussed above, the holder of the pre-emptive right will not be able to claim specific performance from the owner as the owner does not necessarily have a desire to sell its property. However, should the court find that the contract contemplates a sale agreement by considering the parties' intentions, the court might grant an order for specific performance whereas the "sale agreement" would have triggered the pre-emptive right.

Damages can be claimed as a general rule under Dutch law where the aggravated party is placed in the situation it would have been if the event that caused the damage did not take place.²⁷¹ This remedy can be utilized by the holder of the pre-emptive right as well as a *bona fide* third party where the lease agreement has been concluded between the owner and the third party.

Rescission of a contract is when the contract between the parties is cancelled and both parties are released from their performance in terms of the contract.²⁷² If any of the parties performed in terms of the contract, there exists an obligation on the relevant party to undo its performance.²⁷³ This remedy should be distinguished from the remedy of annulment of a contract where a contract is concluded between parties under "duress, fraud, undue influence, or misrepresentation or error".²⁷⁴ This remedy is similar to that of a rescission of a contract, but is differentiated by the fact that a rescinded contract is acknowledged by law and executed, but was terminated by the parties, whereas an annulled contract is considered as if it never existed.²⁷⁵ The holder of the pre-emptive right can apply to court that the lease agreement between the owner and the third party be annulled.

A declaratory judgment declares what the rights of the parties are in respect of a contract.²⁷⁶ It is merely to guide the parties as to their obligations under the contract

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

and what can be an appropriate remedy in determining whether the subsequent agreement constitutes a simulated contract.

Injunction as a remedy corresponds with an interdict under the South African law. It can be mandatory or prohibitory in respect of the defendant to perform or refrain from performance in terms of a contract.²⁷⁷

In the event that the property was sold to a third party in contravention of the pre-emptive right, the legal position applicable under Dutch law is “*naesting*” or *legal jus retractus* in terms of which the holder of the pre-emptive right can demand that they step into the place of the third party (who purchased the property) and become the purchaser under the same terms and conditions under which the third party contracted, including the obligation to pay the purchase price.²⁷⁸ According to a German writer, Van Zutphen, the aforesaid is only a remedy in circumstances where the third party had knowledge of the pre-emptive right.²⁷⁹ Where the third party had no knowledge of the pre-emptive right, the only remedy at the holder’s disposal against the owner (the seller) is a claim for damages.²⁸⁰ However, the first mentioned remedy is not part of the South African modern law²⁸¹ and is not applicable in the circumstances under discussion as there is no sale agreement concluded.

²⁷⁷ *Ibid.*

²⁷⁸ *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at page 906.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid*; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 347.

CHAPTER 6: CONCLUSION

This research study focuses on whether a lease agreement triggers the operation of a pre-emptive right, with reference to other legal systems, because of limited case law in this regard in South African law.²⁸² This arises from a situation the author encountered where a client sought advice on whether a long-term lease agreement can be concluded (or registered) over a property in terms of which a pre-emptive right is registered. The author was surprised not to find much authority, because this situation is surely encountered more in practice than what is reflected in the literature.

Under the South African, English and German law, a pre-emptive right is regarded as a right which is binding on third parties in the event that it is registered.²⁸³ Despite the right being a personal right, even upon registration, it has a proprietary effect on third parties.²⁸⁴ All legal systems referred to above consider a lease agreement enforceable against third parties. South African law and English law provide for the registration of a long-term lease agreement with the effect that it is enforceable against third parties.²⁸⁵ German law and Dutch law do not provide for the registration of a lease agreement but consider the lessee's right enforceable against third parties.²⁸⁶

The trigger event of a pre-emptive right under the South African law and the English law is considered as "the desire to sell".²⁸⁷ The owner of the property does not intend to sell the property when a long-term lease agreement is to be registered over the property.²⁸⁸ Under the German law it is specifically provided that the trigger event of a pre-emptive right is the moment a purchase agreement with a buyer is concluded.²⁸⁹ Dutch law is silent in this regard, because a pre-emptive right is a personal right, which

²⁸² See para 3.1.

²⁸³ See paras 2.2.2, 2.2.3 and 2.2.4.

²⁸⁴ *Ibid.*

²⁸⁵ See paras 2.3.2 and 2.3.3.

²⁸⁶ See paras 2.3.4 and 2.3.5.

²⁸⁷ See paras 3.2 and 3.3.

²⁸⁸ Naude, T. (2011). Pre-emption agreements and the myth of the "trigger event" as any manifestation of a decision to sell: a response to Deeksha Bhana. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 74(1), at page 94; *Ah Ling v Community Development Board* 1972 (4) SA 35 (E); *Associated South African Bakeries (Pty) Ltd v Oryx & Vereingte Bäckereien (Pty) Ltd and Others* 1982 (3) SA 893 (A).

²⁸⁹ See para 3.4.

is only enforceable between the contracting parties and a lessee's right in terms of a lease agreement is a real right, which is enforceable against third parties.²⁹⁰ Therefore the Dutch law considers a lessee's rights stronger than a holder's right of pre-emption. Accordingly, a long-term lease agreement does not trigger the operation of a pre-emptive right over a property.

A long-term lease agreement can be concluded between the owner and the third party in an attempt to avoid the operation of the pre-emptive right and to conceal the true nature of the parties' intentions.²⁹¹ As mentioned in the paragraph above, a long-term lease agreement does not trigger the operation of a pre-emptive right. However, a contract, like a long-term lease agreement can be drafted to conceal the true nature of the parties' intentions. This subsequent (and possibly simulated) contract does not render the contract invalid just because the aggrieved party dislikes the consequences.²⁹² The terms and duration of the lease agreement play an important role in determining the parties' intentions in order to classify the contract between the parties as a simulated contract. Where a third party bears knowledge of the pre-emptive right, either by publication or disclosure by the owner, and nonetheless proceeds with the conclusion (and registration) of a long-term lease agreement to circumvent the pre-emptive right, the lease can be considered as a simulated contract.²⁹³ The various legal systems under discussion agree that a simulated contract is not invalid or is void, but adherence will be given to the true intentions of the parties to the contract, in other words adherence will be given to the underlying contract.²⁹⁴

Remedies at the disposal of the *bona fide* parties exist in all law regimes.²⁹⁵ The corresponding remedies in the event of breach of contract and/or simulated agreements are specific performance, rescission or cancellation of the subsequent agreement, an interdict to prevent the owner from concluding a subsequent

²⁹⁰ See para 3.5.

²⁹¹ See paras 3.1, 3.3, 4.1 and 5.4.

²⁹² See para 4.4.

²⁹³ *Hassim v Shaboodien and Others* 1996 (1) All SA 182 (C); *Midland Bank Trust Co Ltd v Green (No. 1)* [1981] 1 AC 513.

²⁹⁴ See paras 4.3, 4.4, 4.5 and 4.6.

²⁹⁵ See paras 5.4, 5.5, 5.6 and 5.7.

agreement, and a claim for damages.²⁹⁶ The holder of the pre-emptive right is also free to approach the court for a declaratory order confirming the contract as a simulated contract and to pray for any of the aforesaid remedies depending on the facts of the matter. The facts of each matter will determine which remedy is suitable to compensate the aggrieved party for the infringement of its rights. The aggrieved party can either be the holder of the pre-emptive right and/or the *bona fide* third party. Regardless of whether the subsequent contract is found to be simulated or not, the *bona fide* party will have the contractual remedies at its disposal.

²⁹⁶ *Ibid.*

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