

# WHICH TRANSACTIONS TRIGGER A RIGHT OF FIRST REFUSAL OR PREFERENTIAL RIGHT TO CONTRACT?

TJAKIE NAUDÉ\*

*Associate Professor, Department of Private and Roman Law, University of Stellenbosch*

## INTRODUCTION

Preference agreements, also called first refusal agreements, are agreements in which one party promises to prefer the other party when concluding a specific type of contract ('the main contract'). Such an arrangement may also be created by will, where a testator provides that a beneficiary may not sell the inherited object without giving another a chance to buy it first,<sup>1</sup> or by legislation.<sup>2</sup>

Preference agreements are widely used in a number of different contexts. Lease contracts often contain a clause providing that if the lessor should decide to sell the leased premises, the tenant will first be given the opportunity to buy the premises, before it may be sold to an outsider.<sup>3</sup> This type of right of first refusal is also called a 'right of pre-emption', a preferential right to buy the property concerned before all others.<sup>4</sup> Similar clauses granting a preferential opportunity to contract are often found, *inter alia*, in company statutes, partnership contracts, mineral contracts, supply and distribution contracts, franchise agreements, publishing, music recording and

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<sup>1</sup> *Van Wyk v Posemann* 1915 CPD 672; *Fick v Fourie* 1934 EDL 152; *Engelbrecht v Mundell's Trustee* 1934 CPD 111; *Ex parte Zunckel* 1937 NPJ 295; *Bodasing v Christie* NO 1961 (3) SA 553 (A).

<sup>2</sup> See section 10 of the Share Titles Act 95 of 1986 and sections 10A and 10B of the Housing Act 107 of 1997.

<sup>3</sup> See, for example, *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A); *Krauze v Van Wyk* 1986 (1) SA 158 (A) and *Hirschowitz v Moolman* 1985 (3) SA 729 (A).

<sup>4</sup> I use the word 'property' to refer to all kinds of things susceptible to private ownership, including incorporeal things. 'Rights of pre-emption' include preferential rights to purchase at a fixed price or at a price at which the grantor is prepared to sell. Some English writers limit the term 'right of pre-emption' to preferential rights to purchase at a fixed price, however (see Quentin Smye 'Pre-empting the problems' 28 April 2003 *Property Law Journal* 10).

software development contracts, patent licensing agreements and employment contracts.<sup>5</sup>

Despite the widespread use of preference agreements, the residual rules on the basic rights, duties and remedies of parties thereto are surrounded by controversy in South African law.<sup>6</sup> I have argued before that where the preference contract predetermines the eventual contract price, for example by providing for a specific price or a price to be fixed by a third party, any manifestation of a desire to conclude the main contract, such as negotiations with a third party, should amount to breach. It should also entitle the holder of the right to bring the main contract into existence at that predetermined price, since the grantor, having agreed to the price, has no interest in sounding out the market for a higher price once the decision to contract is taken.<sup>7</sup> On the other hand, where the preference contract does not predetermine the price, or simply refers to the price which the grantor would accept from a third party, the default rule should be that nothing short of a valid offer to, or contract with, a third party amounts to breach by the grantor.<sup>8</sup> The grantor should be left as free as possible to sound out the market and obtain the best possible price for his property without fear of his conduct breaching or triggering the holder's right.<sup>9</sup> I have also previously considered the question whether the holder of a right of first refusal falling within this second, ordinary class of preference contracts may ultimately enforce performance of the main contract on breach, or whether the holder should instead be limited to damages and remedies aimed at preserving or restoring the status quo ante breach.<sup>10</sup> I have argued in this regard that the opposing policy considerations in favour of each of these approaches can most fairly be balanced by a rule that the holder should be entitled to enforce performance of the main contract, but only upon the grantor having breached the contract by contracting with a third party or making an offer to a third party.<sup>11</sup>

Another aspect, which requires closer scrutiny, concerns the delineation of the transactions that breach or 'trigger' the holder's right and therefore give the holder the right to exercise his right of first refusal and to enforce the main contract. The Appellate Division has held in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereenigde Bäckereien (Pty) Ltd*<sup>12</sup> that the holder is

<sup>5</sup> For details and examples see Tjakkie Naudé *The Legal Nature of Preference Contracts* unpublished LLD dissertation, University of Stellenbosch (2003)1–5.

<sup>6</sup> For details see Naudé op cit note 5 paras 1.1 and 1.2; Tjakkie Naudé 'The rights and remedies of the holder of a right of first refusal or preferential right to contract' (2004) 121 *SALJ* 636; Tjakkie Naudé 'Rights of first refusal or preferential rights to contract: a historical perspective on a controversial legal figure' (2004) 15 *Stell LR* 66; M F B Reinecke & J M Otto 'Voorkope en ander voorkeurkontrakte' 1986 *TSAR* 18 at 21; T B Floyd 'Die Voorkeepsreg' (1986) 49 *THRHR* 253; Schalk Van der Merwe, L F Van Huyssteen, M F B Reinecke, G F Lubbe & J G Lotz *Contract: General Principles* 2 ed (2003) 79–81.

<sup>7</sup> Naudé (2004) 121 *SALJ* op cit note 6.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> 1982 (3) SA 893 (A).

entitled to 'step into the shoes of the third party' upon conclusion of a contract in breach of the holder's right.<sup>13</sup> This raises the question whether the holder must be able to perform all the terms of the third party contract, before the shoes can be said to fit. For example, a right of pre-emption is obviously triggered or breached by a sale of a property to a third party, but there are third party contracts with unique features which may cause uncertainty as to whether they trigger the right of pre-emption at all, and if so, on what terms the holder may enforce performance of the main contract. Questions arising in this context include the following:

1. Which types of transactions are covered by a pre-emption agreement? Would an involuntary sale, such as a sale by the trustee of the grantor's insolvent estate, trigger the right of pre-emption, for example? What about a sale at a nominal price to a company in which the grantor is the only shareholder and which the grantor regards as his alter ego? Or the transfer of the pre-emption property to a partnership in which the grantor is a partner?
2. If the transaction proposed to be concluded with the third party does amount to the type of transaction which the holder has the preferential right to enter into, what is the effect of the third party undertaking to render some unique performance which the holder cannot match?
3. What is the effect of a sale of the pre-emption property as part of a larger package of properties (the so-called 'package deal' situation)? Does such a sale trigger or breach the right of pre-emption? If so, must the holder be prepared to buy the entire package in order to exercise her right of pre-emption, because she must step into the shoes of the third party? Does she in any event have a right to buy the entire package, or only the pre-emption property, and if the latter, how is the price calculated? Or would a proposed package deal merely entitle the holder to an interdict prohibiting the grantor from selling until he receives a third party offer for the pre-emption property alone, which the holder can match?
4. What is the position when the grantor intends to sell only a portion of the pre-emption property? The holder may have little use for anything less than the entire property, and may not be interested in buying only a portion. On the other hand, non-exercise of her right at that stage may cause the grantor to sell the entire pre-emption property to the third party in increments, in which case the holder would wish to retain her preferential right. Does the failure of the holder to exercise her right when a portion is proposed to be sold to a third party deprive the holder of the right to buy the property when it later appears that the whole property was eventually sold?<sup>14</sup>

<sup>13</sup> 907E.

<sup>14</sup> Other questions which are not addressed in this contribution relate to the effect of a voidable contract with a third party, a conditional contract, a third party contract subject to the grantor's right to cancel it should the holder exercise her right of first refusal. On these questions, see, Harm Peter Westermann in Wolfgang Krüger & Harm Peter Westermann (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band*

The South African case law on these questions is still developing and does not always provide clear answers. Most of these questions have also not been addressed by South African writers. Drafters of preference agreements also rarely provide for these types of situations. Preference agreements are usually worded very cryptically and often do not provide clear answers to these important practical questions.

I will deal with each of the four questions identified above in turn by considering relevant South African case law in the light of the position in the USA and Germany, two countries where preference agreements have received much more attention. The German Civil Code (BGB<sup>15</sup>) regulates one type of right of pre-emption, namely the *Vorkaufsrecht*.<sup>16</sup> The *Vorkaufsrecht* does not prohibit a sale to a third party until the holder has had a chance to buy the property first. Instead, the BGB provisions on the *Vorkaufsrecht* envisage that the grantor must first contract with a third party, after which the holder can be required to decide whether to exercise her right.<sup>17</sup> The type of right of pre-emption generally encountered in South Africa, which forbids the grantor from contracting with a third party first, is termed a *Vorhand* in Germany. This type of right of pre-emption is not regulated by the BGB and probably for that reason more rarely encountered than *Vorkaufsrechte*.<sup>18</sup> Although there is therefore a difference between rights of pre-emption as normally understood in South African law and *Vorkaufsrechte*, they have some aspects in common, such as that the holder should ultimately be entitled to enforce performance of the main contract after the grantor contracts with a third party. It might therefore be useful to consider the rules on the types of transactions which trigger a *Vorkaufsrecht* and the effect of unique, personal terms in the third party contract.

Whereas the primary aim of this contribution is to make proposals on the appropriate default regime in each of the situations mentioned above, I also seek to draw attention to the uncertainty surrounding some of these questions with a view to encouraging drafters of preference agreements to consider the appropriateness and cost-effectiveness of initiating negotiations on these matters and of drafting accordingly.

3 *Schuldrecht, Besonderer Teil I* §§ 433–610, *Finanzierungsleasing, HeizkostenV, BetriebskostenV, CISG* 4 ed (2004) § 463 Rn 15–16.

<sup>15</sup> The Bürgerliches Gesetzbuch.

<sup>16</sup> §§ 463–73 BGB. For more on the *Vorkaufsrecht* see Naudé op cit note 5 at 79–91 and the various German commentaries on this part of the BGB, such as Westermann in Krüger & Westermann op cit note 14 at §§ 463–473; Florian Faust in Heinz Georg Bamberger & Herbert Roth *Bamberger Kommentar zum Bürgerlichen Gesetzbuch Band 1* 1 ed (2003) §§ 463–73; Hans Putzo in Peter Bassenge et al (eds) *Palandt Gesetz zur Modernisierung des Schuldrechts — Ergänzungsband zu Palandt, Bürgerliches Gesetzbuch* 61 ed (2002) §§ 463–73.

<sup>17</sup> § 463 BGB.

<sup>18</sup> On the *Vorhand* generally, see Naudé op cit note 5 at 91–118 and authorities there cited.

## WHICH TYPES OF CONTRACT TRIGGER A RIGHT OF PRE-EMPTION?

Determining the types of transaction that trigger a right of first refusal is primarily a matter of interpreting the contract. Many preference agreements do not, however, clearly spell out the intention of the parties in this respect and residual rules are therefore valuable. Transactions involving pre-emption property raise the following questions:

1. Does an involuntary sale, such as a sale in execution or by the grantor's trustee in insolvency, trigger the right of pre-emption? What about a distribution in kind upon dissolution of a non-corporate structure such as a partnership?
2. What is the effect of a non-arm's length transfer to a relative or commercially related party? Would a sale by a grantor to a company wholly owned by him breach the right of pre-emption, for example? What happens when the pre-emption property is transferred between two corporations controlled by the same person? Is the sale of the shares of a corporate grantor tantamount to a sale of the pre-emption property? Is a transfer of the pre-emption property to a partnership in which the grantor is a partner, a trigger event? May the grantor transfer his interest in the pre-emption property to his co-owners without this triggering the right of pre-emption?
3. Is a right of pre-emption only triggered by a 'sale' or also by the grant of a 99-year lease, a testamentary disposition, donation or exchange contract, or the transfer of pre-emption property to the grantor's ex-spouse as part of a divorce settlement? What about a contract in which the third party undertakes to pay an amount of money for the pre-emption property and additionally perform a service?

*Involuntary sales*

There are conflicting South African decisions on the question whether an involuntary sale, such as a sale in execution, triggers a right of pre-emption.

*Van Wyk v Posemann*<sup>19</sup> holds that the pre-emption property must be offered for sale to the pre-emption holders first when a sale in execution is imminent, or at any rate, before the property is finally sold to a third party.<sup>20</sup> The court in *Van der Berg v Transkei Development Corporation*<sup>21</sup> took a slightly different approach, but one which nevertheless protects the holder's right of pre-emption upon a sale in execution. It held that when the deputy sheriff sold shares in a private company at a sale in execution, the parties must have intended that the deputy sheriff sell to the respondent the rights which the

<sup>19</sup> 1915 CPD 672.

<sup>20</sup> At 674. The clause in the will read that 'none of [the legatees] shall have the right to sell his or her share in the said far to a stranger; but that they shall be bound to sell their shares mutually to each other'. Cf also *The Trustees of the Estate of AAJ Jonker v The Executor Dative of Adolf Jonker Deceased* 1 R 334.

<sup>21</sup> 1991 (4) SA 78 (Tk).

judgment debtors possessed vis-à-vis the transfer of the shares.<sup>22</sup> The respondent therefore purchased the right to notify the directors that the judgment debtor wished to transfer the shares into its name. If the remaining members exercised their right of pre-emption, the respondent would be entitled to receive payment from them for the shares.<sup>23</sup> The effect is that the sale in execution therefore triggered the holders' right of pre-emption, although it was not the sheriff who had to offer the shares to the other shareholders first. The fact that the sale was involuntary and that article 21 of the company's articles of association indicated that the right of pre-emption would arise upon the shareholder 'desiring to sell' his shares, therefore made no difference in the court's view.

By contrast, in *Bodasing v Christie NO*,<sup>24</sup> a will provided that if a legatee 'wants to sell' the property left to him, he must do so to another legatee at a fixed price. The court interpreted this clause as restraining only a *voluntary* sale to anybody but the holder of the right of pre-emption. Accordingly, the trustee of the legatee's insolvent estate could freely sell the property without regard to the right of pre-emption.

American cases also diverge on this issue. Most courts have held that an involuntary sale does not trigger the right of pre-emption as it is usually made dependent upon the grantor 'desiring to sell', which implies a voluntary act.<sup>25</sup> However, a few courts have held that the holder of a right of pre-emption has a prior right to buy the property at a sale in execution.<sup>26</sup> Another view is that, whereas an involuntary sale gives the holder of the right of pre-emption no greater rights than any other buyer at that sale, the purchaser at such a sale takes the property subject to the right of pre-emption.<sup>27</sup>

The German Civil Code provides that the Vorkaufsrecht does not apply to a sale in execution or a sale upon insolvency or liquidation of the grantor.<sup>28</sup> This provision is peremptory and is aimed at protecting the grantor's creditors.<sup>29</sup>

Absent contrary agreement, a sale in execution or upon the insolvency or liquidation of the grantor should indeed not be regarded as breach of the right of pre-emption or a trigger event, as it is not a contract concluded by the grantor. The policy consideration that restraints on alienation should be strictly construed also points to this conclusion. Where the right of pre-emption predetermines the price at which the holder may buy the

<sup>22</sup> At 81F–G.

<sup>23</sup> *Ibid.*

<sup>24</sup> 1961 (3) SA 553 (A) 561A–B.

<sup>25</sup> Ryan M Tew 'Rights of first refusal: the 'options' that are not options, but may become options' (1989) 10 *Eastern Mineral Law Institute Proceedings* 7–1 at 7–67 and cases there cited.

<sup>26</sup> Tew *op cit* note 25 at 7–67. In *Ridfield Oil Corp v Security-First National Bank* 323 P 2d 834 (Cal App 1958) the court held that the deceased grantor's executor who intended to sell the pre-emption property had to offer it to the holder first.

<sup>27</sup> *Draper v Gochman* 400 SW 2d 545 (Tex 1966).

<sup>28</sup> § 471 BGB.

<sup>29</sup> Westermann in Krüger & Westermann *op cit* note 14 at § 471 Rn 2; Faust in Bamberger & Roth *op cit* note 16 at § 471 Rn 2; Putzo in Bassenge et al *op cit* note 16 at § 471 Rn 4.

property upon the grantor desiring to sell, it would also be against the public interest for the right of pre-emption to apply to involuntary sales as well. It is in the public interest, such as in the interest of the grantor's creditors, that the sheriff, trustee or liquidator obtains the highest possible sum at the forced sale, and potential buyers may lose interest if they learn that the holder may exercise her right to buy at a fixed sum regardless of what they offer for the property.

Nevertheless, as the holder often has legitimate reasons for wishing to exercise his right upon a sale in execution or upon insolvency, the parties should be free to extend the right of pre-emption over involuntary sales. In the usual situation, where the preference agreement does not predetermine the ultimate purchase price, this would not necessarily reduce the chances of obtaining a good price at such a sale in the interest of the grantor's creditors. Accordingly, their interest does not justify a peremptory prohibition on the right of pre-emption extending to involuntary sales (contrary to the position in Germany).<sup>30</sup> It is true that a right of pre-emption often dampens third party interest in the pre-emption property, as a third party may not want to invest time and money in negotiating a sale only to have the property snatched away by the pre-emption holder thereafter. Sales in execution do not, however, as a rule involve as much pre-contractual costs and effort for the third party as voluntary sales, as the sheriff usually determines the conditions of sale unilaterally. A normal right of pre-emption which does not predetermine a price is therefore not very likely to dampen third party interest in the forced sale: the third party may still hope with good reason that the holder will not be willing and able to match the highest bid at the auction.

Drafters of rights of pre-emption should therefore take instructions on whether the right of pre-emption should apply to involuntary sales and other transfers by operation of law (such as a transfer to an ex-spouse in terms of a divorce order, or a transfer to the grantor's intestate heirs) and draft accordingly. In view of the importance of rights of pre-emption for private companies (or 'limited interest companies'), especially 'closely held private companies' whose shareholders have good reasons for wishing to control the identity of their co-shareholders,<sup>31</sup> the legislator should preferably indicate in Table B of the Companies Act that the right of pre-emption applies to involuntary sales as well in the manner foreseen by *Van der Berg v Transkei Development Corporation*.<sup>32</sup> However, it should be against public policy for a right of pre-emption to buy at a fixed sum to extend to involuntary sales.

<sup>30</sup> This matter was in fact controversial before promulgation of the BGB (Benno Mugdan *Die Gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich Band II* (1979) Motive II.350 at 194).

<sup>31</sup> See further Carrie A Platt 'The right of first refusal in involuntary sales and transfers by operation of law' (1996) 48 *Baylor LR* 1197.

<sup>32</sup> *Supra* note 21.

*Non-arm's-length transactions between commercially related parties or relatives*

Questions which arise in this context include the following: would a sale by a grantor to a company wholly owned by him breach the right of pre-emption? What is the effect of a transfer of the pre-emption property between two corporations controlled by the same person(s)? What about the distribution of corporate assets to the shareholders of the company? May the grantor transfer his undivided interest in the pre-emption property to his co-owners without this triggering the holder's right of pre-emption over this interest? Is a transfer of the pre-emption property to a partnership in which the grantor is a partner, a trigger event? A related question is whether the sale of the shares of a corporate grantor is tantamount to a sale of the pre-emption property. A sale below market value to a relative, for example to the grantor's son, raises similar questions.

Once again, none of these questions has been clearly decided by the South African case law. Two cases concern a sale of the pre-emption property (shares in both cases) to a company controlled by the grantor or by the grantor's parent company.

In *Bellairs v Hodnett*<sup>33</sup> Bellairs sold his shares in Northcliff Townships (Pty) Ltd to Picked Properties (Pty) Ltd, without first having offered the shares to his co-shareholder, Hodnett.<sup>34</sup> The court stated that Bellairs '*bona fide* regarded [Picked Properties] as being his *alter ego*, created merely as a receptacle of his various interests'<sup>35</sup> (in his township companies). This explained why he sold his shares to Picked Properties at virtually their cost price which bore no relation to their true value.<sup>36</sup> When Picked Properties thereafter proposed to sell the shares to a third party, Bellairs accepted that Picked Properties was bound by Hodnett's right of pre-emption and first offered to sell the shares to Hodnett, an offer which he accepted. He claimed damages from Bellairs for an alleged breach of his right of pre-emption which occurred upon the initial sale to Picked Properties, alleging that he was entitled to buy the shares at the very low price paid by Picked Properties.

The court assumed without deciding that the sale by Bellairs to Picked Properties did breach the right of pre-emption, so that damages was payable, and that the only question concerned the correct measure of damages.<sup>37</sup> The words 'the price which he is willing to accept for such shares' which appeared in the pre-emption provision was held to mean the price which the member, by the exercise of his own free volition, fixes as being the amount he wants the other member(s) to pay him for his shares.<sup>38</sup> The court accepted that it was utterly inconceivable that Bellairs would have accepted the cost

<sup>33</sup> 1978 (1) SA 1109 (C).

<sup>34</sup> A shareholders' agreement between the parties provided that 'a member desirous of selling his shares' would give notice containing an offer to the secretary of the company who would then send an invitation to offer to buy at those terms to the other shareholders in the company.

<sup>35</sup> At 1136D.

<sup>36</sup> At 1136C.

<sup>37</sup> At 1137F-G.

<sup>38</sup> At 1139B.



price of the shares from the other member, namely Hodnett, as he knew that the shares were worth far more at the time.<sup>39</sup> Rather, the only safe conclusion was that Bellairs would have offered them to Hodnett at their true value, so that Hodnett suffered no damages

The court therefore did not rule out the possibility that a sale by the grantor to a company which he regards as his alter ego might not be breach, as it did not decide this point. It nevertheless treated a sale to a company in which the grantor was at that stage the sole shareholder as being different to a sale to any other party.

In *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd*<sup>40</sup> less sympathy was shown to a grantor company that sold to its wholly owned subsidiary at a very low price. The court allowed the pre-emption holder to buy on the same terms, and rejected the arguments that the pre-emption agreement envisaged an arm's-length price or that the sale to the subsidiary was not a 'disposal' as the grantor retained control over the pre-emption property.<sup>41</sup> The court stated that the veil of corporate personality would not easily be pierced,<sup>42</sup> and suggested that this would normally only be done where the transaction concerned could be regarded as a 'cloak, or a fiction or a sham',<sup>43</sup> which was not the case on the facts. The sale to the subsidiary was regarded as a genuine contract, designed to vest the South African assets of an external company in its wholly-owned local subsidiary. Although the purchase price was low, the court held that it was based on a genuine valuation by an engineer, which did not anticipate the subsequent increase in value.

By contrast, American courts usually treat a conveyance between closely-related parties that does not amount to an arm's-length transaction as not constituting a trigger event.<sup>44</sup> Transactions which fall into this category include sales between affiliated corporations,<sup>45</sup> contributions of property, whether for value or not, from a natural person to a corporation owned by the natural person<sup>46</sup> and distribution of corporate assets to the corporation's shareholders.<sup>47</sup> Some cases also concern sales from one partner, co-tenant or

<sup>39</sup> At 1140B–C.

<sup>40</sup> 1985 (4) SA 615 (T).

<sup>41</sup> The preference agreement granted '(a) The right of first refusal for a period of 30 days, by it or its nominee, to acquire the rights to precious metals, including platinum, in respect of the farm, together with the metals found in the ores of precious metals, in the event of your company deciding at any time to take the initiative in disposing of such precious metal rights; (b) the right, for a period of 30 consecutive days from the date that your company advises us of the receipt of a bona fide offer from a third party to match such offer, either direct or through its nominee, to purchase all rights to precious metals as aforesaid.'

<sup>42</sup> 624F.

<sup>43</sup> 625H.

<sup>44</sup> Tew op cit note 25 at 7–66–7–67 and cases there cited as well as further cases cited in footnotes 45–49 below.

<sup>45</sup> See, for example, *Creque v Texaco Antilles Ltd* 490 F 3rd 150 (Virgin Islands CA 2005), *Sand v London & Co* 121 A 2d 559 (1956).

<sup>46</sup> See, for example, *Kroehnke v Zimmerman* 467 P 2d 265 (Colo 1970), *McGuire v Lowery* 2 P 3d 527 (Wyo 2000) and *Belliveau v O'Coin* 557 A 2d 75 (R I 1989) which concerned sales by the individual owners to their wholly-owned corporation.

<sup>47</sup> In *Lehm's Court Management LLC v My Mouna Inc, Chicken George's Palance Inc and Moussa* 837 A 2d 504 (Pa 2003) a transfer for value from the grantor corporation to the sole shareholder of such corporation was also held not to trigger the right of pre-emption.

co-owner to another<sup>48</sup> and intra-family conveyances.<sup>49</sup> The exclusion of this type of transaction from the ambit of triggering transactions is often justified with reference to the typical wording of preference provisions, according to which the buyer may purchase on the terms contained in a 'bona fide offer to purchase',<sup>50</sup> and by the normal definition of a right of first refusal as a right granting an option to purchase on the terms contained in a 'bona fide offer' by a 'third party' to purchase the property.<sup>51</sup> The cases concerned typically rely on the absence of a change in control of the pre-emption property in the case of a transfer to a corporation controlled by the same interests, or a transfer to the grantor's sole shareholder, where the motive of the transfer is business convenience.<sup>52</sup> The courts accordingly look 'beyond formalities and accounting entries to the true nature of the conveyance',<sup>53</sup> and, if it amounts to a restructuring rather than a sale, they treat it as such.<sup>54</sup> In this regard, a sale has been defined as 'a transfer (a) for value (b) of a significant interest in the subject property (c) to a stranger [to the contract creating the right of pre-emption] (d) who thereby gains substantial control over the [pre-emption] property'.<sup>55</sup> Obviously, if a non-arm's length transaction does not trigger the right of pre-emption, the courts accept that the 'new owner' remains bound by the right of pre-emption.<sup>56</sup>

Although loss of control is seen as significant in the cases discussed above, the loss of control over the pre-emption property entailed by the sale of all the shares of a corporate grantor has not caused courts to regard such sale as a trigger event.<sup>57</sup> In this regard, the holder of the right of pre-emption has not been allowed to 'pierce the corporate veil',<sup>58</sup> even in instances where the third party had originally inquired about buying the pre-emption property and/or had bought the shares at the same price it had originally offered to

<sup>48</sup> Tew op cit note 25 at 7–66. See also *Pellandini v Valadao* 113 Cal App 4th 1315 (2003). The fact that no new owner is introduced is seen as decisive. See *Prince v Elm Inv Co Inc* 649 P 2d 820 (Utah 1982) at 822. Robert Flannigan 'The legal construction of rights of first refusal' (March-June 1997) 76 *Canadian Bar Review* 1 at 22 notes that a transfer of an undivided share to a co-owner does trigger a right of pre-emption in Canada, however.

<sup>49</sup> Tew op cit note 25 at 7–66. See, for example, *Isaacson v First Security Bank of Utah* 511 P 2d 269 (1973), where a 'sale' from father to son for one-third of the market value was held to be 'more of a gift than a sale' which did not trigger the right of first refusal (at 272).

<sup>50</sup> See, for example, *Creque v Texaco Antilles Ltd* supra note 45.

<sup>51</sup> See, for example, *Creque v Texaco Antilles Ltd* supra note 45 at 152.

<sup>52</sup> *Creque v Texaco Antilles Ltd* supra note 45 at 154; *Lehn's Court Management LLC v My Mouna Inc* supra note 47; *McGuire v Lowery* supra note 46; *Sand v London & Co* 121 A 2d 559 (1956) 562. *Prince v Elm Inv Co Inc* supra note 48 at 821 did hold that a transfer of property from a sole owner to a partnership in which the owner was one of two partners invoked the right of first refusal, on the basis that there had been a change in control of the property because management decisions had to be made unanimously by the partners and not by the erstwhile owner alone. In *Belliveau v O'Coin* supra note 46 the court reasoned that there was no substantial transfer of control to an unrelated third party (78–9).

<sup>53</sup> *Creque v Texaco Antilles Ltd* supra note 45 at 154.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Prince v Elm Investment Co Inc* supra note 48 at 823, affirmed in *Lehn's Court Management LLC v My Mouna Inc* supra note 47 at 510–11.

<sup>56</sup> See, for example, *Creque v Texaco Antilles Ltd* supra note 45 at 153; *Belliveau v O'Coin* supra note 46.

<sup>57</sup> *LaRose Market Inc v Sylvan Center Inc* 530 NW 2d 505 (Mich 1995). Canadian law is the same on this point (Flannigan op cit note 48 at 21, who regards this as unfair where the pre-emption property is the most important asset).

<sup>58</sup> *LaRose Market Inc v Sylvan Center Inc* supra note 57.

buy the pre-emption property.<sup>59</sup> This situation has been distinguished from those mentioned above on the ground that equitable considerations such as the parties' motives for the sale and the relationship between the parties are not relevant to a mere corporate stock transfer, as the identity of the corporate grantor/owner does not change.<sup>60</sup> Another justification has been that rights of first refusal must be interpreted narrowly.<sup>61</sup> It has also been said that '[i]n view of the ready severability and alienability of corporate stock — and indeed the inevitability of a turnover in the stockholders of a corporation of perpetual duration — it would in most cases be unrealistic and unfair not to consider the lessor [grantor] to be the corporation itself, not its stockholders'.<sup>62</sup> However, if the sale of the shares in the corporate grantor is part of a pre-arranged plan to sell the shares to the outsider first and thereafter to transfer the property of the corporation to its shareholders, proof of bad faith or wrongdoing would cause this 'multistep transaction' to trigger the right of first refusal.<sup>63</sup>

Certain non-arm's length transactions between related parties are also disregarded as non-triggering events in German law. Thus, a co-owner is not treated as a 'third party', and therefore a transfer against value to a co-owner does not trigger another's right of pre-emption.<sup>64</sup> This rule is comparable to the American rule that transfers amongst partners are not trigger events.<sup>65</sup> One German court stated obiter that if only one undivided share in the common property was subject to a right of pre-emption, a sale of that share to another co-owner would indeed trigger the right of pre-emption, as the buyer did not have any right to the undivided share in question and was therefore a 'third party'.<sup>66</sup> This suggestion, which is supported by the German writer Schurig,<sup>67</sup> was not taken up by the German Supreme Court in a later case, however,<sup>68</sup> perhaps because of the particular facts of that case. The co-owner in question granted a right of pre-emption over his share to an entity which was economically speaking identical to itself upon disagreement arising between the co-owners. The holder of the right of pre-emption purported to exercise its right when the property was thereafter awarded and 'sold' to the other co-owner upon dissolution of the co-ownership. The court argued that a co-owner is not a 'third party' for purposes of a right of pre-emption, so that no trigger event occurred. In

<sup>59</sup> *KCS Ltd v East Main Street Land Development Corp* 388 A 2d 181 (1978); *Cruising World Inc v Westermeyer* 351 So 2d 371 (Fla 1977) at 372.

<sup>60</sup> *LaRose Market Inc v Sylvan Center Inc* supra note 57 at 509.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Prince v Elm Investment Co Inc* supra note 48 at 823.

<sup>63</sup> *Ibid.*; *LaRose Market Inc v Sylvan Center Inc* supra note 57 at 508–9 and the cases cited there.

<sup>64</sup> BGHZ 13, 133; BGH WM 1957, 1162; Faust in Bamberger & Roth op cit note 16 at § 463 Rn 24; Othmar Jauernig (ed) *Jauernig Bürgerliches Gesetzbuch Kommentar* 11 ed (2004) § 463 Rn 17; cf Barbara Grunewald 'Umgehungen schuldrechtlicher Vorkaufsrechte' in Hermann Lange et al (eds) *Festschrift für Joachim Gemhuber* (1993) 137 at 146–7 for criticism of this view.

<sup>65</sup> See note 48 above.

<sup>66</sup> BGHZ 13, 133.

<sup>67</sup> Klaus Schurig *Das Vorkaufsrecht im Privatrecht* (1975) 163–4.

<sup>68</sup> BGHZ 48, 1.

addition, it argued that to allow the exercise of the right of pre-emption under these circumstances would mean that the termination of the co-ownership would become practically impossible as the other co-owners would never be allowed to become sole owner through making the highest offer for the property. Schurig criticizes the court's refusal to regard co-owners as 'third parties' in this context.<sup>69</sup> He argues that the co-owner is indeed a third party as he was not a party to the pre-emption agreement. Furthermore, according to Schurig, there are other provisions in the BGB which prevent a deliberate evasion of the rules on dissolution of co-ownership, namely, where the co-owner intentionally creates a right of pre-emption in order to retain control over a share of the property.<sup>70</sup> He argues that if the grant of the right of pre-emption was not aimed at such evasion, the holder should be able to exercise his right over an undivided share of the pre-emption property when that share is sold to a co-owner.

It has also been suggested that a sale of shares to another shareholder in the same company may sometimes trigger the other shareholders' right of pre-emption, namely, where it is clear that the purpose of the right of pre-emption is not merely to ward off unwanted third parties, but was granted by reason of the holder's interest in obtaining more shares in the company.<sup>71</sup>

German law is similar to American law in another respect: a transfer of the pre-emption property to a company as a contribution by its shareholder is generally not regarded as a 'sale' which triggers a right of pre-emption, insofar as the transfer is not aimed at evasion of the right of pre-emption.<sup>72</sup> A transfer of land from one company to another in the same group against an issue of shares has been held to amount to a company restructuring, which did not trigger a right of pre-emption over the land.<sup>73</sup> It has also been argued that any sale which is merely aimed at a restructuring within a group of companies should not be regarded as a trigger event.<sup>74</sup> This would include a sale of the pre-emption property by the parent company to a subsidiary or

<sup>69</sup> Schurig op cit note 67 at 165 ff.

<sup>70</sup> Schurig op cit note 67 at 167–8.

<sup>71</sup> Westermann in Krüger & Westermann op cit note 14 at § 463 Rn 24.

<sup>72</sup> Faust in Bamberger & Roth op cit note 16 at § 463 Rn 22; Westermann in Krüger & Westermann op cit note 14 at § 463 Rn 19. Schurig op cit note 67 at 136 accepts this view where the parties intend that that specific asset must be contributed to the company, for example where the company will conduct its business from the property involved, as the grantor cannot achieve his purpose through selling the property to the holder. Schurig argues, however, that where the grantor is concerned merely with contributing value to the company, regardless of the form of such contribution, the holder should be able to exercise his right of pre-emption to buy the property involved. In that case, he argues, the grantor's purpose can be achieved through a sale to the holder: the grantor can contribute the proceeds of such sale to the company. He points out that the onus would be on the holder to prove that a transaction falls within the last-mentioned category. His view is not generally accepted by other commentators on the BGB (Bamberger & Roth op cit note 16 at § 463 Rn 22; Westermann in Krüger & Westermann op cit note 16 at § 463 Rn 19).

<sup>73</sup> OLG Stuttgart BB 2001, 794 as cited by Westermann in Krüger & Westermann op cit note 14 at § 163 Rn 19.

<sup>74</sup> Faust in Bamberger & Roth op cit note 16 at § 463 Rn 24; Ulrich Huber in Hans-Joachim Mertens (ed) *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen Kohlhauer-Kommentar begründet von Hs Th Soergel & W Siebert 3: Schuldrecht II (§§ 433–515) AGB-Gesetz, AbzG, EAG, EKG, UN-KaufAbk 12 ed (1991) § 504 Rn 15a. Cf Westermann in Krüger & Westermann op cit note 14 at § 463 Rn 24.*

vice versa or a sale between subsidiary companies or a sale by a company to another company controlled by exactly the same persons.<sup>75</sup> Others argue that the situations in which such cases can be regarded as ‘a sale to a third party’ are, in fact, problematic and unclear.<sup>76</sup> It appears, however, that intra-group transfers are sometimes expressly excluded from the ambit of triggering transactions,<sup>77</sup> which seems advisable given the uncertainty in this area.

As under American law, a sale of the shares of the grantor company does not in Germany trigger a right of pre-emption over that company’s property in the absence of contrary agreement.<sup>78</sup>

Sales to relatives are sometimes expressly excluded from the ambit of trigger events. The German Supreme Court has held that, in the absence of such agreement, a sale at a reduced price between a father and son did trigger a right of pre-emption.<sup>79</sup> It was decided that it was irrelevant to the exercise of the right of pre-emption whether the transaction could be described as a sale or mixed donation. Insofar as it was a mixed donation, the advantage of the lower price to the son could simply not benefit the pre-emption holder. This implies that, insofar as the pre-emption agreement did not provide for a price in such a situation, the holder should be able to exercise his right at a price determined in accordance with §§ 315 and further of the BGB (basically, on the basis of a fair price determined by the grantor).<sup>80</sup> German law therefore differs from American law on this point. However, it has been argued that the mixed donation should not trigger a right of pre-emption, where the price is clearly below market value to the knowledge of the parties.<sup>81</sup> Schurig advocates a purposive approach to this problem: he argues that if the bequest to the relative or friend is the main purpose of the contract, this purpose cannot be attained by the holder exercising his right and so the contract should not trigger the right of pre-emption. However, he agrees with the Supreme Court’s solution where the purpose of benefiting the relative or friend by the lower price is merely an ancillary purpose, in which case § 466 BGB should apply which prescribes that the holder should pay the value of an ancillary performance undertaken by the third party. This argument stretches the meaning of § 466 too far, however. It should be noted that § 470 BGB specifically excludes sales to statutory heirs where the sale is concluded out of consideration for the heir’s future right to inherit.

<sup>75</sup> Huber in Mertens op cit note 74 at § 504 Rn 15a.

<sup>76</sup> Christoph Hahn ‘Rechtsgeschäftliche Vorkaufsrechte im Rahmen von Grundstückskaufverträgen’ 1997 *Mitteilungen der Rheinischen Notarkammer* 193 at 199.

<sup>77</sup> Westermann in Krüger & Westermann op cit note 14 at § 463 Rn 23; Götz Hueck ‘Erwerbsvorrechte im Gesellschaftsrecht’ in Gotthard Paulus et al (eds) *Festschrift für Karl Larenz* (1973) 749 at 761.

<sup>78</sup> Hahn op cit note 76 at 197.

<sup>79</sup> NJW 87, 390, 392; Grunewald op cit note 64 at 138–9.

<sup>80</sup> The court based its decision on ‘ergänzenden Vertragsauslegung’ (literally, supplementary interpretation of the contract) based on what the parties to the pre-emption agreement would have agreed in accordance with good faith, taking account market norms or customs (‘Verkehrssitte’). The implication is that the grantor’s assertion that he only intends to transfer to his relative, should not be taken into account, exactly because he granted the right of pre-emption.

<sup>81</sup> Faust in Bamberger & Roth op cit note 16 at § 463 Rn 22.

Whereas there is some uncertainty in German law, a comparative study of South African, German and American law therefore reveals that transactions between related parties are more likely to be disregarded as trigger events in Germany and America, whereas the only South African court which specifically considered whether an intra-group sale triggers a right of first refusal refused to regard the sale as a mere restructuring which did not trigger the right.

One argument in favour of retaining the South African approach is that it is strictly speaking consistent with the reluctance to 'pierce the corporate veil' evident from our case law, which only allows such piercing in the case of fraud or other improper conduct in the establishment or use of the company.<sup>82</sup> It also effectively prevents deliberate evasions of the right of first refusal by the grantor. The American rules seem fairer, however, and it is more consistent with the intention of the parties that only contracts with true outsiders should trigger rights of first refusal, as they alone cause a change in control over the pre-emption property. There also appears to be a growing recognition in South Africa that intra-group transfers should not simply be equated with transfers between non-related parties. For example, s 45 of the Income Tax Act<sup>83</sup> provides that, where an intra-group transaction as defined in the Act takes place, the two parties are deemed to be one for certain purposes. The holder of the right of pre-emption would to some extent be protected against a deliberate evasion of his right in the form of a transfer to another company or relative by a rule that the right of first refusal survives such a non-arm's length transfer so that the new owner is bound thereby. In addition, a 'step transaction' deliberately aimed at evading the right of first refusal should allow the holder to exercise his right, as American law recognizes. This would be the case, for example, where the grantor first sells the property to a company wholly owned by him, and thereafter sells all the shares in that company to an outsider, who soon after causes the company to be liquidated and the pre-emption property 'distributed' to him as shareholder.

It is in any event advisable that grantors specifically consider providing for sales to certain persons, such as relatives, companies controlled by the grantor or other companies in the same group.

#### *Other transactions that are not sales*

There are other non-arm's length transactions or alienations which in all three systems considered here are generally held not to trigger a right of first refusal. These include testamentary dispositions, intestate succession and donations. Bona fide exchanges are usually also not regarded as 'sales' for the purposes of a right of pre-emption.

<sup>82</sup> See, for example, *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) at 566E.

<sup>83</sup> Act 58 of 1962.

Thus in *Crous NO v Utilitas Belville*<sup>84</sup> a testamentary disposition of pre-emption property was not regarded as a trigger event, even though the pre-emption agreement required an offer before an ‘alienation’ of the property, and did not use the word ‘sale’ in this regard. The court held that ‘alienate’ (‘vervreem’) bears its ordinary meaning of a voluntary and ‘intentional’ transfer of ownership of property by an owner to a new owner. The position is the same in American law<sup>85</sup> as well as in German law, where even a sale to a statutory heir in view of the heir’s later right to inherit, is not regarded as a trigger event.<sup>86</sup>

Voet’s view that a right of pre-emption does not prevent the owner from disposing of the subject-matter by way of gift, testamentary disposition or bona fide exchange, has also been cited with approval in South African case law,<sup>87</sup> and agrees with German law<sup>88</sup> and the majority of American decisions on this point.<sup>89</sup> Pre-emption contracts are therefore not understood as granting the holder a right to contract, which the grantor may not thwart by agreeing to donate or exchange the property, but rather as mere undertakings that the holder would be preferred above others if the grantor should sell.<sup>90</sup> These decisions are consistent with the general principle that pre-emption contracts should be strictly construed. That the grantor is under no obligation to ensure that the holder is able to ‘exercise his right’ in the sense of obtaining the property, appears from the fact that the grantor may alter, damage or destroy the object as he pleases as long as it has not been sold to a third party.<sup>91</sup>

A transaction which combines an exchange of property with monetary consideration should be approached in the normal manner under South African law: the parties’ intention is the primary consideration when classifying such a contract, but where their intention is unclear, the transaction would be a sale where the monetary component exceeds the value of the property exchanged for it.<sup>92</sup> Consistent with this principle, mixed exchanges should be regarded as sales where there is some indication

<sup>84</sup> 1994 (3) SA 720 (C).

<sup>85</sup> *Tew* op cit note 25 at 7–66–7–67; *Marr v Hebert* 415 So 2d 254 (La App 1982) (in which the preference agreement specifically bound the grantor ‘and his heirs’, which clearly excludes a testamentary disposition to the heirs as a trigger event).

<sup>86</sup> § 470 BGB.

<sup>87</sup> Voet 18 3 10, cited with approval in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 188 and *Edwards (Waaikraal) Gold Mining Co Ltd v Mamogale NO & Bakwena Mines Ltd* 1927 TPD 288 at 295. See also Grotius 3 16 14.

<sup>88</sup> RGZ 101, 101; BGHZ 49, 8; BGH WM 57, 1164; Westermann in Krüger & Westermann op cit note 14 at § 463 Rn 18.

<sup>89</sup> *Tew* op cit note 25 at 7–65 – 7–66. An example of a recent case is *Park Station Ltd Partnership, LLP v Bosse* 835 A 2d 646 (Md 2003).

<sup>90</sup> Naudé op cit note 5 at 341–2.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Wastie v Security Motors* 1972 (2) SA 129 (C). Where the third party undertakes to transfer a unique object with great sentimental value for the grantor along with monetary compensation, which the third party is only prepared to do against transfer of the object of the right, the parties’ intention would be to conclude a contract of exchange, as the sentimental value which the grantor attaches to the property is worth even more to her than the monetary component.

that non-monetary consideration was added simply to evade the right of pre-emption (as is the position under German law).<sup>93</sup>

The same principles should apply where the consideration consists partly of a service to be rendered. If the intention of the parties is unclear, one should therefore consider whether the preponderant part of the third party's obligations consists in the supply of goods or services to establish whether the transaction could be classified as a sale which triggers the right of pre-emption.<sup>94</sup>

There is no South African case law which considers whether a transfer between ex-spouses as part of a divorce settlement triggers a pre-emption agreement. However, it is submitted that such a transfer, whether in return for monetary compensation or not, should not be regarded as a trigger event, but that the transferee should remain bound by the right of pre-emption.

Drafters of pre-emption agreements should consider providing for 99-year leases as well, as these would likely not be regarded as 'sales' which trigger a right of pre-emption. In *Transvaal Silver Mines v Jacobs, Le Grange & Fox*<sup>95</sup> a 'lease in perpetuo' was indeed regarded as breach of a right of pre-emption, but the effect of a 99-year lease has apparently not been considered in our law. In one American decision, the court held that an eighty-four year lease did not activate a right of pre-emption.<sup>96</sup>

#### TRANSACTIONS THAT INVOLVE UNIQUE TERMS WHICH THE HOLDER CANNOT MATCH

If application of the above principles shows that the third party contract is of the type which would normally trigger a right of first refusal, the question remains whether the holder's inability to perform a subsidiary obligation personal to the third party disqualifies her from exercising her right. An example would be an undertaking by a third party buyer, a close relative, to allow the grantor to stay on in the pre-emption property and to nurse the grantor in addition to paying the purchase price, which the relative is only prepared to do against transfer of the object of the right of pre-emption.<sup>97</sup> The grantor may show that he would not consider being nursed by anyone else in other surroundings. In the case of a right of first refusal to conclude a new lease at the end of a lease contract, the grantor may argue that the holder is unable to use the premises for the same purpose undertaken by the third party and therefore cannot exercise his right. This would be the situation, for example, where the holder has operated a book shop on the premises, whereas the third party contract states that the lessee may only conduct a gift shop.

<sup>93</sup> See the authorities in note 88 above.

<sup>94</sup> Naudé op cit note 5 at 342; cf *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 (1) SA 195 (RA).

<sup>95</sup> 1891 4 SAR 116.

<sup>96</sup> *Kings Antique Corp v Varsity Prop* 503 NYS 2d 575 (NY 1986).

<sup>97</sup> R.G.Z 121, 139.



Conceivably, application of the rules mentioned so far may provide an answer for some such cases. For example, if the obligation to provide services or to transfer unique property for which money would be no substitute, is the only, or most important, reason why the grantor decided to alienate, one could argue that the preponderant part of the third party's obligation comprises the supply of services or property, so that the parties did not intend to conclude a sale. The holder is not prejudiced as he can only reasonably expect to be preferred above third parties in respect of sales. Perhaps it can even be argued that he can only reasonably expect to be preferred above third parties who would provide the same consideration as him in respect of the type of contract foreseen by the preference contract. A counter-argument that the grantor created reasonable reliance on the part of the holder that only a higher monetary consideration would let him prefer a third party above the holder, is also worthy of consideration. On the other hand, if that argument should serve to prevent the grantor from relying on personal obligations in the third party contract, consistency would require that all exchange contracts should also be regarded as a breach of the preference contract. As there is something to be said for the contrary view, there is no good reason to depart from the existing rule that the grantor is free to conclude an exchange contract with a third party.

#### *South African law*

South African case law on the effect of unique terms which the holder cannot match reveals conflicting views and some unpersuasive results.

A case which did not follow a strict duty-to-match approach is *Dithaba Platinum v Erconovaal*.<sup>98</sup> As noted above, the 'third party' contract in this case was concluded with a subsidiary of the grantor, incorporated for the purpose of acquiring all the grantor company's assets and liabilities in South Africa. The court held that such transfer of the assets was a sale which triggered the right of pre-emption, even though the contract made special provision for payment in the form of ordinary shares in the subsidiary equal to the net book value of the assets and liabilities taken over. The court held that the pre-emption holder could exercise his right to buy the pre-emption property at the book value placed on it on the basis that '[i]f the grantor of the rights chooses to accept satisfaction of money in a form which is impossible for the grantee to match, he cannot complain if the grantee offers him the cash for which he stipulated in the bargain'. As argued before, the transaction involved should rather be regarded as a non-arm's length transfer in the form of a company restructuring which should not trigger the right of pre-emption at all, and it should therefore not carry much weight in the present context.

Swart J of the Transvaal Provincial Division in the unreported case of

<sup>98</sup> *Supra* note 40.

*Golden Lions Rugby Union v Venter*<sup>99</sup> took a stricter approach by apparently requiring an exact duplicate of the third party offer. The case concerned the Golden Lions Rugby Union's right of first refusal to conclude a new employment contract with Venter, a rugby player, after expiry of his fixed term contract. The court implicitly held that the exercise of the right of first refusal was precluded by the inclusion of unique terms in an employment contract subsequently concluded between Venter and the Natal Rugby Union. The court held that the Golden Lions Rugby Union could not match the terms offered by the Natal Rugby Union in respect of the living, training and working environment of the player. In this regard, the court held that an exercise programme which includes training on the beach and swimming in the sea could not be matched by the Golden Lions Rugby Union and that the latter Union could not supply coaching by the same coaches employed by the third party club.

Another case which reflects a strict matching approach is *Soteriou v Retco Poyntons (Pty) Ltd*.<sup>100</sup> The majority stated obiter that, to use the *Oryx* mechanism,<sup>101</sup> the holder must be able to 'step into the shoes of the third party', and suggested that this applies even in respect of the use to which the leased premises may be put.<sup>102</sup> This is apparently consistent with the reference in the *Oryx* case to Glück's statement that the holder must be willing to perform *all* the terms undertaken by the third party,<sup>103</sup> although this was not relevant to the facts of *Oryx*. The minority in *Soteriou* took a different approach — the holder must declare unequivocally and unqualifiedly that he intended to step into the shoes of the third party on the terms and conditions of that lease, 'in so far as they were not inconsistent with his continued use of the premises as before.'<sup>104</sup>

### *American law*

There are diverging American cases on the effect of third-party contracts which are of the type foreseen by the preference agreement, but which

<sup>99</sup> *Golden Lions Rugby Union v Venter* (unreported) Transvaal Provincial Division Case 2007/2000 decided on 11 February 2000. This case is discussed by M W Prinsloo 'Enkele opmerkings oor spelerskontrakte in professionele spansport' 2000 *TSAR* 229 at 242–3 and M M Loubser 'Sport and competition law' in J A A Basson & M M Loubser *Sport and the Law in South Africa* Service Issue 2 (August 2001) at 8–39 ff.

<sup>100</sup> 1985 (2) SA 922 (A).

<sup>101</sup> That is, the remedy recognized in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereingte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) in terms of which the holder can create a contract on the same terms as agreed with the third party by unilateral declaration.

<sup>102</sup> 935B–C. After referring to the *Oryx* mechanism, the court stated that: 'There would seem to be no reason in principle why the same should not apply where a lessee of premises has a right of first refusal of a new lease. But the lease concluded with the third party must be such that the grantee of the right can step into the third party's shoes. It is not clear that he could do so in the present case. The terms of Poynton's contract with CNA have not been disclosed, so that important provisions are unknown, including the duration of that lease, and the use to which the premises may be put.' Because the terms of the third-party contract were unknown, the court merely ordered that the lessee may not be ejected as he had undertaken to fulfil the terms of the third party contract (935B–E).

<sup>103</sup> 906H. See also Floyd op cit note 6 at 266. This aspect of *Oryx* is also what swayed the court in *Golden Lions Rugby Union v Venter* supra note 99 to insist upon exact matching of the third party's offer, even as far as the living conditions of the employee is concerned.

<sup>104</sup> 937H.

contain terms that are impossible to match.<sup>105</sup> It is a settled principle that defeat of a right of first refusal should not be allowed by the use of special, peculiar terms not made in good faith.<sup>106</sup> An indication that terms were not imposed in good faith is the absence of a reasonable basis for distinguishing between the two offers.<sup>107</sup> Thus it is often said that the grantor may impose any conditions that are commercially reasonable, imposed in good faith and not specifically designed to defeat pre-emptive rights. Apart from that exception and modifications necessitated by the different identity of the parties, some courts require that the holder's offer must be a perfect match.<sup>108</sup>

Other courts have, however, allowed the exercise of the right of first refusal where the differences between the two proposed contracts are not substantial.<sup>109</sup> Some courts have worded this to require only matching of the essential or material terms of the third party's offer.<sup>110</sup> It has also been said that, as long as the holder submits an equally desirable offer, it does not need to submit an identical offer.<sup>111</sup> It has also been held that because the holder is stepping into the third party contract the court must consider commercial realities and allow modifications consistent with the intention of the parties to the preference agreement,<sup>112</sup> a principle which takes into account the reasonable expectations of the preference holder.<sup>113</sup>

One reason for this opposition to a strict matching requirement is the ease with which a grantor could otherwise evade the right of first refusal by

<sup>105</sup> See generally Tew op cit note 25 at 7–80–7–81.

<sup>106</sup> See, for example, *Prince v Elm Investment Co Inc* supra note 48 at 825; *Brownies Creek Collieries Inc v Asher Coal Mining Co* 417 SW 2d 249 (Ky 1967) at 252; *Davis v Iofredo* 713 NE 2d 26 (Ohio 1998); *Sessel Holdings Inc v Fleming Companies Inc* 949 F Supp 572 (Tenn 1996); *West Texas Transmission LP v Enron Corporation* 907 F 2d 1554 (5th Cir 1990).

<sup>107</sup> *West Texas Transmission LP v Enron Corporation* supra note 106. In *Prince v Elm Investment Co Inc* supra note 48 at 825 the court required the grantor/seller to justify the unique features of the third party contract according to ascertainable commercial standards given that it was a commercial contract. The court also gave the example of a third party offer which includes a house which the seller intends to use as a personal residence. In this regard, it said, the seller's personal preference might be eminently reasonable. But if the seller intended to use the house as a rental property, an explanation in commercial terms is probably required to meet the reasonableness standard.

<sup>108</sup> See, for example, *Minar v Skoog* 50 NW 2d 300 (Minn 1951); *Sessel Holdings Inc v Fleming Companies Inc* supra note 106; Tew op cit note 25 at 7–80–7–81. An example of the modifications necessitated by the different identities of the parties would be a change of the choice of law provision to reflect the fact that both grantor and holder reside in the same state, whereas the third party contract chose the law of the third party's state. Some decisions go further by not requiring commercial justification for the unique term. See, for example, Hall CJ, in the minority in *Prince v Elm Investment Co Inc* supra note 48, who stated that the grantor's decision to accept the holder as a partner in property development in the place of the third party buyer remains a personal one upon which the court cannot impose an objective standard.

<sup>109</sup> See, for example, *Prince v Elm Investment Co* supra note 48; *Davis v Iofredo* supra note 106; *Brownies Creek Collieries Inc v Asher Coal Mining Co* supra note 106; *Vincent v Doebert* 539 NE 2d 856 (Ill App 1989). See also Tew op cit note 25 at 7–80.

<sup>110</sup> *Hallmark Builders Inc v Hickory Lakes of Brandon Inc* 444 So 2d 1047 (Fa 1984); *Davis v Iofredo* supra note 106. In the latter case, the holder was not required to match the third party's undertaking to use a certain corporation to do remedial work to the property as such term was non-material and peculiar.

<sup>111</sup> *Davis v Iofredo* supra note 106 at 28.

<sup>112</sup> *Arden Group Inc v Burke* 45 Cal App 4th 1409 (Cal App 1996) at 1414. The court allowed tenants to exercise their right of pre-emption where the only differences between the two offers were those made necessary by the fact that the tenants intended to continue to use the property as before as a gas station, whereas the third party purchasers proposed to remove the gas station and clean up the property. For a discussion of the case, see 'Leases: Right of first refusal properly exercised' January 1998 *Real Estate Law Report* 5.

<sup>113</sup> *C Robert Nattress & Associates v CIDCO* 184 Cal App 3d 55 (Cal App 1986) at 72.

including unique or peculiar terms. That the holder need only submit an equally desirable offer and not an identical offer is said to be 'axiomatic'.<sup>114</sup> The fact that strict matching may sometimes thwart the holder's reasonable expectations as to the circumstances under which she would have been able to exercise her right is also relevant.<sup>115</sup>

On the other hand, requiring an unqualified acceptance is said to guarantee the grantor that he will receive the benefit of the bargain under which he agreed to relinquish his interests,<sup>116</sup> so that the terms of the contract involved remains his exclusive prerogative, as long as he acts in good faith.<sup>117</sup> However, a number of the cases which require strict matching could also have been decided on the basis that the modification in question was clearly substantial, so that it was not necessary to lay down a principle of strict duplication.<sup>118</sup>

### *German law*

The German Civil Code provides in § 466 that if the third party has undertaken a subsidiary obligation<sup>119</sup> which the pre-emption holder cannot perform, the holder may pay the value of such performance (being the value at the time of exercise of the right).<sup>120</sup> If the subsidiary obligation cannot be valued in money, exercise of the right is precluded, unless the holder can prove that the third party contract would also have been concluded without such subsidiary obligation.<sup>121</sup>

The object of this provision is to ensure that the grantor is not worse off when contracting with the holder instead of the third party.<sup>122</sup> The provision ensures that the grantor is free to decide on the terms of the sale, although he may lose the benefit of certain less important subsidiary obligations.<sup>123</sup> At the same time, § 466 BGB aims to prevent evasion of the right of pre-emption.<sup>124</sup>

<sup>114</sup> *Davis v Iofredo* supra note 106 at 28.

<sup>115</sup> Cf *C Robert Nattress & Associates v CIDCO* supra note 113 at 72.

<sup>116</sup> *West Texas Transmission LP v Emon Corporation* supra note 106 at 1565.

<sup>117</sup> *Weber Meadow-View Corp v Wilde* 575 P 2d 1053 (Utah 1978).

<sup>118</sup> See, for example, *Sessel Holdings Inc v Fleming Companies Inc* supra note 106 (in which the holder attempted to modify a provision of the third party agreement stating that shares acquired were solely for the purchaser's own investment and not for resale or distribution); *West Texas Transmission LP v Emon Corporation* supra note 106 (in which the court held that the holder's attempt to exercise its right without accepting a requirement of FTC approval in the third party contract would substantially vary the terms of the third party contract (1565)). In addition, *Minar v Skoog* supra note 108, which also required strict duplication, was clearly wrongly decided. The court incorrectly held that the holder did not validly accept 'the terms of the option offer'. A proper analysis of the facts reveals that the grantor did not make any offer because the holder was never informed of the terms of the third party contract; thus there was no offer to accept. The grantor should not be allowed to sell to a third party until the terms of its offer has first been put before the holder (see further Naudé op cit note 5 at 357–60; *Sher v Allen* 1929 OPD 137 at 145).

<sup>119</sup> Nebenleistung.

<sup>120</sup> § 466(1) BGB. See also Faust in Bamberger & Roth op cit note 15 at § 466 Rn 4.

<sup>121</sup> § 466(2) BGB. It would be difficult for the holder to prove that the contract would have been concluded without the obligation in question. See Faust in Bamberger & Roth op cit note 15 at § 466 Rn 5.

<sup>122</sup> Faust in Bamberger & Roth op cit note 15 at § 466 Rn 3.

<sup>123</sup> Westermann in Krüger & Westermann op cit note 14 at § 466 Rn 1.

<sup>124</sup> *Ibid.*

If the obligation which the holder cannot perform is a principal obligation,<sup>125</sup> § 466 BGB does not apply, but the contract will then not be regarded as a sale, so that the right of pre-emption is not triggered.<sup>126</sup>

It is also said that § 466 BGB does not apply where the subsidiary performance by the third party is not undertaken in exchange for the pre-emption property, so that the grantor has no interest therein.<sup>127</sup> In this case, the term involved does not bind the pre-emption holder due to a different section of the BGB, namely § 464(2). Such terms are regarded as 'alien elements' ('Fremdkörper') which are not part of the contract of sale.<sup>128</sup> An example would be an undertaking by the third-party buyer to pay the costs of making projections<sup>129</sup> where he himself instructed the company that undertook to make the projections and the company also had no connection with the grantor.<sup>130</sup> An example of a term aimed at evasion of the right of pre-emption which would also not bind the buyer is a penalty clause which applies on resale of the pre-emption property, when the penalty clause was not necessary for the grantor's decision to conclude the contract.<sup>131</sup>

An example of a subsidiary obligation that is regulated by § 466 is an undertaking by the buyer of a restaurant to buy its beers from the seller, a brewery.<sup>132</sup> An example of a subsidiary obligation that cannot be valued in money is an undertaking by the third party to nurse the grantor, his uncle, when the grantor is not interested in being nursed by an outsider.<sup>133</sup>

### *Evaluation*

The South African decisions which require strict matching are problematic.

If one presupposes that the right of first refusal considered in *Golden Lions Rugby Union v Venter*<sup>134</sup> was an enforceable restraint of trade,<sup>135</sup> the result

<sup>125</sup> It appears that essential terms are in view here as opposed to what South African lawyers would understand as *incidentalia*.

<sup>126</sup> Faust in Bamberger & Roth op cit note 15 at § 466 Rn 1.

<sup>127</sup> Faust in Bamberger & Roth op cit note 15 at § 466 Rn 6; cf, however, Westermann in Krüger & Westermann op cit note 14 at § 466 Rn 2.

<sup>128</sup> Faust in Bamberger & Roth op cit note 15 at § 466 Rn 1; § 464 Rn 6; Westermann in Krüger & Westermann op cit note 14 at § 466 Rn 1; § 463 Rn 20.

<sup>129</sup> Projektierungskosten.

<sup>130</sup> Faust in Bamberger & Roth op cit note 15 at § 464 Rn 6.

<sup>131</sup> Westermann in Krüger & Westermann op cit note 14 at § 463 Rn 20, with reference to OLG Stuttgart OLGR 2001, 145.

<sup>132</sup> Faust in Bamberger & Roth op cit note 15 at § 466 Rn 2; cf BGHZ 102, 237, 242.

<sup>133</sup> RGZ 121, 137, 140; Faust in Bamberger & Roth op cit note 15 at § 466 Rn 5; Westermann in Krüger & Westermann op cit note 14 at § 466 Rn 2.

<sup>134</sup> *Supra* note 99.

<sup>135</sup> Loubser argues that such an agreement should normally be regarded as an unreasonable and unenforceable restraint of trade which unduly restricts an employee's freedom to work where he pleases (op cit note 99 at 8–39, 8–40, 8–45; cf Prinsloo op cit note 99 at 242–3). A full consideration of this issue is beyond the scope of this article. See further Naudé op cit note 5 at 345–6. Briefly, Loubser is correct in stating that the general principles applicable to the enforceability of restraints of trade should be considered. However, the right of first refusal does not 'prevent a sport professional from freely offering his services'. As long as he does not contract with another club before the holder had a chance to match that other club's offer, he is free to negotiate with other clubs. It is true that other clubs' interest in negotiating with the player may be dampened by the right of first refusal. This would prejudice the player's freedom to trade. However, in the case of a valued or talented player, this is unlikely to be an obstacle to a third party club's interest, as is clear from the *Venter* case. The employer's interest is not the only factor to be considered in

reached seems unacceptable. To allow an argument that the holder, an inland rugby club, cannot exercise its right as it cannot offer a lifestyle close to the beach as the rival third party club can do, would mean that the preference contract is a dead letter. In addition, the sportsman created a reasonable reliance that the better financial content of the third party offer and other terms integral to his working conditions were all that would sway him not to contract with the holder. Certainly he created a reasonable reliance that the mere fact that another club is situated in a different area would not have an effect on his decision whether to contract with the holder or the third party. As each club is situated in a different area with unique advantages, the preferential right would never otherwise bind the sportsman, as he could always point to some unique advantage of relocating which has nothing to do with the advantages integral to the employment contract itself, such as the monetary compensation, housing offered and undertakings on the prominence to be given to the player (for example, that he would play at least 3 out of every 4 matches or would be the first choice player in his position).<sup>136</sup> Countless opportunities to evade the right would therefore be opened if such aspects are considered.<sup>137</sup> Such a result could not have been intended, as the parties clearly foresaw a binding contract. Similar non-material extraneous benefits of contracting with another club should rather play a role when the reasonableness and enforceability of the right of first refusal as a restraint of trade is considered, or if it passes that test, when the court exercises its discretion to award specific performance or damages. The unreported judgment of *Golden Lions Rugby Union v Venter* cannot be supported, therefore, insofar as it found that the holder of the right of first refusal, Golden Lions Rugby Union, could not exercise its right as it did not match the third party club's offer.<sup>138</sup>

The minority view in *Soteriou v Retco Poyntons*<sup>139</sup> which only requires the tenant (with a right of first refusal to conclude a new lease) to match terms which are consistent with his continued use as before also seems fairer than the majority view. The latter view effectively allows the grantor to defeat the holder's right very easily, as chances are that interested third parties intend running a different business from the premises than the holder. The grantor should at least be required to prove a reasonable justification for inserting a term that the premises could only be used for a particular purpose whereas he

evaluating a restraint of trade. The effect on the player's freedom is also crucial. In this regard, a right of first refusal is less onerous than a normal restraint of trade which prohibits an employee from working for a competitor.

<sup>136</sup> For example, the undertaking by the Natal Rugby Union that Venter would be the first choice no 8 player for Natal (page 13 of the judgment) is an integral and material part of the third party's offer relating to the working conditions themselves which should be matched by Golden Lions to exercise its right of first refusal.

<sup>137</sup> Cf Barbara Grunewald in Harm-Peter Westermann (ed) *Erman: Bürgerliches Gesetzbuch* 10 ed (2000) § 504 Rn 8 (now § 463).

<sup>138</sup> Cf Prinsloo op cit note 99 at 243 who questions the correctness of the court's decision that exercise by the sea and the opportunity to work with the coaches employed by Natal are of material importance in contracts with rugby players.

<sup>139</sup> Supra note 100.

was previously content with the purpose for which it was used by the lessee. He arguably created a reasonable reliance that the holder's right of first refusal would not be thwarted merely because he would want to continue to use the premises as before.

A similar argument could be raised against an author who argues that the atmosphere at a rival publisher's office is superior to that in the grantor firm and that therefore the holder cannot equal the rival's offer. The grantor should not easily be entitled to rely on such unique, intangible advantages of contracting with a third party to escape a contractual relationship with the holder, when the contract with the third party remains of the type foreseen in the preference contract and when it is not regarded as contrary to public interest to enforce the holder's right. Such non-tangible advantages of contracting with a third party should rather be taken into account when the court considers the legality of the right of first refusal or exercises its discretion on the choice between specific performance and damages.

On the other hand, the grantor should retain a large measure of freedom to decide the terms on which he is prepared to contract. There are therefore some situations where it is fair to preclude exercise of the holder's right due to her inability to match unique, personal terms, whereas in other instances a strict duty-to-match approach seems unfair. The complexity in this area requires more elaborate rules than the simplistic strict duty-to-match approach of the South African cases. In this regard, South Africa can learn from the American and German experience. Firstly, one should recognize that unique terms may cause the contract not to be of the type covered by the right of pre-emption. When a unique service undertaken by a third party 'buyer' in addition to payment of the purchase price is of the utmost importance to the grantor, the contract could be classified as a type of exchange or mixed contract rather than as a sale, and should therefore not trigger a right of pre-emption. If the transaction nevertheless remains of the type that would normally trigger the right of first refusal, the point of departure should be that the holder must match all its material terms, subject to the following exceptions.

1. The unique term which the holder cannot match must be imposed in good faith and must not be specifically designed to defeat the right of first refusal. To establish this, the grantor must supply a reasonable justification for a term which the holder cannot match. In the case of a purely commercial transaction, such justification must be based on acceptable commercial standards.
2. Modifications of the terms should be allowed that are consistent with the intention of the parties to the preference agreement (so that the reasonable expectations of the holder are taken into account). Such modifications would include modifications necessitated by the different identities of the parties which do not prejudice the grantor.
3. Where a monetary value can be placed on the personal obligation without prejudice to the grantor, the holder should be able to exercise her right upon payment of such value. In this regard the grantor's ipse

dixit as to the value of the obligation should be accorded due weight and if the stated price and the market value are close enough that there is no reason to disbelieve her, that should be the price that the holder should be allowed to match.

The principle that the holder need only match the material terms of the third-party offer means that where the third-party contract would have been concluded without a particular obligation, the holder can exercise her right and ignore such obligation. An example of such a term would be an undertaking by the third-party buyer to pay projection costs where he himself instructed the company that undertook the forecast and the company also had no connection with the grantor.<sup>140</sup> The grantor clearly has no interest in this term.

### PACKAGE DEALS

Where the grantor purports to sell the pre-emption property as part of a larger package, the question arises whether the holder should be entitled or obliged to 'step into the shoes of the third party' by buying the entire package, or whether she is only entitled or obliged to buy the pre-emption property on its own.<sup>141</sup> The package deal does not involve unique, personal terms which the holder cannot match. As a result, specific rules are laid down for it in the case law of the three legal systems under consideration.

#### *South African law*

*Sher v Allen*<sup>142</sup> is the only South African decision that expressly considered the effect of a package deal. The grantor sold the pre-emption property (a portion of an erf) as part of a greater package (the whole erf). The court decided that this transaction breached the right of pre-emption and awarded damages to the holder, this being the only relief that was claimed. The grantor argued that he did not 'desire to sell' the leased property, as foreseen by the pre-emption provision, as he desired to sell the whole erf and not the half-erf, so that the third party contract did not trigger the right of pre-emption.<sup>143</sup> The court rejected this argument on the basis that by selling the whole erf the grantor must 'ex necessitate rei' be selling the half and must be taken to have desired that which his act implied and involved.<sup>144</sup> The court indicated that the grantor could have sold the package, the erf, to a third party, provided that he had respected his undertaking with the holder.<sup>145</sup> In this regard, three courses were open to him: first, to '(if he could) arrange to sell the whole erf' to the holder; secondly, expressly to give

<sup>140</sup> See text to note 130.

<sup>141</sup> The meaning of the term 'package deal' and the questions raised by such transactions were set out in the introduction to this article.

<sup>142</sup> *Supra* note 118.

<sup>143</sup> At 142.

<sup>144</sup> At 143.

<sup>145</sup> At 144.



the holder 'the preference call in respect of the leased property' (the half-erf); and thirdly, to sell in such a way as to have a specific offer in respect of the leased property regarding which the holder might interpose his preference.<sup>146</sup> The court computed the damages on the basis of a higher outside offer received for the package after the sale to the third party. As the other half of the erf was situated on a corner, the court allocated additional value to it and awarded the holder three-sevenths of £750, being the difference between the price at which the grantor sold to the third party (£5250) and the subsequent higher offer (£6000).

The decision implies that the grantor cannot insist on the holder buying the entire package in order to exercise his right and to prevent the sale to the third party. A rejected offer to the holder to buy the whole package at the price offered by the third party would therefore not terminate the right of pre-emption. This is clear from the court's statement that the grantor would fulfil his obligations under the pre-emption agreement if he arranged to sell the whole property to the holder *if he could*, alternatively, if he offered the pre-emption property to the holder on its own.

As the holder only sought damages, the decision leaves some questions relating to package deals unanswered, but inferences can be drawn from the court's reasoning as to the rules which will probably apply where the holder seeks enforcement of the pre-emption or main contract.

The court in *Sher v Allen* did not decide whether the holder would have a right to enforce a sale of the entire package where the grantor did not follow one of the three courses open to him. As the court held that one of the courses open to the grantor before he sells to a third party is to offer the pre-emption property on its own to the holder, the inference can be drawn, however, that the court would not have enforced the sale of the whole package to the holder against the wishes of the grantor.

The court also did not consider whether the holder would have the right to enforce a sale of the pre-emption property on its own, as opposed to a mere claim for damages. However, the same arguments in favour of the enforceability of the main contract upon breach by the grantor<sup>147</sup> apply here: breach by the grantor in the form of an offer to or contract with a third party should allow the holder to enforce a sale of the pre-emption property on its own.

Whereas the court did not expressly consider the manner in which the price of the pre-emption property alone should be calculated, the manner in which it calculated damages provides an indication of the approach likely to be followed by our courts. The implication of its award is that the holder would be entitled to buy the pre-emption property on its own at a price proportional to the total price agreed with the third party, taking into account not only the size of the pre-emption property in relation to the

<sup>146</sup> *Ibid.*

<sup>147</sup> Set out in Naudé (2004) 121 *SALJ* op cit note 6.

package as a whole, but also special features of the properties which may affect the value of a particular property compared to the others in the package, such as its location in the case of land. The court did foresee the possibility that the grantor and the third party could place a separate value on the pre-emption property in the package deal, as this was mentioned as the third course open to the grantor. However, the court did not deal with the possibility of the holder alleging that this value is not a bona fide price, but an inflated value aimed at discouraging exercise of the right of pre-emption. There is clearly a temptation to allocate an inflated portion of the package price to the pre-emption property for this purpose.<sup>148</sup>

In addition, the court did not consider whether the holder would be entitled to an interdict prohibiting the grantor from selling the pre-emption property as part of a package until the grantor received a third-party offer in respect of the pre-emption property alone, which the holder could match. However, the court's view on this issue appears from its statement that the grantor may sell the entire package to a third party provided he has taken one of the three courses open to him. He could therefore offer the pre-emption property on its own to the holder and on rejection of that offer sell the entire package to the holder. This implies that an interdict prohibiting the sale as part of a package until a third-party offer for the individual property appears will not be available. The holder would, however, be entitled to an interdict prohibiting the grantor from selling the package to the third party until the grantor takes one of the three courses open to him.

Although *Dithaba Platinum v Erconovaal*<sup>149</sup> did not expressly consider the effect of the pre-emption property being sold as part of a greater package, the decision lends implicit support to the approach in *Sher v Allen*. In *Dithaba* the pre-emption property (certain mineral rights) was transferred to a subsidiary of the grantor company together with all the grantor's assets and liabilities in South Africa against shares in the new subsidiary, but a separate book value was placed on each of the assets transferred. The court held that the pre-emption holder could buy the mineral rights at the book value placed thereon. The effect of the mineral rights being sold as part of a package was not argued before the court.

As *Sher v Allen* did not explicitly deal with all aspects of package deals it is useful to consider the position in some other jurisdictions. I will accordingly consider the position in the USA, where there is extensive case law and some academic discussion of package deals, as well as the position in Germany, where the Civil Code provides for package deals.

<sup>148</sup> See also Rebecca Major 'A practical look at pre-emption provisions in upstream oil and gas contracts' (2005) 5 *International Energy Law and Taxation Review* 117 at 122.

<sup>149</sup> *Supra* note 40.

*American law*

There are four conflicting views in the US case law on the effect of the package deal on the holder's rights.<sup>150</sup>

First, the Supreme Court of Nevada has held that the package deal does not breach the right of pre-emption at all, leaving the holder without any remedy.<sup>151</sup> This view depends on a literal interpretation of the pre-emption agreement as being triggered by a desire to sell the pre-emption property alone, where the package is regarded as something completely different from the pre-emption property.<sup>152</sup> Most courts and commentators rightly reject this view.<sup>153</sup> The court's reasoning in *Sher v Allen* that an intention to sell the package necessarily implies an intention to sell the portion burdened by the right of pre-emption is persuasive.<sup>154</sup> The Nevada Court's literal interpretation would also permit grantors easily to render every right of first refusal a nullity by adding any additional property, even movable property of very little value, to the pre-emption property and offering the package for sale.<sup>155</sup>

The second view encountered in the case law, often said to be the majority view, is that a proposed package deal does not activate the holder's right of pre-emption, but the holder may obtain an injunction (interdict) to prohibit the grantor from selling the pre-emption property as part of a package deal.<sup>156</sup> The grantor is therefore barred from selling the pre-emption property until he receives an offer for the pre-emption property alone and gives the holder a chance to match that offer.<sup>157</sup> If the grantor has already sold the combined properties when the holder comes to know of the sale, the court will order that the properties be re-conveyed to the grantor.<sup>158</sup> Accordingly, the package deal breaches the right of pre-emption but does not trigger or activate it. The holder is therefore only entitled to remedies enforcing the negative component of his right, the obligation *not* to contract with a third party without first granting the holder a right to contract on the same terms. The advantage of this construction is that it recognizes that the package deal violates the holder's right, but simultaneously recognizes that

<sup>150</sup> The Canadian case law is also disparate. See Flannigan op cit note 48 at 29–36.

<sup>151</sup> *Crow-Spieker #23 v Helms Constr and Dev Co*, 731 P 2d 348, 350 (Nev 1987).

<sup>152</sup> Bernard Daskal 'Rights of first refusal and the package deal' (1995) 22 *Fordham Urban Law Journal* 461 at 474.

<sup>153</sup> See all the other US cases cited below in this section; Daskal op cit note 152 at 474–5; Weldon B Stutzman & David E Day 'Protecting the preemptor: real property rights of first refusal in light of *Gyurkey v Babler*' (1983) 19 *Idaho LR* 277. See also the Canadian writer Flannigan op cit note 48 at 29–32.

<sup>154</sup> *Supra* note 144.

<sup>155</sup> Daskal op cit note 152 at 474.

<sup>156</sup> See, for example, *Chapman v Mutual Life Ins Co of NY* 800 P 2d 1147 (Wyo 1990) at 1152; *Manella v Brown* 537 F Supp 1226 (D Mass 1982) at 1229; *Gyurkey v Babler* 651 P 2d 928 (Idaho 1982) at 934; *Guacildes v Kruse* 170 A 2d 488 (NJ Super Ct App Div 1961) at 495; *Atlantic Refining Co v Wyoming National Bank of Wilkes-Barre* 51 A 2d 719 (Pa 1947) at 725; *New Atlantic Garden v Atlantic Garden Realty Corp* 194 NYS 34 (NY App Div 1922) at 40; *Sawyer v Firestone* 513 A 2d 36 (R I 1986) as well as the other cases cited by Tew op cit note 25 at 7–70, Daskal op cit note 152 at 475 and Flannigan op cit note 48 at 34. Tew and Daskal are of the opinion that this is the majority view, whereas Flannigan considers that there are in fact also roughly as many US cases that recognize the right to enforce the right to buy the pre-emption property upon a package deal (at 31).

<sup>157</sup> Daskal op cit note 152 at 475.

<sup>158</sup> See, for example, *Wallach v Toll* 113 A 2d 258 (Pa 1955) at 261; Daskal op cit note 152 at 475.

the grantor's intention to sell the package is not tantamount to an intention to sell the pre-emption property.<sup>159</sup> In addition, a right of pre-emption only gives a preference to buy at a price acceptable to the grantor, and if the pre-emption property is sold as part of a package, the price that is acceptable to the grantor is unknown.<sup>160</sup> It could be argued that if the court sets the price, it unduly limits the grantor's right to remain in control of the price which he is willing to accept.<sup>161</sup>

The most important criticism against the total ban on package deals entailed by this approach is that it unfairly deprives the grantor of a legitimate means to market his property.<sup>162</sup> It therefore turns the right of first refusal into an unjustifiably heavy restraint on alienation.<sup>163</sup> It also conflicts with the holder's expectations: from her perspective a sale of the pre-emption property as part of a package is no different from a sale of the property on its own, so that she should be allowed to enforce the main contract upon breach in the form of a package deal.<sup>164</sup> The arguments which justify the availability of a 'positive remedy' to enforce the main contract upon a sale of the pre-emption property on its own to a third party apply in this context as well.<sup>165</sup> On the other hand, a holder who prefers such injunctive relief as is available in the USA cannot expect to prevent a package deal more profitable to the grantor without being willing to purchase the pre-emption property at a fair price.<sup>166</sup> In response to the pricing problem, that is, the argument that it is impossible to establish the price that the grantor would be willing to accept for the pre-emption property alone, some courts have argued that the pricing problem was created by the grantor, so that his failure to set a specific price for the pre-emption property alone cannot stand in the way of positive enforcement of the right of first refusal.<sup>167</sup> It is therefore fair that he be restricted to the 'fair value' of the pre-emption property when the holder exercises his right.<sup>168</sup> It is therefore no wonder that most academic commentators and many US courts reject injunctive relief in this form as a suitable remedy.<sup>169</sup>

A third approach followed by a minority of US courts is that the holder's right to exercise his right of pre-emption embraces the whole package.<sup>170</sup> This entails, on the one hand, that the holder is entitled to buy the entire package, even against the wishes of the grantor. On the other hand, the

<sup>159</sup> Daskal op cit note 152 at 477.

<sup>160</sup> Daskal op cit note 152 at 477. See also Naudé 121 (2004) *SALJ* 636 (op cit note 6) at 647–8.

<sup>161</sup> Daskal op cit note 152 at 477.

<sup>162</sup> Stutzman & Day op cit note 153 at 292–3; Daskal op cit note 152 at 478; *Capalongo v Giles* 425 NYS 2d 225 (NY Sup Ct 1980) 228.

<sup>163</sup> *Ibid.*

<sup>164</sup> Daskal op cit note 152 at 479.

<sup>165</sup> See Naudé (2004) 121 *SALJ* op cit note 6.

<sup>166</sup> Stutzman & Day op cit note 153 at 293–4.

<sup>167</sup> Flannigan op cit note 48 at 31–2 and cases there cited in notes 178–9.

<sup>168</sup> *Ibid.*

<sup>169</sup> Stutzman & Day op cit note 153 292–4; Daskal op cit note 152 at 479; Flannigan op cit note 48 at 36 and cases there cited.

<sup>170</sup> Tew op cit note 25 at 7–71; Daskal op cit note 152 at 487–90 and cases there cited. See, for example, *Capalongo v Giles* supra note 162 at 228.

holder must be prepared to buy the entire package to prevent the transfer to the third party. The principal argument in favour of this construction is that the package deal is simply a term of the sale to the third party and the right of pre-emption merely grants the right to buy on the same terms and conditions as a third party, that is, a right to step into the shoes of the third party. In this sense the package deal is no different from other unconventional terms relating to the counter-performance required from the third party, and thus the holder.<sup>171</sup> South African cases have also required that the holder be able to match the precise terms of the third party contract before she may exercise the right of pre-emption.<sup>172</sup> In addition, it is arguable that this construction does not prejudice the grantor as he receives the same compensation regardless of the identity of the buyer.<sup>173</sup>

However, the grantor may have non-economic, sentimental reasons for being willing to sell the other properties in the package to the third party, but not to the holder. In the American cases it is often the grantor who argues against such relief.<sup>174</sup> Moreover, the holder receives more than was foreseen by him if he is entitled to buy the package.<sup>175</sup> Requiring the holder to buy the entire package in order to exercise his right may prejudice the holder unfairly. It has also been said that the risk taken by the holder in respect of unconventional terms relate to the counter-performance undertaken by the third party and the method of payment, not to a collateral agreement with respect to other properties which has nothing to do with the pre-emption property.<sup>176</sup>

The fourth view, preferred by the writers, is that the holder has a right to purchase the pre-emption property alone upon the conclusion of a package deal with a third party.<sup>177</sup> Correlatively, the grantor may conclude a package deal with the third party after rejection of an offer to the holder to buy the pre-emption property on its own.<sup>178</sup> This position is preferred by writers as they consider the condition of the property being sold or the grantor desiring to sell the property to be fulfilled upon conclusion of a package deal.<sup>179</sup> From the holder's point of view there is no difference between a sale of the pre-emption property on its own or as part of a package.<sup>180</sup> By accepting the package deal the grantor himself causes the impossibility of ascertaining the price which he would have accepted for the burdened property alone, so that

<sup>171</sup> Daskal op cit note 152 at 489–90.

<sup>172</sup> See *Sotenou v Retco Poyntons* supra note 100 at 935B; *Golden Lions Rugby Union v Venter* supra note 99, discussed in more detail supra.

<sup>173</sup> Daskal op cit note 152 at 489.

<sup>174</sup> Daskal op cit note 152 at 491. See, for example *Guadides v Kruse* supra note 156 at 493; *Atlantic Refining Co v Wyoming National Bank of Wilkes-Barre* supra note 156 at 723; *New Atlantic Garden v Atlantic Garden Realty Corp* supra note 156 at 39–40.

<sup>175</sup> Daskal op cit note 152 at 490.

<sup>176</sup> *Ibid* at 490–91.

<sup>177</sup> Stutzman & Day op cit note 153 at 292–4; Daskal op cit note 152 at 497–501; Flannigan op cit note 48 at 36 and cases there cited. See also *Wilber Lime Products Inc v Sonntag Family Limited Partnership* 673 NW 2d 339 (Wis App 2003).

<sup>178</sup> *Ibid*.

<sup>179</sup> Daskal op cit note 152 at 481.

<sup>180</sup> *Ibid* at 483.

the grantor should not be able to complain about losing control over the price when the court fixes it at a reasonable amount.<sup>181</sup> The argument against this relief — that it amounts to rewriting the contract if the court fixes the price — is therefore not convincing.<sup>182</sup> There is some ambivalence in the case law on the calculation of the price at which the holder may buy the pre-emption property. Some courts fix the price at the market value of the pre-emption property<sup>183</sup> and others at the pro rata price.<sup>184</sup> One court has referred to the price which the grantor would have allocated to the pre-emption property, as determined by a court.<sup>185</sup> This seems a fair test, as the court could then take all the circumstances into account, including the fair market value of the property on its own and the proportionate price in relation to the package in light of not only the extent of the properties, but other special features which may affect their value, the grantor's reason for packaging the properties and the effect of packaging the properties on the pre-emption property's value. If the grantor has allocated a price to the pre-emption property on its own, the court should still be able to substitute the price which it considers the grantor would actually have set on that property alone, in order to prevent the grantor from ridding himself of the holder through an inflated fake price allocation.<sup>186</sup>

It has also been held that the holder would be entitled to damages upon a package deal with a third party, with no suggestion that this would be the only relief available to the holder.<sup>187</sup>

The arguments in favour of the fourth construction mentioned above, with damages as an alternative remedy, are persuasive. They are also not inconsistent with *Sher v Allen*,<sup>188</sup> the only South African case. It is preferable, however, for the court to take a wider view of the calculation of the price. It should seek to ascertain the price that the grantor would have accepted for the pre-emption property on its own, taking into account its fair market value, the effect of packaging on its value and any other relevant circumstances.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid at 484.

<sup>183</sup> See, for example, *Pantry Pride Enterprises Inc v The Stop and Shop Co* 806 F 2d 1227 (4th Cir 1986); *Boyd v Mahoney v Chevron USA* 614 A 2d 1191 (1992); *Wilber Lime Products Inc v Sonnentag Family Limited Partnership* supra note 177; Tew op cit note 25 at 7–73 at note 38; Daskal op cit note 152 at 482 note 114.

<sup>184</sup> See, for example, *Berry-Iverson Co of North Dakota Inc v Johnson* 242 NW 2d 126 (ND 1976).

<sup>185</sup> *Brenner v Duncan* 27 NW 2d 320 (Mich 1947) 322. Ultimately the court used the proportionate price, regardless of the property's independent market value, however.

<sup>186</sup> In normal situations, where the grantor intends to sell the pre-emption property on its own, the opportunity for such fraud is reduced if a default rule is accepted that the holder's right only terminates when the grantor actually contracts with and performs to a third party on terms that the holder had an opportunity to match, within a reasonable time after submission of the third party offer to the holder. On this proposed rule, see Naudé op cit note 5 at 358–360; Naudé (2004) 121 *SALJ* op cit note 6 at 648.

<sup>187</sup> *Anderson v Armour & Company* 473 P 2d 84 (Kan 1970).

<sup>188</sup> Supra note 142.

*German law*

§ 467 BGB provides a residual rule for package deals (which may therefore be varied by contrary agreement).<sup>189</sup> It provides that if the third party had bought the object of the right of pre-emption together with other objects or properties for a total price (*Gesamtpreis*), the holder must pay a proportionate part of the total price in order to exercise her right. However, the grantor can require that the pre-emption apply to all the properties which cannot be separated without prejudice to him. Obviously, in such a case, the holder may decide not to exercise her right at all.<sup>190</sup> The first part of the provision thus accords with the solution favoured by the American writers, whereas the second part contains an important qualification not yet considered in South Africa or the USA.

The purpose of this qualification is to ensure that economically integrated properties should not be separated where this would prejudice the grantor.<sup>191</sup> The likelihood that the third party would only be willing to pay less or would retreat from the contract upon exercise of the right of pre-emption does not in itself constitute 'prejudice', as the grantor of every right of pre-emption must reckon with this possibility.<sup>192</sup> If exercise of the right of pre-emption in relation to the pre-emption property alone would impede the sale of the rest of the property on terms as favourable as those agreed with the third party, however, there is sufficient prejudice to entitle the grantor to insist that the holder exercise his right in respect of the package, if at all.<sup>193</sup> There is some controversy over whether the grantor should be denied the right to insist on a sale of the entire package under this qualification, where the economic unity of the properties already existed at the time when the right of pre-emption was granted.<sup>194</sup> The better view is that this should not in itself bar the grantor from extending the pre-emption over the package.<sup>195</sup> The holder cannot prevent the grantor from insisting on a sale of the entire package by offering the grantor compensation for the prejudice suffered by the grantor on division of the package.<sup>196</sup>

If the holder is entitled to purchase the pre-emption property alone, its 'objective value' must be ascertained, and in this regard the value at which the property could have been sold on its own is decisive.<sup>197</sup>

<sup>189</sup> Dieter Henrich *Vorvertrag, Optionsvertrag, Vorechtsvertrag* (1965) 342 argues that the BGB provisions should be applied analogously to *Vorhand* agreements.

<sup>190</sup> Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 5.

<sup>191</sup> Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 1.

<sup>192</sup> Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 4.

<sup>193</sup> Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 4; Faust in Bamberger & Roth op cit note 16 at § 467 Rn 4; RG HRR 1935 Nr 724.

<sup>194</sup> Compare Putzo in Bassenge et al op cit note 16 at § 467 Rn 4 with Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 5.

<sup>195</sup> Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 5.

<sup>196</sup> Westermann in Krüger & Westermann op cit note 14 at § 467 Rn 1; OLG Stuttgart OLGR 1999, 1.

<sup>197</sup> Faust in Bamberger & Roth op cit note 16 at § 467 Rn 3.

*Evaluation*

For the reasons mentioned in the discussion of American law on this issue, the holder should be entitled to exercise her right to buy the pre-emption property on its own at a fair price, with the correlative that the grantor should be entitled to conclude the package deal with the third party after rejection of an offer to the holder to buy the pre-emption property on its own at a fair price. This solution finds support in some American case law, amongst most North American writers, and in German law. It is also not inconsistent with the only South African case on package deals, *Sher v Allen*.<sup>198</sup> Allowing the holder to enforce the package deal as a whole against the grantor's wishes would be an unfair limitation on the free alienability of the grantor's other properties, in respect of which the holder has no right.

The question whether the holder's right to buy the pre-emption property alone should be qualified in the manner provided for in the German BGB is more difficult to resolve. This solution has not been considered in American or South African law. The German solution aims to balance the opposing interests of the parties to pre-emption agreements, which may vary considerably depending on the circumstances. The holder may only be interested in obtaining the pre-emption property on its own, or may be interested in the total package, whereas the grantor may have reasons for preferring the holder to purchase the pre-emption property on its own, or may instead prefer that the holder should purchase the entire package if she wishes to exercise her right. The BGB's § 467 gives partial effect to each of the parties' possible interests and is therefore a *via media*: the holder may only insist on purchasing the pre-emption property whereas the grantor may only insist on the holder buying the package when he can prove that he will be prejudiced by a sale of the pre-emption property on its own. This approach may cause some uncertainty, due to the difficulty of defining 'prejudice to the grantor'. It is also rather harsh towards a holder who is unable to afford the package. The German solution should be rejected as it is the grantor himself who, by granting the right of pre-emption, caused the problem of not being able to market his properties as a package. Allowing the holder to exercise her right over the pre-emption property alone may in any event encourage the grantor and the third party to negotiate a fair solution with the holder, which also caters for the grantor's interest in selling the entire package. For example, the grantor and third party may offer the holder a share in the ownership of the combined properties proportionate to the value of the pre-emption property, should she refrain from exercising her right to buy the pre-emption property on its own, or they may agree that the holder will continue to enjoy a right of pre-emption over the pre-emption property after the sale to the third party. The grantor could in this manner attain his purpose with the package deal to some extent whilst at the same time respecting the holder's interest to exercise control over the destiny of

<sup>198</sup> *Supra* note 144.



the pre-emption property. Although the equities are not entirely clear, on balance the qualification that the grantor may sometimes require the holder to buy the entire package if she wishes to exercise her right should not be adopted by South African law.

#### SALE OF A PORTION OF OR PARTIAL INTEREST IN PRE-EMPTION PROPERTY

A proposed sale of only a portion of the pre-emption property, that is, a sale of less than the grantor's entire interest in the property (including a sale of an undivided share therein), may also cause some difficulties. The holder may have little use for anything less than the entire property, and may not be interested in buying only a portion.<sup>199</sup> On the other hand, non-exercise of her right at that stage may ultimately result in the grantor selling the entire pre-emption property to the third party in increments, in which case the holder would wish to retain her preferential right.<sup>200</sup> Must the holder buy the portion in order to retain her right of pre-emption? In other words, does the failure of the holder to exercise her right when a portion is proposed to be sold to a third party deprive the holder of the right to buy the property when it later appears that the whole property was eventually sold? May the holder obtain an interdict prohibiting a partial sale by the grantor?

##### *South African law*

*McGregor v Jordaan*<sup>201</sup> considered a sale of a portion of the pre-emption property to a third party who knew of the right of pre-emption. The holder sought, and was granted, an order declaring the contract with the third party null and void and an interdict prohibiting the holder from giving and the third party from receiving transfer of any portion of the farm. The holder also claimed damages, but none was awarded by the court, which gave no reasons for this decision.

Although the facts of *Transvaal Silver Mines v Jacobs, Le Grange & Fox*<sup>202</sup> are not entirely clear, it appears that the grantor of the right of pre-emption granted a perpetual lease over a portion of the pre-emption property to a third party. The court ordered that the third party contract be cancelled as the third party had prior knowledge of the right of pre-emption.

As the holders in these decisions only sought cancellation of the transfers to mala fide third parties, neither of these decisions provides answers to all the questions raised by sales of a portion of the pre-emption property. It is, however, clear that the sale of a portion of the pre-emption property is regarded as a breach of the right of pre-emption, and that the holder is entitled to an interdict prohibiting such a sale or an order cancelling the

<sup>199</sup> Tew op cit note 25 at 7-74.

<sup>200</sup> Ibid.

<sup>201</sup> 1921 CPD 301. See also *McGregor v Jordaan* 1920 CPD 209.

<sup>202</sup> 1891 4 SAR 116.

transfer of the pre-emption property to a third party with prior knowledge of the right of pre-emption. These decisions, read with later decisions which grant the holder the right to enforce the main contract upon breach, are likely to persuade a court that the holder has a right to purchase the partial interest in the pre-emption property at the terms agreed with or offered to the third party.

#### *American and Canadian law*

A majority of courts in the USA have decided that the grantor's willingness to sell a partial interest in the pre-emption property gives the holder the right to buy that partial interest by matching the third party's offer.<sup>203</sup> A Canadian court has also held that the sale of a portion of the pre-emption property (one of three parcels of land), triggers the right of pre-emption to buy that portion.<sup>204</sup> The alternative would allow the grantor unfairly to defeat the right of pre-emption by piecemeal alienation.<sup>205</sup>

In *Laurence v Peel*<sup>206</sup> an Oregon court held that the holder cannot force the grantor to sell the pre-emption property all at once upon the grantor proposing to sell a portion of the land in question to a third party. This is a sensible rule: the opposite view would entail too serious a restraint on the grantor's freedom to alienate his property as he wishes.

The question whether a long-term lease as a partial interest in land triggers a right of pre-emption has been discussed above.<sup>207</sup>

There is some authority that a holder's failure to exercise the right of pre-emption when offered a partial interest in the pre-emption property does not amount to a waiver of the holder's right, so that she may exercise her right to buy the remainder of the property when it is sold to a third party.<sup>208</sup>

#### *German law*

The German BGB provisions on *Vorkaufsrechte* are silent on the effect of the sale of a partial interest in the pre-emption property. However, there is authority that the sale of a portion of the pre-emption property triggers the right of pre-emption to buy that portion.<sup>209</sup>

#### *Evaluation*

The case law from the USA is implicitly consistent with (although more detailed than) the two South African cases on sales of partial interests in the

<sup>203</sup> Tew op cit note 25 at 7-75 and cases there cited.

<sup>204</sup> *Pushka v Magnowski Estate* 26 Man R 2d 89 (Man CA 1984).

<sup>205</sup> Flannigan op cit note 48 at 22.

<sup>206</sup> 607 P 2d 1386 (Ore Int App Ct 1980).

<sup>207</sup> See the text to notes 95 and 96. See also Tew op cit note 25 at 7-76

<sup>208</sup> Tew op cit note 25 at 7-76-7-77; cf *Meyer v Warner* 448 P 2d 394 (Ariz 1968).

<sup>209</sup> BGH WM 1984, 511; Henrich op cit note 189 at 341-2; Grunewald op cit note 64 at 146.

pre-emption property and should be followed. German law also points to the same approach.

Suppose the holder did not exercise her right of pre-emption to buy a portion of the pre-emption property as she was only interested in the property as a whole. If she could thereafter prove that the grantor subsequently sold the entire property in a series of transactions to the same third party in a deliberate attempt to get rid of the holder, she should be entitled to buy the entire property on the terms agreed with the third party, due allowance being made for inflation, and should not be held to have waived her right when she refused to buy the first portion.

## CONCLUSION

The South African case law on the transactions which trigger a right of first refusal leaves much to be desired. Uncertainty is caused by conflicting decisions on a number of points and the absence of clear authority on others. Furthermore, a comparison with American and German law reveals that some of the South African decisions offer overly simplistic solutions which lead to unfair results in some situations. Drafters of preference agreements or preference clauses in wills must therefore seriously consider the cost-effectiveness of initiating negotiations on the areas of uncertainty and of drafting accordingly. Because of the typically cryptic wording of preference agreements, the need for fair residual rules remains.

First, involuntary sales should not trigger a right of pre-emption in the absence of agreement to the contrary, despite some case law which suggests otherwise. However, the legislation should preferably indicate in the Companies Act that the right of pre-emption of limited interest (private) company shareholders applies to involuntary sales as well in the manner foreseen by *Van den Berg v Transkei Development Corporation*.<sup>210</sup> In addition, some non-arm's length 'sales' to related parties which have been held to trigger rights of pre-emption, such as sales within the same group of companies which involve no change in control of the grantor company, and which are aimed solely at a company restructuring, should probably not be trigger events. However, the right of pre-emption should continue to bind the new owner as before. Where the grantor uses corporate vehicles to transfer the pre-emption property to a third party by means of a so-called 'step transaction', the holder should, however, be able to exercise her right.

The strict duty-to-match approach which some South African cases adopt in respect of unique, personal terms undertaken by the third party is too simplistic to provide a fair solution in all cases. A combination of exceptions to the duty to match encountered in German and American law provides a more complex, but fairer solution.

Although the only relevant South African case did not consider all aspects of package deals, the court's point of departure in that case is sound. The

<sup>210</sup> *Supra* note 21.

same applies to the early cases on sales of a portion of the pre-emption property. If the grantor used a series of transactions in which portions of the pre-emption property were sold to a third party to defeat the holder's right, the latter should be allowed to exercise her right, due allowance being made for inflation, and should not be held to have waived her right when she failed to buy the first portion.