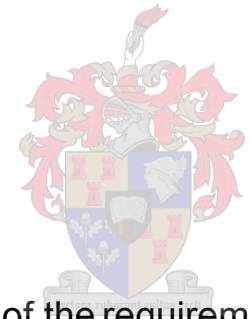
Misrepresentation by Non-disclosure in South African Law

Robin Vicky Cupido



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Supervisor: Professor J E du Plessis

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SUMMARY

This thesis investigates the approach to non-disclosure as a form of misrepresentation in South African law. The primary focus is the question of liability, and whether parties should be able to claim relief based on non-disclosure. In order to determine this, attention is also paid to the standards which have traditionally been employed in cases of non-disclosure, and it is questioned whether a general test can be formulated which could be used in all such instances.

The point of departure in this discussion is a general historical and comparative overview of the law relating to non-disclosure. This overview places the position in modern South African law in context, and highlights some of the similarities between our current position regarding non-disclosure and the position in other jurisdictions. The overview also sets out the provisions relating to non-disclosure in international legal instruments, which could be of use in interpreting concepts used in our law.

The study then shifts to an exploration of the specific situations, such as the conclusion of insurance agreements, or agreements of sale involving latent defects, where South African law automatically imposes a duty of disclosure. These instances are the exception to the general rule against imposing duties of disclosure on contracting parties. The study reveals that certain principles are applied in more than one of these exceptional cases, and attention is paid to each in order to determine which principles are most prevalent. It is suggested that the nature of the relationship between the parties is the underlying reason for always imposing duties of disclosure in these circumstances.

Attention is then paid to the judicial development of the law relating to non-disclosure, specifically in those cases which fall outside the recognised special cases referred to above. The remedies available to a party when they have been wronged by another's non-disclosure are identified and investigated here, namely rescission and damages. A distinction is drawn between the treatment of non-disclosure in the contractual sphere and the approach taken in the law of delict. The different requirements for each remedy are explored and evaluated.

A detailed examination of the key judgments relating to non-disclosure shows us that the judiciary apply similar principles to those identified in the discussion of the exceptional

instances when deciding to impose liability based on non-disclosure. Reliance is also placed on the standards set out in the earlier historical and comparative discussion. The most prevalent of these standards are the nature of the relationship between the parties and the good faith principle.

It is then considered whether all of these principles and elements could be used in order to distill one general standard that could be used to determine whether non-disclosure could give rise to relief. The conclusion is drawn that it may not be advisable to adopt such a standard, and that the seemingly fragmented treatment of non-disclosure in South African law thus far has enabled its development and will continue to do so. A number of key considerations have been identified as possible standards, and these considerations can be applied by the judiciary on a case by case basis.

OPSOMMING

Hierdie tesis ondersoek wanvoorstelling deur stilswye in die Suid-Afrikaanse kontraktereg. Die primêre fokus is op wanneer stilswye aanleiding gee tot aanspreeklikheid, en watter remedies daaruit voortvloei. Om dit vas te stel, word aandag geskenk aan die standaarde wat tradisioneel gebruik word in gevalle van stilswye, en word veral bevraagteken of 'n algemene toets formuleer kan word wat in al sulke gevalle toepassing sou kon vind.

Die ondersoek begin met ‘n algemene historiese en regsvergelykende oorsig, wat die konteks verskaf vir die analise van die posisie in die moderne Suid-Afrikaanse reg, en ooreenkomste tussen hierdie posisie en die benadering in ander jurisdiksies na vore bring. Die bepalings van sekere internasionale regsinstrumente wat spesifiek met stilswye handel, word ook ondersoek om te bepaal hulle van nut kan wees by die uitleg van konsepte wat in die Suid-Afrikaanse reg gebruik word.

Die fokus van die studie verskuif dan na spesifieke, uitsonderlike gevalle waar die Suid-Afrikaanse reg outomaties ‘n openbaringsplig tussen partye erken. Prominente voorbeelde is versekeringskontrakte en koopkontrakte waar die *merx* ‘n verborge gebrek het. Hierdie gevalle is uitsonderings op die algemene reël dat kontrakspartye nie openbaringspligte het nie. Dit kom voor dat sekere gemeenskaplike beginsels van toepassing is in sekere van die uitsonderingsgevalle, en dit word ondersoek hoekom hierdie beginsels gereeld na vore tree. Dit word ook voorgestel dat die aard van die verhouding tussen die partye die onderliggende rede is waarom ons reg openbaringspligte in hierdie spesifieke omstandighede oplê.

Aandag word dan geskenk aan die regterlike ontwikkeling van die regsposisie ten opsigte van stilswye in gevalle wat nie by een van die bogenoemde erkende uitsonderings tuisgebring kan word nie. Die remedies beskikbaar aan partye wanneer hulle deur ‘n ander se stilswye benadeel is, word hier geïdentifiseer en ondersoek. Hierdie remedies is die kontraktuele remedie van aanvegting (moontlik gevolg deur teruggawe) en die deliktuele remedie van skadevergoeding. ‘n Onderskeid word ook getref tussen die hantering van stilswye in die kontraktereg en die benadering wat in die deliktereg gevolg word. Aan die hand van hierdie onderskeid word die vereistes vir albei remedies bepreek.

Die belangrikste uitsprake van die howe in gevalle wat nie by die spesifieke, uitsonderlike kategorieë tuisgebring kan word nie, word dan oorweeg. Dit is duidelik dat die howe in die konteks van hierdie residuele gevalle soortgelyke beginsels geïdentifiseer het as dié wat voorgekom het by gevalle soos versekering en koop. Uit hierdie uitsprake blyk dit ook duidelik dat die howe ag slaan op soortgelyke standaarde as dié wat in die historiese en vergelykende oorsig na vore getree het. In dié verband is die aard van die partye se verhouding en die goeie trou beginsel veral prominent.

Ten slotte word oorweeg of die beginsels en elemente wat hierbo geïdentifiseer is, gebruik kan word om ‘n algemene standaard te ontwikkel wat gebruik sal kan word om te bepaal of ’n openbaringsplig ontstaan. Die gevolgtrekking word bereik dat so ‘n algemene standaard nie noodwendig die beste oplossing is nie. Die oënskynlik gefragmenteerde hantering van stilswye in die Suid-Afrikaanse het tot dusver tog regsontwikkeling bevorder, en sal waarskynlik ook voortgaan om dit te doen. ’n Aantal kernoorwegings kan wel geïdentifiseer word, wat dan sou kon dien as moontlike standaarde wat regsontwikkeling verder sou kon bevorder, en wat deur die howe toegepas sou kon word na gelang van die spesifieke omstandighede van elke saak.

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LIST OF ABBREVIATIONS

ASSAL	Annual Survey of South African Law
BGB	*Bürgerliches Gesetzbuch*
CESL	Common European Sales Law
LHR	The Legal History Review
LQR	Law Quarterly Review
OJLS	Oxford Journal of Legal Studies
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law

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CHAPTER 1: INTRODUCTION

One of the requirements for a valid contract is that there must be consensus, or a proper meeting of the minds, between the contracting parties.[1] The expressions of will which are essential for establishing consensus can be influenced by various factors, which are in some cases so serious that they affect the validity of a contract. One such factor is misrepresentation.[2]

Misrepresentation occurs when a contracting party's decision to enter into a specific contract is influenced by a false representation.[3] Traditionally, the law of contract has regarded such a misrepresentation as a ground for the innocent party to rescind the contract and claim restitution, as well as to claim damages. The question posed in this thesis is when non-disclosure, as opposed to making some positive representation, can constitute a misrepresentation and entitle a party to these remedies. As in many other systems, non-disclosure has traditionally been a problematic area of the South African law of contract, and it is unclear which situations would require that the parties incur liability for their silence.

The general rule in South African law is that there is no inherent duty on a contracting party to disclose any information concerning a proposed contract which he might have.[4] This rule is derived from the idea that knowledge is power when parties enter into contracts, and that parties should at times have the right not to disclose certain information if the disclosure thereof would cause the other party to question whether to enter into the transaction, or enter into it on specific terms. An example which illustrates the application of this rule is the situation where one party buys a house from another, unaware that a murder had been committed in the house a few years prior to the purchase.[5] It would clearly be unpleasant for the buyer to live in a place with such a history, and the question is whether the seller should have disclosed this information to the buyer. This information does not relate to the structural

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[1] S Van der Merwe, LF Van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 4th ed (2012) 90; *Bourbon-Leftley v WPK (Landbou) Bpk* 1999 1 SA 902 (C).

[2] *George v Fairmead (Pty) Ltd* 1958 2 SA 468; *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A).

[3] *George v Fairmead (Pty) Ltd* 1958 2 SA 468; *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A); Van der Merwe et al *Contract: General Principles* 93.

[4] "There is in our law no general duty upon contracting parties to disclose to each other any facts and circumstances known to them which may influence the mind of the other party in deciding whether to conclude the contract" (*Speight v Glass* 1961 1 SA 778 (D); further see 3 1 below).

[5] *Sykes v Taylor-Rose* [2004] 2 P & CR 30.

quality of the house, but it is likely to make the buyer entertain doubts about entering into the contract. In this instance, the seller's non-disclosure is a means of protecting his interests, albeit at the expense of the buyer's interests. This could lead to the buyer being disadvantaged, since he might never have entered into the contract if he had been privy to the same information as the seller. There is no obvious answer, though, to the question whether the buyers' interest in not being disadvantaged in this manner should weigh more strongly than the seller's interest in withholding information. The courts do at times impose duties to disclose, but there is no general criterion that can be used to determine when someone should be liable for an omission to disclose, or when it is unlawful, and each case is decided on its particular facts.

Historically, the problem of imposing liability for non-disclosure arose as early as Roman law. In his *De Officiis*,[6] Cicero described the problem of a merchant who wanted to import grain to a famine-stricken country. As a result of the shortage of grain in the country, he could potentially sell his grain at a high price. However, he discovers that the market will soon be saturated with grain as other ships carrying the same cargo are due to arrive shortly, consequently reducing the price of grain. Assuming that he would want to act in good faith, would he be bound to disclose this information to prospective buyers? Would there be a legal obligation to disclose in this instance, or would it only be morally reprehensible to keep silent? Throughout the ages, legal systems have had to contend with problems like these. In modern South African law it has been suggested that there should be a standard test to determine when such duty will arise.[7] The proposed formulation of this test differs greatly. It has been suggested that because *bona fides* forms the basis of the contract, the parties to a contract are bound to act according to the dictates of good faith, and failure to do so should be actionable.[8] Christie proposes that the test should be that "if, in the circumstances, it would be wrong to keep silent, then silence amounts to misrepresentation."[9] Hutchison's enquiry is whether the non-disclosure was "lawful".[10] However, these tests still leave it very unclear how

[6] 3.12.50.
[7] MA Millner "Fraudulent Non-Disclosure" (1957) 76 *SALJ* 177; RH Christie *The Law of Contract in South Africa* 6th ed (2011) 279.
[8] *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802A-B per Jansen J.
[9] Christie *The Law of Contract* 279.
[10] "In principle, therefore, a party who has been induced to contract by the unlawful non-disclosure of material information is entitled to the same remedies as the victim of any other misrepresentation. The problem, however, is to

we can determine whether or not non-disclosure is actionable in any given circumstance. This lack of a fixed standard is still a problem for which no suitable solution has yet been found.

Linked to this problem is the question whether such a duty to disclose arises only when dealing with certain contracts such as insurance contracts, or other contracts previously designated *uberrimae fidei*, where a higher duty of care *inter partes* has traditionally been required. Does the increased risk in these types of contracts necessitate a higher duty of care? Are there other elements of these contracts that could indicate when a duty to disclose arises between parties? Can these elements be identified in other types of contracts outside the specified exceptions?

Millner, in his famous article dealing with fraudulent non-disclosure, was of the opinion that the duty to disclose could indeed be identified in contracts falling outside the category of *uberrimae fidei*, saying that:

> "The same relationship, and therefore the same duty of disclosure, can arise in any other negotiations which, in the particular case, are characterised by the involuntary reliance of the one party on the other for information material to his decision."[11]

The use of the "involuntary reliance" test as a possible standard for determining the existence of a duty to disclose has often enjoyed support in South African law, both from academic writers and the judiciary.[12] However, the basis, justification and practical application of this standard remain unclear and must be investigated, together with the other possible standards.

The problem of determining when a duty to disclose arises is a global phenomenon. Unsurprisingly, a number of international legal instruments specifically make provision for imposing such a duty. The potential exists that an exploration of the most important of these provisions may aid South African law in determining when such a duty to disclose arises

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establish that the failure to speak was unlawful in the circumstances." D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* (2012) 134.

[11] Millner (1957) *SALJ* 189.

[12] Millner (1957) *SALJ* 177; Christie *The Law of Contract* 280; *Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W); *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 797C; *Orban v Stead* 1978 2 SA 713 (W) 718C.

between parties. These instruments could also be useful in giving meaning to our own Consumer Protection Act,[13] which is aimed at "levelling the playing field" between consumers and suppliers, and empowering consumers. These international instruments, the Consumer Protection Act and other statutory instruments will be explored insofar as they address issues of non-disclosure in the modern commercial world. The relevant question is why the legislature chose to expressly create duties of disclosure in statute, and what their importance is in aiding the development of a general test for the duty to disclose.

This work will begin to address the problems mentioned here by considering the historical development of the law relating to non-disclosure, as well as approaches adopted in some foreign systems and international instruments in chapter two. After exploring these approaches, the focus in chapter three will shift to the specific contracts in which parties may be awarded a claim based on non-disclosure. These contract types will be explored in order to see whether there are any basic principles common to them which could be distilled into a test to use in residual cases of non-disclosure. Finally, in chapter four, attention will be paid to judgments dealing with these residual cases in order to explore their approach to each circumstance. The discussions in chapter three and four may aid us in identifying any similarities between the principles applied in the specific cases and those applied by the judiciary.

[13] 68 of 2008.

CHAPTER 2: HISTORICAL AND COMPARATIVE OVERVIEW OF THE LAW RELATING TO MISREPRESENTATION BY NON-DISCLOSURE

2 1 Misrepresentation by non-disclosure under Roman and Roman-Dutch law

2 1 1 Non-disclosure, dolus and bona fides

2 1 1 1 Roman Law

In Roman law it was crucial to identify the appropriate action governing a given situation. In the case of fraud, it recognised the following remedy according to D.4.3.1.1.

> "The following are the terms of the Edict: 'Where anything is said to have been done with fraudulent intent and no other action is applicable in the matter, I will grant an action if there seems to be good ground for it."

The appropriate action would have been the *actio de dolo*, which was aimed at providing recourse in the event that a contracting party's actions constituted *dolus malus.*[14] This remedy was originally narrow in scope and could only be applied in cases of actual deception, if one of the parties to a contract purposefully created an impression that was different to his true intention.[15]

This interpretation of *dolus malus* was supported by both Servius Sulpicius and Gaius, and was referred to as *aliud simulare, aliud agere*.[16] It has been suggested that a more lenient interpretation of this construction would have allowed for *dolus* being recognised as "the frustration of a justified expectation by the person responsible for it."[17] However, it does not appear that the early jurists extended their application of *aliud simulare, aliud actum* that far. The problem with using such a narrow interpretation of *dolus malus* was that it did not provide for the situation where somebody intends to deceive another and does this without committing a positive act, using concealment to induce the other into entering into a specific contract.

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[14] R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 665-667; C Lewis "The demise of the *exceptio doli*: Is there another route to contractual equity?" (1990) 107 *SALJ* 26 31.
[15] Referred to as "simulation" by Zimmermann *The Law of Obligations* 665.
[16] Zimmermann *The Law of Obligations* 665; A Watson "*Actio de dolo* and *actiones in factum*" (1961) 78 *ZSS* 392 392.
[17] G McCormack "*Aliud simulatum, aliud actum*" (1978) 104 *ZSS* 639 646.

This construction of *aliud simulare, aliud agere* was thus too narrow to accommodate non-disclosure as an actionable offence, as provision was only made for liability for positive acts. However, if it were possible to construe non-disclosure as a type of fraud, it may have been brought within the scope of the *actio de dolo*. The inclusion of non-disclosure as a type of fraud (thereby making it actionable) thus "depended…to a large extent on the interpretation of the words *dolus malus*".[18]

In due course, the definition was indeed extended in order for the law to accommodate instances where the 'wrongdoing' took the form of non-disclosure. This extension began during the early classical period, when the jurist Labeo developed a broader definition of *dolus malus*. The definition is found in D.4.3.1.2, which states that

> "Servius defines 'fraudulent intent' to be a scheme for the purpose of deceiving another party, where one thing is pretended and another is done. Labeo, however, states that it is possible for this to be accomplished, without pretence, for the overreaching of another; and it is possible for one thing to be done without deceit, and another pretended; just as persons act who protect ether their own interests or those of others, by the employment of this kind of dissimilation. Thus he gives a definition of fraudulent intent as being: 'An artifice, deception, or machination, employed for the purpose of circumventing, duping, or cheating, another.' The definition of Labeo is the correct one."[19]

As this text reflects, Labeo defined *dolus malus* (translated here as 'fraudulent intent) widely enough to accommodate any "artifice, deception or machination" aimed at "circumventing, duping, or cheating another". The focus in this definition was thus on the purpose of the action (or possibly omission), instead of the type of action required. In the previously accepted *aliud simulare, aliud actum* construction, a party had to have actually created an impression and then acted contrary to such impression in order to incur liability for *dolus malus*. Labeo's definition, confirmed as the correct one,[20] allows for a wider range of ways in which a contracting party can incur liability, including the possibility of someone being held liable for a non-disclosure. The concealment of information in order to induce another to enter into a contract which he would not otherwise have done is arguably a type of deception aimed at duping another, as the definition provides.

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[18] Zimmermann *The Law of Obligations* 664.
[19] D.4.3.1.2.
[20] D.4.3.1.2.

Millner provides a different translation of D.4.3.1.2, saying that Labeo's famous definition of *dolus malus* includes "any craft, deceit or contrivance (*calliditas, fallacia, machinatio*) employed with a view to circumvent, deceive or ensnare other persons".[21] In his discussion, Millner states that "deceitfulness is clearly the central element in *dolus* – deceitfulness on the part of the guilty party, and not the mere fact of deception of the innocent party, for that might have been innocently brought about."[22] For this reason, as stated above, the question of what constituted *dolus malus* was not to be answered by looking at the specific type of action committed by a contracting party, but rather by considering whether or not he had intended to disadvantage the other party by his conduct (or possibly omission). Bigelow goes so far as to suggest that "all forms of real fraud are, it is apprehended, actually or virtually covered by the definition."[23] He further states that it would theoretically then be possible for someone to attempt to deceive somebody else by their "passive conduct" (which would be inaction), and for such passive conduct to be classified as fraud.[24] In these situations:

> "'Some special duty' may be enjoined by law, requiring a party to speak, as where two persons are negotiating in the presence and with the knowledge of another for the purchase of property belonging in reality to the latter, but not to the knowledge of the buyer. No duty indeed to speak is created by the mere fact that one man may be aware that someone else, he knows not who, may act to his own prejudice if the true state of things is not disclosed…Cases like this, where there is a duty to speak, may properly be deemed to fall within the definition, for they are cases of *misleading* silence."[25]

According to Watson,[26] Labeo extended the definition of *dolus malus* in two ways. The first extension was to include situations where the parties had negotiated prior to concluding the contract, but no express representations were made between them. *Dolus malus* was also extended to find application where there was no direct relationship between the parties.[27] This extension is further evidenced by Ulpian's writing, which provides that:

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[21] MA Millner "Fraudulent non-disclosure" (1957) *SALJ* 177 193. The same definition is used in JW Wessels *The Law of Contract in South Africa* 2nd ed (1951) 327. The words "*calliditas*" and "*fallacia*" also appear in D.2.14.7.9.
[22] Millner (1957) *SALJ* 193-194. Confirmed in MM Bigelow "Definition of fraud" (1887) 3 *LQR* 419 419.
[23] Bigelow (1887) *LQR* 419.
[24] Bigelow (1887) *LQR* 427.
[25] Bigelow (1887) *LQR* 427.
[26] Watson (1961) *ZSS* 392.
[27] See further D.4.3.18.3., and Watson's discussion of the matter at (1961) *ZSS* 393, in which he acknowledges that this second extension was not completely accepted by Labeo's contemporaries, citing D.4.3.7.7. as authority.

> "Where an animal belonging to you does some damage to me through the malice of a third party, the question arises whether I am entitled to an action for malice against him? I agree with the opinion of Labeo, that where the owner of an animal is insolvent, an action based upon malice should be granted; although if there was a surrender of the animal by way of reparation, I do not think it should be granted, even for the excess."[28]

In practice, however, this wider definition of *dolus* proposed by Labeo was just as problematic as the initial narrow definition, despite the fact that it accommodated situations where non-disclosure by a contracting party had led to loss.

As Roman law developed further, it became evident that the construction of *dolus* set out above was inadequate. This was due to the fact that there were "many cases…where the actual misconduct of the plaintiff fell short of deceit or trickery in terms of the Labeonic definition."[29] This definition made specific provision for cases of intentional concealment and dishonesty, and excluded situations where a contracting party's conduct fell short of such concealment and dishonesty. A strict adherence to the Labeonic definition would lead to an inequitable result, as a party who was wronged by the conduct or omission of another that was not actual "deceit or trickery" would have no recourse. This was not in keeping with the Roman ideal of *bona fides*, which became important in deciding whether a contracting party's conduct became actionable. The law developed to such an extent that even if the defendant's conduct fell short of actual dishonesty or misconduct, action could be taken against him. This was possible due to the principle of *bona fides*, which dictated that "the plaintiff was not supposed to turn a situation to his advantage against the precepts of natural equity".[30]

For this reason, several cases where the party's conduct fell short of any actual wrongful intention or conscious concealment were dealt with in terms of the *exceptio doli generalis.*[31] This remedy was used to deal with any cases where the conduct of one of the parties constituted bad faith, and the principles of fairness, reasonableness and *bona fides* required that such conduct be actionable,[32] "wherever, in other words, the very act of commencing a

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[28] D.4.3.7.6.
[29] Zimmermann *The Law of Obligations* 668.
[30] Zimmermann *The Law of Obligations* 668.
[31] D Hutchison "Good faith in the South African law of contract" in R Brownsword, NJ Hird & GG Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 213 215-217.
[32] Hutchison "Good faith in contract" in *Good Faith in Contract* 216.

suit constitutes a deliberate violation of the requirements of *bona fides*."[33] Due, perhaps, to this broad field of application of the *exceptio doli generalis*, it has been stated that the concept of *dolus malus* functioned as a direct opposite to *bona fides* in Roman law.[34] As Zimmermann put it, "the crucial dividing line appears to have been drawn between *bona fides* on the one hand and *dolus* on the other".[35]

2 1 1 2 Roman-Dutch law

Roman-Dutch writers retained most of the Roman law principles of the law of obligations. The main difference in approach to the law of obligations, specifically concerning the roles of the parties and their duties *inter se*, was the disappearance of the distinction between contracts *bonae fidei* and contracts *stricti iuris*.[36] In contracts *stricti iuris* "a judge had to decide the case according to the strict rules of the old law, and this could be inequitable in effect".[37] By contrast, the judge was not bound to the specific wording of the contract between the parties in *negotia bonae fidei*, but could take into consideration the real intention of the parties and any other surrounding circumstances that would aid in his making an equitable decision.[38] However, Roman-Dutch authorities recognised a general theory of contract, in which all contracts were governed by the dictates of good faith, and any agreement entered into with the requisite intent constituted a contract.[39] According to Hutchison, "by the eighteenth century, if not earlier…the concept of contract had come to be generalised, with the gradual acceptance of the fundamental principle that any serious and deliberate promises should be

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[33] JC Ledlie (translator) *Sohm's The Institutes: A text-book of the history and system of Roman private law* 2nd ed (1901) 280, Lewis (1990) *SALJ* 31.

[34] 595F. Joubert JA refers to Botha's unpublished doctoral thesis *Die Exceptio Doli Generalis in die Suid-Afrikaanse Reg* (University of the OFS 1981), where he states that it was "…correctly accepted (by Botha) that according to the formulary procedure of classical Roman law the *exceptio doli generalis* was not founded on equity but *mala fides (dolus malus)* which was in conflict with *bona fides* in an objective sense.".

[35] Zimmermann *The Law of Obligations* 668. The line between *bona fides* and *dolus* has also been described as a "strong inverse relationship" by JE du Plessis "Art 3.8 (Fraud)" in S Vogenauer & J Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts PICC* (2009) 438.

[36] Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) 597F-H; Cod 4.10.4.

[37] Van Warmelo *Introduction to the Principles of Roman Law* 393-394.

[38] Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) 596F-H. Van Warmelo *Introduction to the Principles of Roman Law* 393-394.

[39] JW Wessels *History of the Roman-Dutch Law* (1908) 579.

treated as binding, provided it was not illegal."[40] This had the effect of casting all contracts into the category of *bona fides*, which was now treated as an overarching principle.[41]

It was also accepted that all obligations had to comply with two requirements, namely that each party contracted on the strength of a free exercise of will, and that nobody could be bound to any contract that was "impossible or unlawful for all men in general *or for himself in particular*." (own emphasis).[42] Grotius expands on the requirement that there be a free exercise of will when contracting, saying that this requirement means that a person cannot be considered to be bound "when misled by fraud".[43] It is not expressly stated in this work whether silence would be included in this concept of fraud. The acknowledgement that fraud would impact on the conclusion of a valid contract is based on the Roman law definition of fraud.[44] As we have seen, these provisions generally defined fraud (*dolus*) as positive conduct, but that there are indications that in due course Roman law may have developed to include the situation where misrepresentation occurred by way of omission.[45] Grotius relies on the definition of fraud contained in D.4.3, which includes Labeo's statement that "(a)n artifice, deception, or machination, employed for the purpose of circumventing, duping, or cheating, another" is fraud. D.4.3.1.2 also contains Ulpian's endorsement of this definition, and it can thus be argued that Grotius provides implicit recognition that someone may incur liability for silence, if such silence was aimed at cheating the other contracting party.

The extension of the field of application of the *exceptio doli generalis* resulted in all contracts being governed by the principle of good faith. The use of such a broad principle to govern all contracts meant that courts could judge all contracts according to the dictates of justice and equity, and had the power to impute liability to contracting parties for any conduct that they felt to be contrary to *bona fides*. This was a very broad power and had the positive effect of allowing for inequity to be corrected, but also had the danger of being too broad, and relying

[40] Hutchison "Good faith in contract" in *Good Faith in Contract* 216.
[41] M Lambiris in "The *exceptio doli generalis*: an obituary" (1988) 105 *SALJ* 644 644 is wary of overstating the influence that *bona fides* as an overarching principle has on contractual relationships, saying that although "the law derives certain rules from the concept of good faith which apply to and govern contractual relationships, and which give rise to certain legal obligations which, if broken, may be enforced. It is not the same thing to suggest that the notion of good faith underlies contractual relationships to the extent that, whatever the parties may actually agree, the resultant obligations are enforceable only if they do not contravene general notions of good faith."
[42] AFS Maasdorp (translator) *The Introduction to Dutch Jurisprudence of Hugo Grotius* (1878) Book 3 Ch 1, n19, 295-296.
[43] Maasdorp (translator) *The Introduction to Dutch Jurisprudence of Hugo Grotius* 295.
[44] D 4.3, C 2.20.
[45] See the discussion concerning the Labeonic definition of *dolus malus* at 2 1 1 1 above.

solely on judicial discretion to determine which situations would demand that non-disclosure be actionable. It must be remembered that "the *exceptio doli generalis* was originally available, not on the basis of a generalized notion of equity overriding valid legal obligations, but on the existence of *mala fides* on the plaintiff's part in attempting to enforce legal rights in specific situations."[46]

The development of the *exceptio doli generalis* in Roman law, and the question of its continued relevance in Roman-Dutch law, and subsequently in modern South African law is discussed at length by Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas*.[47] To follow his argument, we need to return briefly to Roman law. Joubert JA suggests that the *exceptio doli*, after its inception, became the most important defence in Roman law, and was initially only used to defend a claim based on a *negotium stricti iuris*, which could often have harsh consequences, due to the *iudex* having to adhere to the precise terms of the contract as signed by the parties.[48]

> "The object of the *exceptio doli generalis* was equitable, viz to ameliorate the harshness of a plaintiff's claim based on a *negotium stricti iuris* such as a stipulation or a *mutuum.*"[49]

Later, during post-classical Roman law, the *exceptio doli generalis* "ceased to function as a praetorian procedural remedy".[50] However, the terminology was still used in both the Corpus Iuris Civilis[51] and the Digest,[52] which led to some confusion in application. It became accepted that a defendant wanting to raise the *exceptio doli generalis* as a defence would have to plead it on the facts, instead of adhering to the strict formula previously required when using the remedy. The *exceptio doli generalis* became an appropriate remedy to use in situations where actual fraud was not proved, but the facts pleaded were such that would require an action, focusing on the plaintiff's *mala fides*.[53]

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[46] Lambiris (1988) *SALJ* 648-649.
[47] 1988 3 SA 580 (A).
[48] 592I-593J.
[49] 595D.
[50] 597A.
[51] The best example of this is found in Inst 4 tit 13, which preserves Gaius' writing (IV 115-24) on the *exceptiones*.
[52] This is largely found in book 44 of the Digest, most specifically in D.44.4.1.1.
[53] Lambiris (1988) *SALJ* 646.

The question was then whether or not this adapted version of the *exceptio doli generalis* was retained by the Roman-Dutch jurists, as "there does not appear to be authority in Roman and Roman-Dutch law for the proposition that an *exceptio doli generalis* was available whenever it appeared that to enforce the performance of a legal obligation was 'unconscionable' or contrary to generalized notions of good faith and fair dealing."[54]

Joubert JA answers this question in the negative, contending that although the Roman law of Justinian was received in the Netherlands during the 15th century, it was not necessarily true that it was received in its entirety.[55] Regarding the issue of the *exceptio doli generalis*, Joubert JA examined the writings of Roman-Dutch jurists closely, but could not find any references to the remedy. Voet[56] does indeed refer to the exception, but by means of quoting Papinian's statements on the matter. Joubert JA suggests that Voet's commentary regarding the application of the *exceptio doli generalis* in Roman law in no way suggests that the remedy has formed part of Dutch law, and thus we cannot simply accept that it did.[57]

Following the court's exploration of Roman-Dutch authorities, as well as Botha's contention that there is no reference to the *exceptio doli generalis* in Roman-Dutch law,[58] the court reached the conclusion that "…the *exceptio doli generalis*…was never part of Roman-Dutch law."[59]

Although it would be possible to conclude the discussion of Roman-Dutch law at this point, it may be useful to consider briefly the implications of the *De Ornelas* decision for modern South African law, especially as regards the relevance of *bona fides* in the law of contract. We will return to this point in later chapters that specifically deal with the relationship between *bona fides* and non-disclosure."[60]

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[54] Lambiris (1988) *SALJ* 646.
[55] 601D-F.
[56] D.44.4.1.
[57] 602G-I.
[58] This was stated in Botha's unpublished doctoral thesis *Die Exceptio Doli Generalis in die Suid-Afrikaanse Reg* (University of the OFS 1981).
[59] 605H.
[60] See 5 2 1 below.

In essence, the majority judgment in *Bank of Lisbon* put an end to the use of the *exceptio doli generalis* in South African law. According to Joubert JA:

> "All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace*."[61]

But this was not the end of the matter.

Joubert JA's judgement was severely criticised for being too academic,[62] and the argument has been made that, despite the official remedy of *exceptio doli* no longer being recognised in South African law, "the underlying factors responsible for its development in the first place will of course always be present; namely, the need for a measure of substantive fairness in contractual dealings…".[63] The *Bank of Lisbon* decision has led to debate about the possible role of good faith as a means of limiting unfairness in contractual relationships.[64] Hutchison states that "(w)ithin the judiciary too there are now welcome signs of a desire to reintroduce considerations of good faith and equity through the medium of the public policy rule in contract."[65] Of particular interest in the present context is the notion that although good faith may not be a "free-floating" principle, providing courts with an equitable discretion, it could fulfil the function of facilitating new rules to promote contractual equity.[66] To the potential for good faith fulfilling this role in the context of the law of non-disclosure we will return later on.[67]

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[61] 607A-B.

[62] See Zimmermann *The Law of Obligations* 676-677.

[63] Hutchison "Good faith in contract" in *Good Faith in Contract* 221; also see Zimmermann *The Law of Obligations* 677. This possibility of adopting a more general defence in modern South African law founded on standards of good faith and equity has also been discussed in Millner (1957) *SALJ* 188; Hutchison "Good faith in contract" in *Good Faith in Contract* 240. See also *Dibley v Furter* 1951 4 SA 73 (C), *Cloete v Smithfield Hotel (Pty) Ltd* 1955 2 SA 622 (O), *Pretorius v Natal South Sea Investment Trust Ltd* 1965 3 SA 410 (W), *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W); *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C) 325; *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C).

[64] S Van der Merwe & G Lubbe "Bona fides and public policy in contract" (1991) 2 *Stell LR* 91 96; G Lubbe 'Bona fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg' (1990) 1 *Stell LR* 7 19-20. Hutchison "Good faith in contract" in *Good Faith in Contract* 221.

[65] Hutchison "Good faith in contract" in *Good Faith in Contract* 215. This statement is made regarding the apparent shift in the way in which good faith is perceived and applied in the law of contract, and the potential use of good faith as a measure of contracting partys' conduct.

[66] *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82; *Potgieter v Potgieter NO* 2012 1 SA 637 (SCA) para 32; R Zimmermann "Good faith and equity" in R Zimmermann & D Visser *Southern Cross: Civil and Common Law in South Africa* (1996) 217 246-249.

[67] See 5 2 1 below.

2 1 2 The duty to disclose in contracts of sale

In order to investigate the role of non-disclosure in our law more closely, and identify principles that could guide us when deciding to impose liability for non-disclosure it is necessary to focus on the treatment of non-disclosure in the Roman and Roman-Dutch contract of sale. According to Stein, the contract of sale was the most important in the Roman commercial practice, and as such, there were many provisions in the Roman law of sale that dealt with the duty to disclose and liability for non-disclosure.[68] Although there is the possibility of both the seller and the buyer incurring liability for non-disclosure, the focus of this discussion will be on the seller's liability, as it was more prevalent than that of the buyer, and may be more useful in discovering general legal principles.

The contract of sale, like the majority of contracts in Roman law, was governed by the standard of *bona fides*,[69] and it was therefore "fraudulent for the seller to refrain deliberately from disclosing a material matter known to him and unknown to the other party with the intention thereby of inducing a sale."[70] The liability of the seller in such a case was acknowledged in Roman law, as is apparent from the following text:

> "Julianus, in the Fifteenth Book, makes a distinction with reference to rendering a decision in an action on purchase between a person who knowingly sold the property, and one who ignorantly did so; for he says that anyone who sold a flock which is diseased, or a defective beam, and did so ignorantly, must make the claim good in an action on purchase, to the extent that the buyer would have paid less if he had been aware of said defects. If, however, he was aware of them, and kept silent, and deceived the purchaser, he will be obliged to make good all loss which the purchaser sustained from said sale. Therefore, if a building should fall down on account of the defect in the price of timber aforesaid, its entire value must be estimated in assessing damages; or if the flock should die through the contagion of the disease, the purchaser must be indemnified to the extent of the interest he had in the sale of the property in good condition."[71]

> "If you sell me a vessel of any kind, and state that it is of a certain capacity, or of a certain weight, if it is deficient in either respect, I can bring an action on sale against you. But if you sell a vase to me, and guarantee it to be perfect, and it should prove not to be so, you must make good to me any loss which I may have sustained on that

[68] P Stein *Fault in the Formation of Contract in Roman Law and Scots Law* (1958) 5.
[69] Millner (1957) *SALJ* 180.
[70] D.19.1.1.1.
[71] D.19.1.13.

> account; but if it is not understood that you guarantee it to be perfect, you may be liable for fraud. Labeo is of a different opinion, and thinks it should only be held that the party must guarantee that the vase is perfect, where the contrary has not been agreed upon; and this opinion is correct. Minicius states that that Sabinus gave it as his opinion that a similar guarantee should be understood to be made where casks are hired."[72]

From these extracts it is evident that there was a possibility of the buyer bringing an action against a seller in the case of latent defects, if the seller knew or was supposed to know about these defects. In a discussion of these texts, it is asserted that "(a)ccording to Roman law, this knowledge in the pre-contractual stage would have resulted in full contractual liability (under the *actio empti*), that means for all damages, including consequential losses."[73] Most discussions on liability for latent defects focus on such liability as it arises from the Aedilitian remedies, but, as shown by the above extracts, there was also a possibility of relying on the *actio empti* to do so. From this, it is clear that Roman law was prepared to hold a seller liable for any hidden defects in merchandise. The question is thus whether the seller was liable for his silence on any other matters.

One option would be to draw a distinction between "permissible reticence" and "guilty concealment".[74] Presumably, "permissible reticence" refers to situations where the seller would have a moral duty to speak, but no harmful consequences would ensue from his silence. By contrast, "guilty concealment" would refer to those situations where the seller knowingly conceals important information from the buyer in order to induce him to enter into the contract. The implication of this distinction is that in situations amounting to "permissible reticence" silence would not be reprehensible, whereas cases where there was an intention to hide specific information should be actionable, an opinion argued by Diogenes.[75] This type of distinction does not provide for cases of so-called "innocent misrepresentation", where one party's silence (not intended to mislead the other) still leads to a disadvantage for the other.

Another method of determining a seller's liability for non-disclosure is to distinguish between situations where the seller's silence concerns an intrinsic defect or an extrinsic defect in the

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[72] D.19.1.6.4.

[73] W Decock & J Hallebeek "Pre-contractual duties to inform in early modern Scholasticism" (2010) 78 *LHR* 89 93.

[74] Stein *Fault in the Formation of Contract* 6; Millner (1957) *SALJ* 179.

[75] Millner (1957) *SALJ* 185. Millner suggests that "guilty concealment" should be dealt with as a form of positive misrepresentation, as the fraudulent nature of such an action is obvious.

merx.[76] An intrinsic defect refers to a defect in the merchandise itself which would affect the price thereof,[77] for example, defects in quality, substance or quantity. Extrinsic defects refer to the conditions surrounding the sale contract, such as current market prices,[78] and availability of the *merx*. In their work, Decock and Hallebeek focus on defects in quality when discussing the seller's liability for intrinsic defects. In Roman law, D.21.1.14.10 draws a distinction between latent and patent defects.

> "Where the existence of a blemish was not expressly mentioned by the vendor, but it was of such a character that it would be apparent to everyone; for example, if the slave was blind, or had a manifest and dangerous scar on his head, or on some other part of his body, Caecilius says that the vendor will not be liable on this account, any more than if he had expressly mentioned the defect, for it is held that the Edict of the Aediles has only reference to such diseases and defects as the purchaser was or could be ignorant of."[79]

According to Decock and Hallebeek,[80] medieval scholars such as Aquinas and Biel have taken this extract to mean that where there are visible defects in the *merx*, the seller is under no obligation to disclose them to the buyer as long as the sale price reflects that the *merx* is flawed. With regard to latent defects there would be a duty to disclose, but only if the defects would cause harm (*damnum*) or risk (*periculum*).

> "I reply that it is always illicit to cause harm or risk to another person, although it is not necessary always for a human being always to provide his fellow man with help and advice to the latter's advantage. That is only necessary in some specific situations, for example when the other is submitted to his care, or when there is no other person who can help him. Now, the seller who offers something for sale, causes the buyer harm or risk by the mere fact that he offers him something defective, if that defect can result in harm or danger. The seller causes harm when the thing offered for sale actually needs to be priced much lower on account of its defect, but he does not reduce the price. The seller causes risk if on account of its defect the use of a thing is impossible or dangerous, for example when someone sells a lame horse as if it were fleet of foot, or a dilapidated house as if it were solid, or contaminated food as if it were good. So whenever such defects are latent and the seller does not disclose them, the sale will be illicit and fraudulent, and he will be obliged to pay damages. If, however, a defect is apparent, for instance when a horse has only one eye, or a thing is still likely to be useful to other persons though it is not any longer to the seller himself, no duty of

[76] Decock & Hallebeek (2010) *LHR* 90.
[77] Decock & Hallebeek (2010) *LHR* 97.
[78] An example of this can be found in Cicero's " *De Officiis* 3.12.50.
[79] D.21.1.14.10.
[80] Decock & Hallebeek (2010) *LHR* 97.

> disclosure exists provided that the seller reduces the price in accordance with the seriousness of the defect. For otherwise the buyer would wish to reduce the price further than is necessary. Consequently it is allowed for a seller to secure his own protection by not disclosing the defect in his merchandise."[81]

A good example of problems relating to extrinsic defects can be found in the writings of Cicero, whose work is used as the point of departure in many discussions on actionable non-disclosure.[82] In his *De Officiis*, Cicero uses the example of a merchant who seeks to sell grain in a time of famine in order to discuss the question of when silence should be actionable.[83] In this example, a merchant from a famine-ravaged country imports a large cargo of grain. Due to the scarcity of grain, he stands to make a large profit. However, he receives word that other ships carrying the same cargo are also bound for his country, which would reduce the grain prices. Is he bound to disclose this information to prospective buyers before selling his cargo at the inflated famine price, assuming that he seeks to act within the bounds of good faith?

In order to decide this, Cicero considers the opposing viewpoints of two Stoic philosophers, Diogenes and Antipater.[84] Antipater proposes that, in the situation sketched above, all the facts known to the merchant should be disclosed, in order for him and the buyer to be on an equal footing. Diogenes provides a different opinion, stating that the merchant in this case would only be bound to disclose defects in his wares. Any other information can be kept to himself, if it enables him to sell his goods as advantageously as possible without resorting to any misrepresentation.[85] In his translation of Cicero's text, Miller sets out the position of Diogenes' merchant as follows:

> "'I have imported my stock,' Diogenes' merchant will say; 'I have offered it for sale; I sell at a price no higher than my competitors – perhaps even lower, when the market is overstocked. Who is wronged?'"[86]

This is a decidedly business-oriented view, which prioritises the tradesman's need to make a living, and allows the merchant to conceal the fact that the market will soon be saturated with

[81] Aquinas *Summa Theologiae*, IIaIIae, quaest. 77, art. 3, concl., p.152.
[82] See Stein *Fault in the Formation of Contract* 6; MJ Schermaier "Mistake, misrepresentation and precontractual duties to inform: the civil law tradition" in R Sefton-Green (ed) *Mistake, Fraud and Duties to Inform in European Contract Law* (2004) 39 44.
[83] 3 12.50.
[84] 3.12.51; 3.12.52; 3.12.53.
[85] Miller *Cicero De Officiis* 321.
[86] 3.12.51.

grain in order to sell his goods at the best possible price. As mentioned above, Antipater takes the opposite stance, saying that all facts known to the seller which would influence the buyer should be disclosed.[87] His reasoning was grounded in the Stoic belief that an individual's interests should also serve the interests of the community. Diogenes countered this,[88] drawing a distinction between silence and concealment and saying that the former did not necessarily lead to the latter. In his view, silence should not be punishable unless it would result in a direct disadvantage to the other party (as in the case of latent defects in the *merx*). Millner, in his article on fraudulent non-disclosure, accepts Diogenes' view, saying

> "In our system of society, paternalism is not a characteristic of the common relations of men or the common law which mirrors those relations…the rule is that each must pit his skill, enterprise, acumen and energy against those of his neighbour."[89]

Another important point to consider is the position regarding "insider information", which is similar to the problem of the Merchant of Rhodes. An example of such a problem is where the seller of a certain type of product is familiar with the administration regulating such a product, and through his connection learns of a future regulation that will lower the price of his goods.[90] Is he bound to share this information with prospective buyers? The post-glossator Bartolus de Saxoferrato, in his commentary on D.19.1.39,[91] is of the opinion that the seller would be bound to disclose such information, as non-disclosure would amount to *circumventio* (fraud).[92]

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[87] 3.12.52; Stein *Fault in the Formation of Contract* 6.

[88] 3.12.53 "It is one thing to conceal…not to reveal is quite a different thing…But I am under no obligation to tell you everything that it may be to your interest to be told."

[89] Millner (1957) *SALJ* 183. Stein expresses the same opinion in his *Fault in the Formation of Contract* 6, saying "there is no universal obligation to teach one's fellow men all that it is of advantage to them to know.

[90] Decock & Hallebeek (2010) *LHR* 101.

[91] "I ask if anyone should sell a tract of land under the condition that all should be considered to be sold which he possessed within certain boundaries, and the vendor, nevertheless, well knew that he did not possess a certain part of said land, and did not notify the purchaser of the fact; would he be liable to an action of sale, since this general rule ought not to apply to those portions of land which the party who sold them knew did not belong to him, and yet did not except them? Otherwise, the purchaser would be taken advantage of, who if he had known this, would perhaps not have purchased the property at all; or would have bought it at a lower price if he had been notified with reference to its true amount; as this point has been settled by the ancient authorities, with respect to a person who made an exception, in the following terms, 'Any servitudes that are due shall remain due.' For persons learned in the law gave it as their opinion that, if a vendor, knowing that servitudes were due to certain persons, did not notify the purchaser, he would be liable to an action on purchase; for this general exception does not refer to matters which the vendor was aware of, and which he could and should expressly except, but to things of which he was ignorant, and concerning which he could not notify the purchaser. Herennius Modestinus was of the opinion that if the vendor in the case stated did anything for the purpose of deceiving the purchaser, he could be sued in an action on purchase."

[92] Bartolus a Saxoferrato *In secundam Digesti veteris partem*, ad D.19.1.39, Venetiis 1570.

Following this discussion about the merchant's liability, Cicero mentions another example where the extent of a vendor's duty is under debate.[93] In this situation, an "honest man" has put his house up for sale due to flaws in the building of which only he is aware. Cicero lists a number of possible faults, including that the house is unsanitary (despite having a reputation for cleanliness), overrun with vermin and likely to collapse due to an unsound structure. The question in this case is whether it would be "unjust or dishonourable" for the seller to withhold this information from the buyer and sell the house for more money that he would have obtained had the defects in the house been public knowledge.[94] Antipater, following the same reasoning used in the grain merchant example, is of the opinion that silence in this case would be reprehensible, and amounts to "deliberately leading a man astray".[95] Diogenes once again takes the opposing view, saying that the seller in this scenario in no way compelled the buyer to purchase the house. The seller merely advertised something in a way that the buyer found attractive and acted upon. In cases like this, Diogenes suggests that the question should be "…where the purchaser may exercise his own judgment, what fraud can there be on the part of the vendor?"[96] The overriding consideration, again, seems to be the demands of business and what would be considered good or acceptable business practice. The impression created by Diogenes' arguments in both examples mentioned above is that it is only an inexperienced or unintelligent seller who would lay bare all faults in the object that he is selling, and a shrewd seller should not be punished for presenting his wares to the best of his ability.

Cicero then offers his own decision on these two cases, saying that he agrees with Antipater's opinion and that full disclosure would be required in each instance.[97] In his words, as translated by Miller:

> "The fact is that merely holding one's peace about a thing does not constitute concealment, but concealment consists in trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it."[98]

[93] 3.13.54.
[94] 3.13.54.
[95] 3.13.55.
[96] 3.13.55.
[97] 3.12.56; 3.13.57.
[98] 3.12.57.

This decision of Cicero's is strongly rooted in the Stoics' moral convictions, and the idea that the individual's interest should also serve the public interests. For purposes of this discussion, however, moral reprehensibility should be separated from legal responsibility, as it is important to remember that the former does not necessarily constitute the latter. It is submitted that, for purposes of legal certainty, Diogenes' view would be more practical to implement, as it sets clear parameters for when the seller should be liable. Undoubtedly, this viewpoint would also be problematic, in that it could lead to inequitable results. However, if any morally questionable non-disclosure by the seller could be punished, it would lead to an extremely wide liability, and would discourage the conclusion of new contracts of sale. The underlying rationale behind Diogenes' approach seems to be the maxim *caveat emptor*, which was the traditional point of departure in South African law until the recent introduction of the Consumer Protection Act.[99] The provisions of this Act are specifically designed to provide the buyer with more protection than has traditionally been available, and aims at preventing any exploitation of the buyer's weaker position by the seller. As will be indicated later on, these stricter provisions will have a significant impact on the way in which we approach the duties of buyer and seller in a contract of sale, and may well place a heavier duty of care on the seller than what is traditionally accepted.[100]

The extension of the liability for non-disclosure to cases of so-called "mere silence" mentioned above arises specifically in Cicero's discussion of contracts for the sale of immovable property.

> "In the laws pertaining to the sale of real property it is stipulated in our civil code that when a transfer of any real estate is made, all its defects shall be declared as far as they are known to the vendor. According to the laws of the Twelve Tables it used to be sufficient that such faults as had been expressly declared should be made good and that for any flaws which the vendor expressly denied, when questioned, he should be assessed double damages. A like penalty for failure to make such declaration also has now been secured by our jurisconsults: they have decided that any defect in a piece of real estate, if known to the vendor but not expressly stated, must be made good by him".[101]

[99] 68 of 2008.
[100] See 3 5 4 below.
[101] 3.16.65.

This rule that all defects in immovable property had to be made known to the vendor prior to sale is contained in the Twelve Tables, and jurists such as Cato applied it in such a way that rooted this rule in the principle of *bona fides*. In one of Cato's judgments, he confirmed that it was central to the concept of good faith that any defect known to the seller should be disclosed to the buyer.[102] This judgment and many after it contributed to the gradual interpretation of *bona fides*, which occurred through the constant application of the *bona fides* concept in judgments of that time. These judgments served as precedents, and proved to be of great assistance in deciding subsequent similar cases.

The first impression gained from the above extract is that the seller appears to be liable for any defect in the immovable property that he knew about and did not disclose to the buyer. Stein submits that such an impression would be incorrect, and would be too wide in imputing liability.[103] He suggests, as do other writers,[104] that this extract only imposes liability for non-disclosure of legal defects in the land, such as title disputes and servitudes. This opinion is grounded on the use of the words *"jure…praediorum"* in the description of the seller's liability, which refers to the "legal condition" of the land rather than its physical status.

Although there are few case examples available to support this interpretation, Cicero cites a case where the sellers sold their house to the buyer, knowing that the house had been marked for demolition.[105] The buyer then successfully sued the seller, a decision which, in Cicero's opinion, was based largely on the dictates of good faith. However, he did not agree that the requirements of good faith should extend so far as to impose liability on the seller for every non-disclosure of material facts. As Stein says,

> "the restriction [of liability for non-disclosure to legal defects] can be justified rationally, because such defects as the existence of a demolition order or of some servitudes cannot be discovered on inspection, whereas material defects, such as the verminous condition of the premises, are usually evident on a diligent inspection."[106]

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[102] 3.16.66.
[103] Stein *Fault in the Formation of Contract* 8.
[104] G Beseler "De Jure Civili Tullio duce at naturam revocando" (1931) *B.I.D.R.* 324 324-329.
[105] 3.16.67.
[106] Stein *Fault in the Formation of Contract* 9.

The distinction drawn above is important, as it gives us some insight into the reasoning followed by jurists when deciding whether or not non-disclosure should be actionable in any given situation. In the extract, a line seems to be drawn between information that the buyer could access if he wished to, and information that could not be obtained through a reasonable inspection. The underlying principle seems to be that where the information withheld from the buyer could be readily obtained by him following a diligent inspection, the seller should not be liable for any non-disclosure.[107] The rationale for this is that the buyer would have had access to the information if he had troubled himself to find it out. By contrast, defects relating to the legal aspects of the property (such as the examples mentioned by Stein) are not as easily discovered, even if there was a thorough investigation. The seller would then have a duty to inform the buyer of such defects.

By the end of the Republic, the accepted legal position was that the seller of immovable property could be sued for non-disclosure of any legal defects in the property that he knew of, and which were unknown to the buyer.[108] No liability could be incurred for non-disclosure of material defects (defects in the property itself), as these were generally deemed to be ascertainable by the buyer if he conducted a diligent inspection. This position continued into the classical period, and was applied as an absolute rule. There was an obligation on the part of the seller to disclose any legal burdens on the land that he had knowledge of, and this obligation could never be circumvented by including an exemption from liability in the contract.[109] This obligation was absolute, except in situations where there was no question of fraud and the seller had made no representations on the subject. In such cases, the buyer would have no recourse against the seller if there were later found to be legal burdens on the land.

Having established that there was indeed a duty on the seller to disclose any legal defects in the land that he knew of, the question remains whether a similar liability existed in classical law for non-disclosure of material defects. Stein answers this in the negative, by referring to certain extracts from the Digest[110] which he uses as grounds for his submission that “there is no justification in the sources for holding that in classical law the seller of land was under a

[107] D.18.6.9, Stein *Fault in the Formation of Contract* 14.
[108] Stein *Fault in the Formation of Contract* 10.
[109] D. 19.1.13.6.; D.19.1.1.1.
[110] D.18.1.59.; D.18.1.35.8.; D.18.6.9.

general liability to disclose material defects of which he was aware."[111] Thus, in cases where the buyer wished to impose liability for non-disclosure of a material defect in immovable property, he only had two options. He could either compel the seller to make a representation about the property and later attempt to prove that representation false, or he had to conduct his own investigation into the quality of the land.[112]

In respect of contracts for the sale of movable property, buyers were protected under the Aedilitian Edicts, which specifically regulated the sale of slaves and cattle. The Aedilitian Edicts provided buyers with a choice of actions if a defect was discovered in the *merx*, namely the *actio redhibitoria* or the *actio quanti minoris*. The *actio redhibitoria* was used to completely reverse the effects of a contract of sale, whereas the *actio quanti minoris* was used in order to claim a reduction in the purchase price of a defective *merx*. These actions both stipulated that the seller would always be liable for any defect in the *merx* that he did not disclose, which includes any latent defects that he might not have been aware of.[113] This rule posed a problem for the seller, as strict compliance with it would result in someone incurring liability for their ignorance. The buyer would find this requirement to his advantage, as there was always a chance of recouping losses, no matter what the nature of the defect.

The provisions of the Aedilitian Edicts mainly concerned physical defects in the slaves, and made no mention of mental or character flaws. Despite this, it became common practice for sellers of slaves to declare these "*vitia animi*" (defects in spirit), even though it was not a strict legal requirement.[114] Even though the declaration of *vitia animi* was recognised as common practice, the buyer could not expect the seller to disclose every single defect in the slave, whether physical or otherwise. Under the Aedilitian Edicts, liability was dependent on the seller's "knowledge and dishonest silence".[115] From this it is clear that there was never any absolute duty under classical law for the seller to inform the buyer about all defects in the *merx*.

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[111] Stein *Fault in the Formation of Contract* 14.
[112] Stein *Fault in the Formation of Contract* 14.
[113] Schermaier "Mistake, misrepresentation and precontractual duties to inform" in *Mistake, Fraud and Duties to Inform* 43.
[114] Grotius *De Jure Belli ac Pacis*, ii.12.9.
[115] Stein *Fault in the Formation of Contracts* 17.

There was, however, a means available by which a buyer could sue the seller for latent defects. It was known as the doctrine of *laesio enormis*. Codex 4.44.2 originally provided that

> "If either you or your father should sell property for less than it is worth, and you refund the price to the purchasers, it is only just that you should recover the land which was sold by judicial authority; or, if the purchaser should prefer to do so, you should receive what is lacking of a fair price. A lower price is understood to be one which does not amount to half of the true value of the property."

This provision served to protect the seller from any disadvantage. However, in the Middle Ages, this rule came to be applied more generally, and was used in cases where either the seller or buyer was deceived by the other.[116] Even in situations where the buyer could not justify recission by using C.4.44.2, the civilians recognised that the buyer would be able to sue the seller for latent defects, provided that the seller knew or had a duty to know about said defects.[117] This remedy was derived from D.19.1.13 and D.19.1.6.4, which provide the seller's liability for latent defects.[118] From this we see that any knowledge of the defect on the part of the seller would make him fully liable for all damages (including consequential loss) under the *actio empti*.[119]

The prevailing view in Roman law, as discussed above, was that liability was dependent on *dolus* or fraud on the part of the seller. But, as mentioned several times in the above discussion, this stance does not provide any indication of precisely what types of non-disclosure would lead to liability. Specifically in the context of sale, there was still no generally accepted test to use to determine whether any given situation imposed a positive duty of disclosure on the seller. Various authors have suggested different options that could perhaps be used as a test. Buckland proposes that non-disclosure of "important" defects known to the seller would lead to liability,[120] but this standard is too vague, as people's interpretations of "important" will differ. Stein submits that it would be incorrect to impose a general liability for non-disclosure whenever the seller had knowledge of any defect, no matter what it is.

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[116] Decock & Hallebeek (2010) *LHR* 93.
[117] Decock & Hallebeek (2010) *LHR* 93.
[118] D.19.1.13. and D.19.1.6.4 are discussed above.
[119] Decock & Hallebeek (2010) *LHR* 93.
[120] WW Buckland *A Text-book of Roman Law from Augustus to Justinian* 3rd ed (1968) 489.

It is clear from this discussion that, in the Roman law of sale, the seller would be liable for his non-disclosure if he knew of a defect in the *merx* and failed to disclose it to the buyer. The buyer would then be able to claim not only the Aedilitian remedies, but also compensatory damages, given that the seller consciously remained silent.[121] This was the extent of the duty of disclosure as it was imposed in the context of liability for latent defects and this position was echoed in the writing of Roman-Dutch jurists.[122]

This concludes our overview of the important aspects of the development of the civil law relating to non-disclosure. The focus has been on whether non-disclosure could constitute a type of fraud that could give rise to relief in different types of contracts, as well as the specific rules governing non-disclosure in the context of sale. This focus now shifts to the treatment of non-disclosure in modern law, paying specific attention to those systems which are based on similar foundations to those on which modern South African law rests.

2 2 A comparative perspective on the duty to disclose

2 2 1 Introduction

The problem of determining when a duty to disclose arises is universally recognised. Here the approaches of the common law and civil law systems will be examined, focusing on the law of England as an example of the common law system, and the law of Germany as an example of the European civilian law, which is more similar to the modern South African law. A number of international legal instruments specifically provide for situations where there has been misrepresentation by non-disclosure, and an examination of the most influential and widely recognised of these instruments could enable us to identify various situations where the duty to disclose arises in international contract law, and highlight any differences or similarities between them.

[121] Millner (1957) *SALJ* 194.
[122] Voet *Commentarius ad Pandectus* 21.1.10; Grotius *Inleidinge* 3.15.7.

2 2 2 Modern common law systems

2 2 2 1 Introduction

According to Cartwright, the contrast between English law and European civil law systems when it comes to the treatment of non-disclosure is marked.[123] This is reflected by the narrow view that English law takes regarding pre-contractual liability and the unwillingness to impose a duty to disclose on contracting parties. This stands in opposition to the European civil law approach, which recognises that parties have a duty to negotiate in good faith, and makes allowance for the possibility of parties incurring liability for acting 'contrary to good faith' in the pre-contractual negotiation stage. The English law approach to contractual non-disclosure will be discussed in the following sections, with special attention paid to the similarities and differences that it has in relation to Roman and Roman-Dutch law as discussed above.

2 2 2 2 General rule

The point of departure in English law is the general rule that there is no duty on a person entering into a contract to disclose any material facts to the other party [124] and misrepresentation can only arise out of a "positive assertion of fact".[125] The rationale for adopting this rule appears to be the difficulty that arises in determining the extent of the information that should be disclosed in any given case, if the situation even gives rise to a duty of disclosure.[126] This reticence to recognise the duty of disclosure in English law has been described as "no more than an application of the more general disinclination on the part of the common law to recognise a duty to negotiate in good faith".[127]

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[123] J Cartwright *Misrepresentation, Mistake and Non-disclosure* (2007) 536. Also see Legrand's comparison of English and French law in P Legrand "Pre-contractual disclosure and information: English and French law compared" (1986) 6 *OJLS* 322 322.

[124] E Peel *The Law of Contract* 12th ed (2007) 424, Zimmermann & Whittaker (eds) *Good Faith in European Contract Law* (2000) 656, Cartwright *Misrepresentation, Mistake and Non-disclosure* 535, *Smith v Hughes* (1867) L.R. 6 Q.B. 597, *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch D 469, 474. Lord Atkin in *Bell v Lever Bros [*1932] A.C.161 at (227) provides a very strict view on this rule, saying "Ordinarily the failure to disclose a material fact which might affect the mind of a prudent contractor does not give the right to avoid the contract. The principle of *caveat emptor* applies."

[125] MH Whincup *Contract Law and Practice: The English System and Continental Comparisons* 2nd ed (1992) 217.

[126] Peel *The Law of Contract* 424. P Giliker "Formation of contract and pre-contractual information from an English perspective" in S Grundmann & M Schauer (eds) *The Architecture of European Codes and Contract Law* (2006) 301 302.

[127] R Halson *Contract Law (*2001) 31.

This view seems to be confirmed by the decision in *Sykes v Taylor-Rose*,[128] where the court continued to apply the strict general rule, despite the fact that the information not disclosed had a negative effect on the buyers of a property, leading to financial loss for them. *Sykes v Taylor-Rose*[129] concerned the sale of a house, which the appellants had bought from the respondents in ignorance of the fact that a gruesome murder had taken place there. Once they discovered this fact, they wanted to sell the property and move out. The property sold at less than the market value, due to the fact that they "could not in conscience dispose of the property without disclosing what they had found out."[130] The argument before the court was that the appellants had suffered damage due to the respondents' silence, in that they had to sell their house for less than they originally paid, which would not have happened if the Taylor-Roses had been forthcoming with the information regarding the murder. The question was thus whether or not the respondents had any duty to disclose this information to the appellants. If such a duty was found to exist, it had to be determined whether the respondents breached that duty and incurred liability for their non-disclosure.

The appeal court considered the facts, and revisited the judgment in the court a quo, where the presiding officer had dealt fully with the issue of disclosure. The point of departure was that English law does not recognise a general duty on a vendor to disclose any information, regardless of whether it pertains to defects in the quality, expected enjoyment or even value of the land. The appellants' counsel contended that in cases where the defect was of such a nature that no reasonably prudent buyer would be able to discover the defect without being informed thereof (as seen here), the seller should be obliged to disclose the information. It was further argued that the *caveat emptor* principle was reaching the end of its life, and was no longer suited to modern sale contracts. Despite this argument, as well as the extraordinary nature of the defect in the property, the court a quo was unwilling to impose a duty to disclose in this situation. The appeal court confirmed this decision, upholding the rule against imposing a duty of disclosure.

However, it has been recognised that such a strict application of this rule has the potential to yield harsh and inequitable results, seen especially in cases where the seller has been

[128] [2004] 2 P & CR 30.
[129] [2004] 2 P & CR 30.
[130] *Sykes v Taylor-Rose* [2004] 2 P & CR 30, n12.

allowed to conceal certain information concerning the *merx* from the buyer.[131] It has also been suggested that this is a special danger in cases where there is an unequal balance of power between the parties, and that courts should begin to develop the law concerning non-disclosure in order to protect the more vulnerable parties to a contract.[132]

For this reason, English law has developed to make provision for certain exceptions to this general rule against imposing a duty to disclose. These exceptions will be discussed in an attempt to identify the underlying principles that have led to courts recognising them as instances where contracting partys have a duty to disclose.

2 2 2 3 Instances where a duty to disclose is recognised

English law writers appear to have isolated certain exceptional circumstances where the courts would be willing to impose a duty to disclose between the parties. However, each author has grouped these exceptions differently, recognising a different number in their respective works.[133] In Giliker's article, she identifies all of these exceptions and groups them into six broad categories.[134] These categories are special types of contract (*uberrimae fidei*), contractual warranties, misrepresentation, custom, tort law and statute.[135] Regarding statute, the focus here will be on the position regarding contracts for the sale of property, which has been affected by recent reforms in UK consumer law. When discussing the recognised exceptions to the general rule, it must be noted that the duty to disclose in these cases is limited to those facts that the contracting party had actual knowledge of or had access to.[136]

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[131] See further *Keates v Cadogan* (1851) 10 C.B. 591 and *Fletcher v Krell (*1872) 42 L.J.Q.B 55, which provides that there is no duty on a party to disclose if the other party does not ask about a specific fact.

[132] Giliker "Formation of contract and pre-contractual information" in *Architecture of European Codes and Contract Law* 302.

[133] Whincup *Contract Law and Practice* 218-220, GH Treitel *The Law of Contract* 11th ed (2003) 392-400, Peel *The Law of Contract* 424, Cartwright *Misrepresentation, Mistake and Non-disclosure* 543, C Twigg-Flesner *The Europeanisation of Contract Law* (2008) 135.

[134] Giliker "Formation of contract and pre-contractual information" in *Architecture of European Codes and Contract Law* 301-319.

[135] Giliker "Formation of contract and pre-contractual information" in *Architecture of European Codes and Contract Law* 302. These categories are similar to the exceptional circumstances recognised by South African courts as giving rise to duties of disclosure. The South African classifications will be investigated and evaluated in chapter three below.

[136] Confirmed in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016.

As stated above, contracts *uberrimae fidei* are recognised as agreements that give rise to a duty to disclose. This designation refers to contracts where the relationship between the parties is governed by the "utmost good faith". The necessity for such a designation has been criticised in both English law[137] and modern South African law[138] due to the implication that the designation of certain contracts as *uberrimae fidei* means that the law recognises varying standards of good faith; that different types of contracts require different levels of honesty.[139] A possible means of identifying this type of contract is that in these situations there is often an imbalance of power between the parties, and one party is necessarily privy to more information regarding the material facts. Traditionally, this type of contract has included insurance contracts, suretyship agreements and any contract between parties who have a fiduciary relationship.

It is to be noted, however, that in South African law, no distinction is drawn between contracts *uberrimae fidei* and other contracts, as our law does not recognise that there are degrees of good faith.[140] It is noted that "(t)he same relationship [of trust or influence], and therefore the same duty of disclosure, can arise in any other negotiations…which…are characterised by the involuntary reliance of one party on the other for information material to his decision."[141] Rather, all contracts are governed by the dictates of good faith, as applied in Roman and Roman-Dutch law.

Another exception to the general rule against imposing duties of disclosure is found when there has been a contractual warranty between the parties. This construct serves as an indirect means by which parties impose a positive duty of disclosure, in that where one party has warranted that the object of a contract has certain attributes, he is bound to disclose any information to the contrary to the other party. A distinction is often drawn between express and implied warranty, and it is the latter which has been identified as a means of regulating

[137] Cartwright *Misrepresentation, Mistake and Non-disclosure* 544.
[138] See 4 2 11 below
[139] Cartwright *Misrepresentation, Mistake and Non-disclosure* 544, Millner (1957) *SALJ* 188, Hutchison "Good faith in contract" in *Good Faith in Contract* 238.
[140] See 42 11; D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* 2nd ed (2012) 134.
[141] Millner (1957) *SALJ* 189.

pre-contractual negotiations.[142] A good example of implied terms can be found in the provisions of the Sale of Goods Act 1979.[143] In each of these provisions, an indirect duty to disclose can be seen, in that the quality of the goods is guaranteed unless any defects are brought to the attention of the buyer prior to the sale. It is not only legislation that imposes a duty to disclose in cases of warranty. The common law also recognises contractual warranties as an indirect means of imposing a duty to disclose on contracting parties. The *locus classicus* in this regard is *Esso Petroleum Company v Mardon*.[144]

In this case, Mardon entered into a contract of lease with Esso Petroleum, in terms of which he would live on the premises of and manage a petrol station on Esso Petroleum's behalf. The amount of rent to be paid was determined with reference to a calculation of profitability done prior to Esso Petroleum purchasing the site. However, changes made to the structure of the petrol station by the local planning authority had the effect of substantially lowering the earning potential of the business, and Mardon, in executing his duties as tenant, suffered extensive financial loss. He then brought the matter before the court, basing his action on the fact that the initial profitability calculation amounted to a warranty that the business would be profitable.

The court then embarked on a detailed exploration of the so-called "collateral warranty", investigating whether or not it could give rise to a duty to disclose. The finding of Lord Justices Ormrod and Shaw was that, in prior cases, the English Courts, "more often than not…elevated the innocent misrepresentation into a collateral warranty: and thereby did justice - in advance of the Misrepresentation Act, 1967."[145] The judgment in this matter, making reference to other cases where a similar approach was followed,[146] serves as authority for the assertion that "…both at common law and by statute, contractual warranties

[142] Giliker "Formation of contract and pre-contractual information" in *Architecture of European Codes and Contract Law* 307, B Nicolas in D Harris & D Tallon (eds) *Contract Law Today* (1989) 166 170 comments that "the characteristic Common Law instrument for the judicial development of the law of contract is the implied term."
[143] See especially ss 12,13,14,15.
[144] [1976] Q.B. 801.
[145] *Esso Petroleum Co Ltd. v Mardon* [1976] Q.B. 801.
[146] *Dick Bently Productions v. Harold Smith Motors* (1965) 1 W.L.R, *Sunday v. Keighley* (1922) 27 C. C, *The Pantanassa* (1958) 2 Lloyd.

provide a means by which the judiciary can maintain its adherence to the doctrine of freedom of contract and yet indirectly provide consumer protection."[147]

Misrepresentation can also be a ground of liability for non-disclosure. Generally speaking, the law of misrepresentation only gives rise to liability when a party has committed a positive act in order to induce another to enter into a contract. However, in practice, the courts have been willing to allow that, under certain circumstances, silence may amount to a misrepresentation. In *With v O'Flanagan*,[148] the court imposed liability on a contracting party for a failure to inform the other contracting party of a change in circumstance. In this instance, a previously made statement later turned out to be incorrect, and it was the opinion of the court that the defendant in such a matter would have a duty to inform the plaintiff of the changed state of affairs. In such a case, the court would enforce the duty to disclose, as it is deemed to be the defendant's responsibility to correct an incorrect impression created by a statement made by him to the plaintiff.

There are specific types of contracts that are concluded according to the customs of a particular trade or business, which sometimes demand that information be disclosed between contracting parties. In these contracts, parties could incur liability for non-disclosure, if a duty to disclose traditionally exists between the parties. An example of customary business practice being an exception to the rule against imposing a duty to disclose can be found in *Jones v Bowden.*[149] This case concerned the sale of 101 bags of pimento that were transported by sea. It was common practice for the seller to declare any defects in the goods at the time of sale, which was not done in *Jones v Bowden*.[150] Instead, the goods were shipped under a clean bill of lading, and the buyer received the damaged goods. It was argued before the court that the seller's silence with regard to the defects was tantamount to a misrepresentation, given that the seller had knowledge of the defects prior to the sale. The court acknowledged that the contract was one where a duty to disclose any defects in the goods did exist, and that the breach of such a duty would allow the plaintiffs to institute an action, thus establishing custom as one of the exceptions to the general rule.

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[147] Giliker "Formation of contract and pre-contractual information" in *Architecture of European Codes and Contract Law* 310.
[148] [1936] Ch 575. See further *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch D 469, 475.
[149] 4 Taunt. 846.
[150] 4 Taunt. 846.

When discussing misrepresentation, it is important to note that there is often an overlap between misrepresentation in the law of contract and misrepresentation in the law of delict (referred to as tort law in the UK). Liability for non-disclosure under tort law is thus one of the exceptions to the general rule against recognising a duty to disclose in English law. Under tort law, a duty to disclose may arise where there is a relationship between the defendant and plaintiff that would require that the defendant bear a duty of care towards the plaintiff, demanding that he disclose certain types of information. The existence of such a "special relationship" is thus necessary to impose liability for non-disclosure,[151] and English courts have recognised that such a relationship exists between an employer and employee,[152] as well as between a solicitor and the beneficiaries of a will,[153] although the latter has been criticised.[154]

Certain statutory instruments also create a duty of disclosure in English law. With regard to contracts for the sale of property, the recent development of UK consumer legislation has taken strides in imposing a duty on the vendor to disclose certain types of information, a change since the decision in *Sykes v Taylor-Rose*.[155] The most marked change in the way that contracts for the sale of property are concluded is the requirement that a potential seller provide a potential buyer with a Home Information Pack (HIP).[156] The Act places a positive duty on the vendor to have one of these HIPs,[157] and a further duty to provide a copy of the HIP to a seller on request.[158] The contents of these packs include the terms of sale, evidence of title, replies to standard preliminary enquiries made by buyers, copies of planning, listed building and building regulations consent and approvals, copies of warranties and guarantees for new properties, any guarantees for work carried out on the property, replies to searches made of the local authority, environmental issues, as well as a Home Condition Report based on a professional survey of the immovable property (including an energy efficiency assessment). These HIPs, as well as the standard information form that vendors have to complete for buyers, impose a statutory duty on the vendor to disclose any pertinent

[151] See *Hedley Byrne v Heller and Partners* [1964] A.C. 465.
[152] *Spring v Guardian Assurance plc* [1994] 2 A.C. 296.
[153] *White v Jones* [1995] 2 A.C. 207.
[154] A Haydon "Frustration of testamentary intentions: a remedy for the disappointed beneficiary" (1995) *C.L.J.* 238, P Cane *Tort Law and Economic Interests* (1996) 182-186.
[155] [2004] 2 P & CR 30.
[156] This requirement is contained in Part 5 of the British Housing Act 2004.
[157] s155 Housing Act.
[158] s156 Housing Act.

information relating to the property to the buyer. The failure to disclose information as required by the Housing Act, and the HIP regulations, would be grounds for the seller's liability. It is still unclear what the courts' reaction would be to a case like *Sykes v Taylor-Rose*[159] in light of the new statutory provisions, and it would be interesting to see how they would treat matters concerning the non-disclosure of an immaterial quality.

It has been questioned whether English law is ready to develop more generalised duties of disclosure, and whether this is in fact necessary.[160] The possibility of having a more inclusive approach was raised as early as the eighteenth century, in *Carter v Boehm*.[161] Lord Mansfield proposed a system based on good faith, saying that "good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."[162] From this statement, it would appear that there are circumstances in which parties may have a duty to disclose information within their knowledge, but identifying such circumstances continues to be a problem. Cartwright suggests that Lord Mansfield's approach, focusing on the relationship between the parties and their respective skill and knowledge, could be of assistance in determining which situations would require a duty of disclosure between contracting parties.[163] However, the English courts have yet to adopt this approach, preferring to approach the development of the law relating to non-disclosure with caution.[164]

2 2 3 Modern civilian systems

For purposes of this study, attention will be paid to the position regarding the duty to disclose in German law, which is one of the most prominent civil law jurisdictions.

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[159] [2004] 2 P & CR 30.
[160] Cartwright *Misrepresentation, Mistake and Non-disclosure* 539.
[161] (1766) 3 Burr.1905.
[162] (1766) 3 Burr.1905, 1909.
[163] Cartwright *Misrepresentation, Mistake and Non-disclosure* 539-540.
[164] This is evidenced by the discussion of *Sykes v Taylor-Rose* above.

2 2 3 1 Non-disclosure in German law

It has been stated that, in German law, "silence only constitutes fraud if there is a duty to provide information".[165] This requirement that there be a duty to disclose in order to impose liability for an omission is the same one seen in Roman, Roman-Dutch and South African law. Especially during the negotiation stage, there is no obligation on contracting parties to disclose all information that they are privy to, as "it is the task of each party to inquire about the advantages and disadvantages of entering into a contract."[166] It is suggested that the existence of a duty to disclose can be determined by consideration of the specific circumstances of each matter.[167]

Markesinis proposes that the courts will consider whether good faith and common practice create a duty to disclose.[168] In addition to these standards, the courts will also consider the relationship between the parties in order to see whether the parties had a duty to disclose *inter se*. This fluid standard of determining the existence of a duty to disclose has strong roots in the Roman law position, which relied strongly on the "customary business standards of decency" test and the *bona fides* principle.[169]

It is necessary when discussing liability for non-disclosure to determine whether or not the German civil code recognises that non-disclosure is a valid reason for rescinding a contract. §123(1) of the BGB deals specifically with voidability of a contract on grounds of deceit or duress, and provides that "a person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration".[170] This is a very basic statement, and does not expressly include the possibility of voiding a contract based on silence alone. However, it has been accepted in practice that the act of keeping silent could indeed amount to fraud in terms of §123 of the BGB, if there was a duty to disclose.[171] As stated, there is no general duty to disclose, but it can arise where one contracting party is relying on the skill or

[165] PDV Marsh *Comparative Contract Law England, France, Germany* (1994) 137.
[166] BS Markesinis, W Lorenz & G Dannemann *The German Law of Obligations The Law of Contracts and Restitution: A Comparative Introduction* Vol 1 (1997) 209.
[167] Marsh *Comparative Contract Law England, France, Germany* 137.
[168] Markesinis et al *The German Law of Obligations* 209.
[169] Discussed at 2 1 1 2 above.
[170] Langenscheidt Translation Service *BGB Translation* on http://www.gesetze-im-internet.de/englisch_bgb/ last accessed 21 May 2011.
[171] O Lando *Principles of European Contract Law* Volume 1 & 2 (1994) 256.

knowledge of the other contracting party or where the parties have a relationship that would normally be governed by good faith due to an increased level of trust between them.[172]

The existence of a duty to disclose is most often a question when it comes to contracts of sale, as sale contracts are typically situations where each party uses whatever information he might have in order to maintain a competitive edge, often more beneficial to the seller than the buyer. In situations where the seller bears knowledge of a fact that he knows would influence the buyer's decision to contract, and that he knows the buyer has no means of discovering that fact on his own, the courts are likely to find that a duty to disclose exists.[173] A good example of this is the situation where the sellers of immovable property receive information that the right of way at the bottom of their garden had been varied to allow public motor vehicles to drive through.[174] Although they receive this information just before the contract of sale is to be signed, they fail to inform the buyers accordingly. The contract is duly concluded, and the buyers then discover that the property receives a great deal of noise from the passing cars. Would German law allow the buyers a remedy in such a case?

In such a case it would first have to be established whether or not the silence of the sellers would amount to fraud in terms of §123 of the BGB. It is submitted that "it must be asked whether the party making the mistake may have expected disclosure according to the principles of good faith taking into account the generally accepted standards in business."[175] This is in keeping with §242 of the BGB, which provides that "an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."[176] The standard set out in this section is reminiscent of the standards relied upon in Roman and Roman-Dutch law when determining liability for non-disclosure, showing that these principles have been adapted to fit modern law, and can still be considered when determining the duty to disclose. Grounded on this provision, as well as §§ 433-437 of the BGB,[177] which require that the seller inform the buyer of any material defect in the *merx* that he has knowledge of,

[172] Lando *Principles of European Contract Law* 256.
[173] BGH (V ZR 21/88) 7 July 1989 [1989] DB 2426.
[174] Sefton-Green (ed) *Mistake, Fraud and Duties to Inform in European Contract Law* (2004) 193.
[175] Sefton-Green (ed) *Mistake, Fraud and Duties to Inform in European Contract Law* 206.
[176] Langenscheidt Translation Service *BGB Translation* on http://www.gesetze-im-internet.de/englisch_bgb/ last accessed 21 May 2011.
[177] Langenscheidt Translation Service *BGB Translation* on http://www.gesetze-im-internet.de/englisch_bgb/ last accessed 21 May 2011. These provisions set out the duties of the buyer and seller in relation to material defects in the object of a contract.

the sellers in the example were bound to inform the buyers of the right of way of vehicles over their property. As a result, the sellers' silence in this matter may amount to fraud as defined in §123 of the BGB, given that the buyers of the property were induced to enter into the contract by the concealment of information regarding a material aspect of the property.

2 2 4 Modern international instruments

2 2 4 1 General provisions on good faith

One of the most widely recognised international documents dealing specifically with commercial contracting is the UNIDROIT Principles of International Commercial Contracts (PICC). These Principles were specifically developed to regulate the operation of international commercial contracts, which is pivotal to the smooth execution of international trade transactions. The Principles serve as a guideline for contracting parties who interact across international borders, and could possibly assist in providing a "general standard" by which these interactions are measured. As such, they are fairly comprehensive in scope, and include provisions governing each stage of the contract, both before and after conclusion thereof.

Chapter 1 of these Principles provides the general values and ethics that govern international contracting. Article 1.7 of Chapter 1 requires that each party to an international trade contract is bound to act in accordance with the tenets of good faith and fair dealing, and cannot exclude or limit this obligation by any means.[178] This standard of good faith and fair dealing can also be found in Article 1:102 of the Principles of European Contract Law (PECL).[179] The PECL, despite being an instrument devoted to governing contract law in Europe, can also serve as a useful tool for us when applying contract law in South Africa, as it draws from the civil law systems used in countries such as Germany and the Netherlands as well as the common law system, as followed in the United Kingdom. The combination of principles from both of these systems can aid the development of South African law, which is a mixed system, having been influenced by both Roman law and English law in the past.

[178] Article 1.7 UNIDROIT Principles of International Commercial Contracts (2010) 17.
[179] Principles of European Contract Law (2000) 99.

There are a number of provisions throughout the PICC and PECL that directly or indirectly incorporate this requirement that parties act in accordance with the standards of good faith and fair dealing.[180] These ideals of good faith and fair dealing are underlying principles which must always be kept in mind when applying and interpreting the provisions of the UNIDROIT principles. The inclusion of this article at the beginning of the PICC and the general language used suggests that the parties have to uphold these principles throughout the contracting process. The wording of Art. 1.7(2) makes the upholding of the standards of good faith mandatory, saying that parties may not exclude their duties to act in good faith and comply with the requirements of fair dealing. This has the effect of setting good faith and fair dealing as the absolute minimum standard of behaviour between parties to an international contract. Parties have the option of providing for a higher standard of behaviour in their contract, but can never act in a manner that does not comply with the minimum requirements of good faith and fair dealing as set out in Art. 1.7.

In Art 1:102 of the PECL the concept of parties adhering to the standards of good faith and fair dealing in the contracting process is stated more generally, forming part of the principle of freedom of contract. The inclusion of these principles indicates a willingness on the part of the drafters to provide an overarching standard of behaviour for contracting parties to abide by, but at the same time, it appears that there is a reluctance to accept good faith and fair dealing as a specific test for the liability of contracting parties. This is evidenced by Art 1:102(2), which provides that "The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles."[181] The effect of this section is that the parties may choose to exclude or lessen their duty to act in good faith and in line with the principle of fair dealing. This is confirmed by the inclusion of Art 1: 106(1) of the PECL, which provides that "…regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application."[182] The inclusion of the words "regard should be had" shows that the parties may choose to disregard the standards of good faith and fair dealing, making it a less effective standard by which to measure contracting partys' behaviour.

[180] These include Art 1.8, Art 1.9(2), Art 2.1.15, Art 2.1.16, Art 3.5, and Art 3.8 (which will be discussed more fully below) of the PICC and Art 1:106, Art 2:104 and Art 4:109 of the PECL, to name but a few.
[181] Principles of European Contract Law (2000) 99.
[182] Principles of European Contract Law 108.

This is a very different approach to that seen in Art 1.7 of the PICC, which states that the parties are bound to act in accordance with the dictates of good faith and fair dealing, and cannot exclude this duty. Art 1.7 of the PICC appears to have a stronger impact on the rest of the PICC provisions that Art 1:102 of the PECL has on its consequent articles. From this it seems that there is more of a balance between the common law and civil law views on the elements of good faith and fair dealing in contract law in the PECL, as these standards are acknowledged as significant, but parties are not bound thereto. A comparison of this nature serves to support the contention that the PICC, when dealing with duties of disclosure, "…takes the lead from civil law systems…to guide the determination of when duties of disclosure should be disclosed."[183] This is clearly seen in the fact that the parties must act according to the principles of good faith and fair dealing in commercial contracting, and the willingness to impose liability wherever it is felt that parties have failed to comply with these standards.

2 2 4 2 Non-disclosure and the requirements for a valid contract

The PICC addresses the problem of misrepresentation by non-disclosure in chapter 3, dealing with the validity of contracts. The first provision to consider is Article 3(5)(1), which indirectly deals with the effect of non-disclosure on a contract, and the parties' duties *inter se*. This article provides that:

> "[a] party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and the other party made the same mistake, or caused the mistake, *or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error*…"[184] (own emphasis).

The wording of the italicised phrase in the above extract appears to make provision for the existence of a duty to disclose in certain situations. This is clearly reflected by imposing liability on a party who bears knowledge of a fact that would influence the other contracting party's decision to contract and fails to inform the latter of such fact. The article further states

[183] Vogenauer & Kleinheisterkamp *Commentary on the UNIDROIT Principles* 437-438.
[184] Article 3.5(1) UNIDROIT Principles of International Commercial Contracts (1994) 98.

that the duty to disclose in this case would only arise if it would be "contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error".[185] This reference to "fair dealing" emphasises the fact that the principles established in Chapter 1 of the PICC underscore all of the guidelines set out in the subsequent chapters, and must be adhered to when applying the provisions of the PICC.

The official commentary accompanying the main text of the PICC supports the supposition that Art 3.5(1) makes provision for the possibility of misrepresentation occurring in the form of non-disclosure. It is clearly stated in this commentary that "(e)ven silence can cause an error".[186] It is also stated that the party having the advantage of knowing what the other party does not should incur liability if the other party makes an error, and such error can be linked to his conduct (or lack of action where action was required).[187] Article 3.5(1) therefore reveals that liability can be imposed for misrepresentation by non-disclosure but that there is also uncertainty on the circumstances that would give rise to a duty to disclose.

The duty to disclose is directly discussed in Article 3.8 of the PICC which specifies actions that would constitute fraud in international contract law. Article 3.8 states that a party may avoid the contract if he was led to conclude it by the other party's fraudulent representation. Such fraudulent representation can take a number of forms, including "…fraudulent non-disclosure of circumstances which, according to reasonable standards of fair dealing, the latter party should have disclosed."[188]

A link can be discerned between fraud and certain types of mistake, as seen in the wording and commentary of Article 3.5(1).[189] This link is apparent from the fact that both fraud and mistake (as described in Article 3.5(1)) "may involve either representations, express or implied, of false facts, *or non-disclosure* of true facts"[190] (own emphasis). The inclusion of this comment in the PICC confirms that liability for non-disclosure can be imposed on parties to international contracts.

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[185] Article 3.5(1) UNIDROIT Principles of International Commercial Contracts 98.
[186] UNIDROIT Principles of International Commercial Contracts 100.
[187] UNIDROIT Principles of International Commercial Contracts 100.
[188] Article 3.8 UNIDROIT Principles of International Commercial Contracts 104.
[189] UNIDROIT Principles of International Commercial Contracts 104.
[190] Comment 1, UNIDROIT Principles of International Commercial Contracts 104.

The construction of Art 3.8, specifically the choice to include the phrase "reasonable commercial standards of fair dealing", indicates that the rules of civil law systems have had a strong influence on the content of the PICC. It is in civil law systems that one would find a reliance on general standards of behaviour, such as *bona fides* and customary business practices,[191] in order to determine how parties to a contract should conduct themselves. The problems relating to the use of this standard would arguably be the same in any system that aims to use it as a test for determining the existence of a duty to disclose. According to Du Plessis, "…the danger exists that radically different interpretations of the meaning of good faith could undermine the purpose of unification".[192] It is submitted in the same commentary that there is thus a need to isolate specific instances where these reasonable commercial practices and standards demand that there be liability for non-disclosure, and use these cases to develop an internationally practical standard for determining the existence of a duty to disclose.[193]

Throughout the discussion of the international legal instruments governing contract law, emphasis has been placed on the importance of the standards of good faith and fair dealing in commercial contracting. The inclusion of these standards in both the PICC and PECL proves that they are still widely regarded as the underlying principles of modern contract law, and would be useful in determining which situations would lead to liability of parties to a contract. However, the fluidity of these standards makes them difficult to use as a set method of determining liability, and the same problems faced when applying them in the past are sure to arise in modern law.[194]

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[191] Discussed more fully in 2 1 1 2 and 2 1 2 above.

[192] Vogenhauer & Kleinheisterkamp *Commentary on the UNIDROIT Principles* 438.

[193] This statement will be discussed at length in chapter four below, which contains a thorough exploration of the specific circumstances in which legal systems always recognise a duty to disclose.

[194] It is of interest that Art 49 of the recently-drafted Common European Sales Law (CESL) aims to provide more certainty be "fleshing out" this general standard. It maintains that in determining whether a duty to disclose could arise on the basis of good faith and fair dealing, regard should be had to all the circumstances. These circumstances include

> (a) whether the party had special expertise;
> (b) the cost to the party of acquiring the relevant information;
> (c) the ease with which the other party could have acquired the information by other means;
> (d) the nature of the information;
> (e) the apparent importance of the information to the other party; and
> (f) in contracts between traders good commercial practice in the situation concerned

The question remains whether or not these more general principles can be distilled into a practical test for when non-disclosure is actionable in any given situation. To this question we return later.[195]

2 3 Conclusion

The Roman law of contract provides a number of guidelines for interpreting our own law. The influence of the jurists of the Republic as well as the classical jurists is still felt in modern South African law, seen especially in the way that we approach issues regarding liability for non-disclosure. The development of Roman law to include cases where the parties' conduct did not amount to *dolus* has also had a great impact on modern law, creating room for the acknowledgment of non-disclosure as a form of misrepresentation.

However, there is still difficulty in deciding which situations would give rise to a duty to disclose on parties, making any non-disclosure actionable. In this regard we have seen that international instruments, in contrast with the common law, expressly provide for good faith being a general standard for ascertaining whether or not a party's behaviour is actionable. However, South African law does not make such overt and direct reference to this standard. It is also still not evident, whether it should do so. We will return to this question when dealing with the modern South African law.[196]

[195] See discussion in chapter 5 below.
[196] See the discussion at 4 3 below.

CHAPTER 3: SPECIFIC INSTANCES OF THE DUTY TO DISCLOSE IN SOUTH AFRICAN LAW

3 1 Introduction

The general rule in South African law is that there is no inherent duty on one contracting party to disclose information within his or her knowledge to the other party. However, the judiciary and academic commentators alike have identified that, despite this general rule, there are exceptional circumstances in which parties to certain types of contract have a duty to disclose information, resulting in any non-disclosure being actionable.[197]

These exceptional circumstances have been identified by various writers, and the classifications differ. The most commonly recognised exceptions are contracts of insurance, agency and suretyship, as well as contracts of sale, specifically the position regarding latent defects.[198] Hutchison further identifies as exceptions contracts where there is a fiduciary relationship between the parties, statutory duties of disclosure, the situation where unrehabilitated insolvents apply for credit and situations where a party's prior conduct makes any subsequent silence misleading.[199] For purposes of this discussion, these exceptions will be used as the point of departure, since it is the most extensive classification to date.

In the past, some of these "exceptional" contracts have been designated contracts *uberrimae fidei*.[200] This term refers to contracts where parties are bound to act with the "highest good faith".[201] The term '*uberrimae fidei*' is the Latin equivalent of 'utmost good faith'. It is uncertain what the exact origin of the phrase is, but it seems to have appeared in English law from 1850 onwards.[202] As mentioned in the previous chapter, this designation has been criticised in

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[197] According to D Hutchison & CJ Pretorius (eds), "the rule has always been subject to a number of exceptions, and as the policy considerations underlying these exceptions have become more apparent, the courts have synthesised them into a general test for liability." *The Law of Contract in South Africa* 2nd ed (2012) 134.

[198] RH Christie *The Law of Contract in South Africa* 6th ed (2011) 277; Hutchison & Pretorius *The Law of Contract* 134-135.

[199] Hutchison & Pretorius *The Law of Contract* 134-135.

[200] Christie *The Law of Contract* 277. This is especially seen in some of the earlier judgments discussed at 4 2 in the following chapter, and was an accepted concept in South African law until the judgment in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A).

[201] Christie *The Law of Contract* 277.

[202] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A). An example of this is found in section 17 of the English Marine Insurance Act 1906, which states that "(a) contract of marine insurance is a contract

South African law, as it seems to imply that there are degrees of good faith.[203] The strongest criticism is found in Joubert JA's majority judgment in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*,[204] where he states that:

> "there is no magic in the expression *uberrima fides*. There are no degrees of good faith. It is entirely inconceivable that there could be a little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room *for uberrima fides* as a third category in our law…*Uberrima fides* is not a juristic term with a precise connotation. It cannot be used as a yardstick with a precise legal meaning…In my opinion, *uberrima fides* is an alien, vague, useless expression without any particular meaning in law…Our law of insurance has no need for *uberrima fides* and the time has come to jettison it.". This decision confirms the statement made in *Iscor Pension Fund v Marine and Trade Insurance Co Ltd* 1961 1 SA 178 (T) that "the label placed on the undertaking is not of importance and the claim that *uberrima fides* is a necessary concomitant of insurance is misleading."

This view is confirmed in *Silent Pond Investments CC v Woolworths (Pty) Ltd.*[205] Following the exploration of the historical development in the preceding chapter, it is evident that Roman law did not make reference to degrees of good faith, and as such, the court in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*[206] was correct in its judgment, effectively ending the application of the "alien, vague, useless expression without any particular meaning" in South African law. This rejection of the construct of *uberrimae fidei* leads us to question on what basis the special rights and duties attaching to this type of contract have been recognised. In this chapter we will explore some of the most notable exceptions with the aim of discovering the reasons why these specific types of contracts always impose a duty of disclosure on the parties.

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based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

[203] As Christie states, "All contracts in our law are *bonae fidei*, and there is no room for a higher category of *uberrima fides*" (*The Law of Contract* 277). The court in *Iscor Pension Fund v Marine and Trade Insurance Co Ltd* 1961 1 SA 178 (T) relied on Spencer-Bower's view that "The Roman Law distinguishes between actions *bonae fidei*…and actions which are not. It does not erect into a third and superlative class, with a special name, such transactions and relations which English law designates *uberrimae fidei*."

[204] 1985 1 SA 419 (A) 433C-D.

[205] 2011 6 SA 343 (D) 357-360.

[206] 1985 1 SA 419 (A).

3 2 Contracts of insurance

It is an accepted principle of modern South African law that an insured is under a duty to volunteer certain facts to prospective insurers at the time of seeking insurance.[207] It is submitted that the scope of the insured's duty to disclose in South African law is limited by a number of factors.[208] First, the insured's duty to disclose is a pre-contractual duty, as it concerns information that must be disclosed in order for parties to contract. It thus follows that such a duty would terminate upon contract conclusion.[209] The duty only exists in respect of material facts. Materiality is determined by using an objective test of the reasonable person, specifically the reasonable person in the position of the insured.[210] The facts in question must actually be known to the insured. It has been debated whether 'constructive knowledge' (the fact that the insurer *ought* to have known something) would be sufficient to establish a duty to speak.[211] The prevailing opinion of our courts and academic writers seems to be that the insured's duty of disclosure does not extend to facts that the insurer already knows or can be presumed to know.

In practice, insurers usually only allege the breach of a duty of disclosure when the insured institutes a claim on his insurance contract. Typically this is used in instances where the insurer suspects that the insured acted fraudulently but is unable to prove it. In such a case, the breach of a duty of disclosure provides extensive protection for insurers, whilst being extremely onerous on the insured. The basis of this extensive protection, the reasons for imposing a duty of disclosure of the insured and the nature and scope of this duty can be

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[207] MFB Reinecke, S van der Merwe, JP van Niekerk & P Havenga *General Principles of Insurance Law* (2002) 192-196; Christie *The Law of Contract* 277; JP van Niekerk "Goodbye to the duty of disclosure in insurance law: reasons to rethink, restrict, reform or repeal the duty (part 1)" (2005) 17 *SA Merc LJ* 150 169.

[208] Van Niekerk (2005) *SA Merc LJ* 150.

[209] Confirmed in G Gordon & WS Getz *The South African Law of Insurance* 2nd ed (1969) 112; RW Lee & AM Honorè *The South African Law of Obligations* (1978) 590; *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A) 756A; Reinecke et al *General Principles of Insurance Law* 130.

[210] See further *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A) 756; *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 1 SA 208 (A); Reinecke et al *General Principles of Insurance Law* 131.

[211] According to Reinecke et al, "South African case law appears to favour the view that the duty to disclose is simply a duty to disclose material facts within one's actual knowledge. This means that no duty of disclosure exists regarding facts which do not lie within a party's actual knowledge but of which he could have obtained knowledge had he taken reasonable steps." (footnotes omitted) *General Principles of Insurance Law* 128; *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) 762.

better understood in light of a brief discussion on the history of the duty to disclose in insurance law.

3 2 1 Historical treatment of the duty to disclose in insurance contracts

The recognition in South African law that insurance contracts always create a duty of disclosure between the parties has its roots in Roman-Dutch and English law.

In Roman-Dutch law, the duty of disclosure in insurance law was regulated by statute.[212] The insurance legislation at the time prescribed which matters had to be mentioned in insurance policies.[213] Any failure to disclose the required information would result in the contract being void, or in reduced liability for the insurer.[214] The reason for requiring such a duty on the part of the insured was that the information required concerned matters of which the insured had knowledge, as well as matters that the insured would not otherwise voluntarily disclose to the insurer.[215] It was also common practice at the time for individuals to draft their own insurance policies and then search for people to underwrite their risks.[216] Thus it was possible for these individuals to determine the contractual terms unilaterally, which could be detrimental to potential underwriters. The duty to disclose was very limited in that parties were only bound to disclose information by means of including it in the written insurance policy. This meant that there was no such duty in the absence of a written insurance contract.[217] Significantly, the statutory duty to disclose in Roman-Dutch insurance law could not be abolished or limited, or conversely, extended. There was thus a very narrow duty on the insured to disclose specific information to the insurer.[218]

Initially in English law, a similarly narrow duty of disclosure was imposed on parties to insurance contracts. In terms of this duty, an insured was only bound to disclose “special

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[212] Van Niekerk (2005) 17 *SA Merc LJ* 323 323. Also see JP Van Niekerk *The Development of the Principles of Insurance Law in the Netherlands from 1500-1800* (1998).
[213] Van Niekerk (2005) *SA Merc LJ* 323.
[214] Van Niekerk (2005) *SA Merc LJ* 323.
[215] Van Niekerk (2005) *SA Merc LJ* 323-324.
[216] Van Niekerk (2005) *SA Merc LJ* 324.
[217] Van Niekerk (2005) *SA Merc LJ* 325.
[218] Van Niekerk (2005) *SA Merc LJ* 326-329.

facts...in the knowledge of the insured only".[219] This narrow duty was countered by a duty on the part of the insurer to enquire about facts that he had reason to believe were important when considering the potential risk.[220] However, this narrow scope of the duty to disclose later developed in such a way that, by the 19th century, it was accepted law that the insured had a general duty to disclose all material facts to the insurer. The duty was no longer limited to those material facts which the insured had private knowledge of and that the insurer could not possibly know. The law developed further so that the insurer's reciprocal duty to enquire also fell away, which is especially seen in the decision in *Bates v Hewitt.*[221] By the 20th century, it was "apparent that in English law insurance contracts generally were no longer merely ones of good faith like all other contracts, but had indisputably become exceptional ones of the utmost good faith".[222] This 'utmost good faith' thus became the basis of the recognition of the duty to disclose in insurance contracts, and it was this basis which was later accepted into South African law and used as a standard for imposing duties of disclosure in certain types of contract.

3 2 2 The duty to disclose in South African insurance law

This duty of disclosure first arose in South African insurance law during the late 19th century, and arose in courts where English law was accorded great persuasive force.[223] As indicated in the preceding paragraph, English law at that time imposed a general duty on the insured to disclose all material facts to the insurer. This position was adopted by South African courts, who used English cases as authority for recognition that certain contracts were *uberrimae*

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[219] *Carter v Boehm* (1766) 3 Burr 1905, 1909.

[220] Confirmed in *Carter v Boehm* (1766) 3 Burr 1905; *Planche & Another v Fletcher* (1779) 1 Dougl 251, 99 ER 164; *Noble & Another v Kennoway* (1780) 2 Dougl 510, 99 ER 326; *Court v Martineau* (1782) 3 Dougl 161, 99 ER 591; *Mayne v Walter* (1787).

[221] (1867) LR 2 QB 595. In this case it was held that the insured was bound to disclose "everything within his knowledge which is of a nature to increase the risk which the underwriter is asked to undertake" (611), No mention is made of a reciprocal duty on the part of the underwriter, and at 610-611 of the judgment, the court states that even if the underwriter could have discovered certain information for himself, there is no obligation on him to do so.

[222] Van Niekerk (2005) *SA Merc LJ* 162.

[223] Van Niekerk (2005) *SA Merc LJ* 329. This is evidenced by the judgments in *Malcher & Malcomess v Kingwilliamstown Fire & Marine Insurance & Trust Co* (1883) 3 EDC 271; *Spencer v London & Lancashire Insurance Co* (1884) 5 NLR 37; *Drysdale v Union Fire Insurance Co Ltd* (1890) 8 SC 63.

fidei, and that insurance contracts fell into this category, and would thus require "perfect or the utmost good faith from the insured."[224]

This concept of utmost good faith appears to have been the basis of imposing an exceptionally broad duty of disclosure on the insured in the earlier cases regarding the duty to disclose in insurance law. The courts went so far as to say that:

> "It is well settled law that insurance policies are contracts *uberrima fidei* and consequently there is a greater duty cast upon an insured regarding the disclosure of facts than in an ordinary contract."[225]

From this statement we see that the insured traditionally bears a greater burden of disclosure in a contract of insurance. No mention is made of the reciprocal duty of the insurer to enquire about the risk as seen in earlier English law. There is, however, provision for the limitation of the insured's duty. First, he is only bound to disclose matters that are material, secondly he had to have private knowledge of these matters, and thirdly the insurer must have had no way of knowing them.[226] This broadened duty of disclosure has been firmly established in South African law,[227] and continues to be applied by modern courts, despite being criticised for being too onerous on the insured.[228]

These provisions which serve to limit the insured's duty to disclose require further attention, and bear a similarity to the factors identified by the judiciary when dealing with cases of non-disclosure, which will be properly investigated in the following chapter. For the moment it is necessary to consider the aspects of materiality and private knowledge, and their importance in the law of insurance.

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[224] Van Niekerk (2005) *SA Merc LJ* 330. Authority for the principles applicable to insurance contracts in early South African law is found in *Malcher & Malcomess v Kingwilliamstown Fire & Marine Insurance & Trust Co* (1883) 3 EDC 271.

[225] *Fine v The General Accident, Fire and Life Assurance Corp Ltd* 1915 AD 213 218. This view is confirmed in later cases such as *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A).

[226] *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A) 755F.

[227] The scope of this duty has not been challenged in subsequent cases, although the designation *uberrimae fidei* was criticised and effectively struck down by the court in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A). Reform has, however, been proposed. In Van Niekerk (2005) *SA Merc LJ* 335-339, the author explores possible methods in which the insured's duty to disclose can be reformed in order to place parties to an insurance contract on a more equal footing.

[228] *Bruwer v Nova Risk Partners Ltd* 2011 1 SA 234 (GSJ).

It has been stated above that the insured is only bound to disclose material facts. It is important that, in insurance law, the insured's own view of the materiality of facts is irrelevant, and the contract will be void if he fails to disclose material facts in the belief that they are not so.[229] This view is problematic because it raises the question as to how one would determine whether facts are objectively material.

The test for materiality has been discussed in case law, and the most common approach appears to be the "reasonable man" test.[230] The court does not consider the position of the reasonable insurer or the reasonable insured, but favours the standard of the "average prudent person or reasonable man".[231] It has been suggested that this is due to the fact that this test treats both parties equally, as it does not give preference to either the insurer or insured.[232]

Another important factor is whether the insured had private knowledge of the material facts. This is important, as it is generally accepted in insurance contracts that those facts necessary to compute the potential risk are only known to the insured, and thus he would bear the burden of informing the insurer.[233]

From this discussion, it is apparent that materiality of the facts concerned and whether the insured had exclusive knowledge thereof are significant factors underlying the imposition of an absolute duty of disclosure in insurance law.

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[229] *Malcher & Malcomess v Kingwilliamstown Fire & Marine Insurance & Trust Co* (1883) 3 EDC 271 289.

[230] This standard is applied in *Fine v The General Accident, Fire and Life Assurance Corp Ltd* 1915 AD 213 220-221 and approved in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 1 SA 208 (A). Also see Van Niekerk (1999) *SA Merc LJ* 182.

[231] This test is most commonly known as the "reasonable man test", and is seen in a number of cases such as *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 410H-411D. It is clearly set out by Reinecke et al in their *General Principles of Insurance Law* 136: "For the sake of clarity, it seems that the test for materiality formulated in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* is best expressed as referring to those facts which are objectively and reasonably related to a decision when all the circumstances of the case are taken into account. It poses the question not whether the reasonable person would have disclosed the fact in question, but whether the reasonable person would have considered that fact reasonably relevant to the risk and its assessment by an insurer."

[232] *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 435G-I; Reinecke et al *General Principles of Insurance Law* 136. On the test for whether positive misrepresentations by the insured are actionable, and especially the impact of the *Qilinqele* case and subsequent legislative reform see, most recently, *Mahadeo v Dial Direct Insurance Ltd* 2008 4 SA 80 (W) para [16] and [17].

[233] *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A) 755G.

3 3 Fiduciary relationships

Fiduciary relationships are another exception to the general rule in South African law that non-disclosure is not automatically actionable.[234] A fiduciary relationship can arise in many contexts, including trusteeship, agency, partnership and the relationship between companies and their directors, amongst others.[235] There is no *numerus clausus* of fiduciary relationships,[236] and the duties of parties to such a relationship vary according to their specific circumstances.[237] A fiduciary is defined as "someone who acts on behalf of and in the interests of another person",[238] and the relationship between the fiduciary and the other party is distinguished by a high level of trust and confidence.[239] In these types of relationships, it is the norm that one party is more vulnerable than the other, or has a position of power over the other.[240] The nature of this relationship is best described as follows:

> "Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position...Whether a fiduciary relationship is established will depend upon the circumstances of each case ..."[241]

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[234] GF Lubbe & CM Murray (eds*) Farlam & Hathaway Contract: Cases, Materials, Commentary* 3rd ed (1988) 330; S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe (eds) *Contract: General Principles* 4th ed (2012) 110-111; Hutchison & Pretorius *The Law of Contract* 134. It is pointed out by the authors that this category of exceptions overlaps with those contracts traditionally classed *uberrimae fidei*. Also see RH Zulman & G Kairinos (eds) *Norman's Law of Purchase and Sale* 5th ed (2005) 84.

[235] FHI Cassiem (ed) *Contemporary Company Law* (2011) 465.

[236] *Volvo (Southern Africa)(Pty) Ltd v Yssel* 2004 3 SA 465 (SCA) 477H.

[237] Cassiem *Contemporary Company Law* 465; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) "There is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship."

[238] MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* vol 2 (2002) 8-12.

[239] Cassiem *Contemporary Company Law* 465. Millner states that the fiduciary relationship has an "element of dependence" MA Millner "Fraudulent non-disclosure" (1957) 74 *SALJ* 177 188.

[240] Cassiem *Contemporary Company Law* 465. "In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination." *Volvo (Southern Africa)(Pty) Ltd v Yssel* 2004 3 SA 465 (SCA) 536D-E.

[241] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177-178.

According to Cassiem, there are three elements in a fiduciary relationship.[242] First, a fiduciary has a discretion or power. Second, the fiduciary can unilaterally exercise such power in a way that would affect the beneficiary's interests, legal or otherwise. Finally, the beneficiary is "vulnerable or at the mercy of the fiduciary".[243]

These elements clearly indicate that one party is in a stronger position than the other, and as such, there are certain duties that arise in order to address this imbalance of power.[244] These duties are imposed in order to ensure that the fiduciary does not abuse the trust and confidence of the relationship.[245] The two main duties are that the fiduciary must act in the best interests of the beneficiary and the fiduciary must act in good faith. These fiduciary duties include a duty to disclose.[246] According to the court in *Meskin, NO v Anglo-American Corporation of SA Ltd*,[247] a duty to disclose is always recognised when there is a fiduciary relationship between the parties.

An example of such a fiduciary relationship would be the relationship between a company director and his company.[248] A director's fiduciary duties are derived from common law. In common law, the director's overarching fiduciary duty is to act in good faith.[249] This duty has been described as the duty "from which all the other fiduciary duties flow".[250] An extension of this duty is the rather broad duty to avoid a conflict of interest between the company and the director's own personal interests.[251] One means of doing this is to require that the directors disclose any potential conflict to the company.[252] These duties of disclosure have been partially codified into the Companies Act 71 of 2008, and will be discussed at 3 4 3.

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[242] Cassiem *Contemporary Company Law* 465. These elements are also identified by Wilson J in *Frame v Smith* [1987] 2 SCR 99 (SCC) 136.
[243] Cassiem *Contemporary Company Law* 465. "(T)he one party so trusts to the other or is so dominated by the other that he does not or cannot independently safeguard his interests. It is an elementary requirement of public policy that such trust or power shall not be abused and that such dependence shall be protected." Millner (1957) *SALJ* 188.
[244] *Orban v Stead* 1978 2 SA 713 (W).
[245] Blackman et al *Commentary on the Companies Act* 8-34.
[246] *Orban v Stead* 1978 2 SA 713 (W) 718C.
[247] 1968 4 SA 793 (W).
[248] Cassiem *Contemporary Company Law* 467.
[249] "It is a well-established rule of common law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company." *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA).
[250] Cassiem *Contemporary Company Law* 475.
[251] Cassiem *Contemporary Company Law* 485.
[252] *Novick v Comair Holdings Ltd* 1979 2 SA 116 (W).

Other types of fiduciary relationships requiring disclosure are the relationship between an attorney and a client,[253] relationships of agency,[254] partnerships and trustees, all of which impose a full duty to disclose on the parties.

The main reason for recognising such a duty has been identified as the nature of the relationship between the parties. As explained above, the fiduciary relationship is characterised by an element of dependence, whereby one party necessarily depends on the other to protect his interests due to the imbalance of power in the relationship. The fact that there is always a duty of disclosure in these circumstances indicates that the law recognises the need to protect parties where there is such an "involuntary reliance". This involuntary reliance test as proposed by Christie and other writers has become one of the standards used to determine the existence of a duty to disclose in situations which do not fall under one of the exceptions mentioned in this chapter. The formulation and application of this test will be discussed later.[255]

3 4 The seller's duty to disclose latent defects

3 4 1 General principles

In contracts of sale, the duty to disclose is relevant in the context of latent defects.[256] A defect refers to a flaw in the *merx* that amounts to "an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used."[257] Defects are latent when they are not visible or discoverable on an inspection of the *res vendita*.[258] These types of defects are also referred to as aedilitian defects,[259] and include defects that do not necessarily constitute

[253] *Schneider NO v AA* 2010 5 SA 203 (WCC).
[254] *Stainer and others v Palmer-Pilgrim* 1982 4 SA 205 (O).
[255] See 5 2 1 below.
[256] Christie *The Law of Contract* 278.
[257] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 683H. Also see the definitions in DF Mostert, DJ Joubert & G Viljoen *Die Koopkontrak* (1972) 185; F du Bois (ed) *Wille's Principles of South African Law* 9th ed (2007) 897; GRJ Hackwill (ed) *MacKeurtan's Sale of Goods in South Africa* 5th ed (1984) 134; JW Wessels *The Law of Contract in South Africa* 2nd ed (1951) para 4590.
[258] Millner (1957) *SALJ* 189.
[259] Du Bois *Wille's Principles* 897.

physical defects in the *res vendita*.[260] It is in these situations that an automatic duty of disclosure arises on the part of the seller, who is bound to disclose any latent defects to the purchaser. Significantly, it does not matter whether he knows about the defect or not.[261] This duty to disclose includes the seller's duty to assume responsibility for any defects in the *merx*,[262] and extends only to those defects which are present at the time of the sale.[263] If such disclosure does not take place, the purchaser may avoid the contract, and elect to use one of a number of available remedies.[264]

It is suggested that the basis of this duty to disclose latent defects is that the hidden nature of the defects places the prospective buyer "into a position of dependency on the seller's candour…creating the typical relationship from which a duty of disclosure springs..."[265]

The current position in our law is that "a seller is obliged to disclose all material latent defects which unfit or partially unfit the *res vendita* for the purpose for which it was intended to be used."[266] This rule requiring that the seller disclose any latent defect in the *res vendita* on the part of the seller is clearly aimed at protecting the buyer, and it has been stated that this is derived from the rule in Roman-Dutch law which said *respondeat venditor*, as opposed to the general rule of *caveat emptor* applied in contracts of sale.[267] It has been suggested that the reason for imposing such a duty of disclosure on the seller is that the defect is not discoverable by ordinary inspection, which means that the buyer is dependent on the seller's honesty. This dependence creates

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[260] The best example of this is seen in *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A), where the historical monument status of a statue on the property was held to constitute a defect.

[261] Hutchison & Pretorius *The Law of Contract* 134 ("In terms of the aedilitian edict, (the seller) is liable for such defects even if ignorant of their existence, but knowledge transforms silence into fraud and thus widens the scope of his or her liability – at any rate, where the knowledge is deliberately withheld to induce the sale"); G Bradfield & K Lehmann (eds) *Principles of the Law of Sale and Lease* (2010) 33 ("The 'warranty' arises from the mere fact of the sale and does not depend on the seller's knowledge or ignorance of the defect. The seller's state of mind is therefore relevant only in respect of the extent, not the existence, of its liability").

[262] Bradfield & Lehmann *Law of Sale and Lease* 32.

[263] Bradfield & Lehmann *Law of Sale and Lease* 33.

[264] WA Hunter *Introduction to Roman Law* 9th ed (1955) 117; Du Bois *Wille's Principles* 897. The appropriate remedies available to the buyer would depend on the nature and extent of the defect, as well as the circumstances of the particular matter. These remedies will be discussed fully below.

[265] Millner (1957) *SALJ* 189. This places the focus on the relationship between the parties, which has been identified above as an important factor in determining the existence of a duty to disclose,

[266] *Crawley v Frank Pepper (Pty) Ltd* 1970 1 SA 29 (N). Also see Millner (1957) *SALJ* 189, which states that "a latent defect of which the would-be seller has knowledge falls into the class of information disclosure of which is always obligatory."

[267] Zulman & Kairinos *Norman's Law of Purchase and Sale* 163.

> "the typical relationship from which a duty of disclosure springs: the recurrent expectation of the parties negotiating a sale that such disclosure will be made comes to be reflected in a positive duty of disclosure operative in every sale as a rule of law, the transgression of which in itself amounts to fraud."[268]

This duty of the seller to disclose latent defects in the *res vendita* is also referred to in some texts as the seller's implied warranty against latent defects.[269] The seller is presumed to warrant or guarantee that at the time of sale, the *res vendita* is free from all latent defects.[270] This "implied warranty" against latent defects is based on the principle in our law that "everyone selling an article is bound…to supply a good article without defect, unless there are circumstances to show that an inferior article was agreed upon."[271]

This classification of the seller's duty to disclose latent defects as an implied warranty has been criticised for being misleading.[272] This is due to the fact that the remedies awarded for non-disclosure of a latent defect, namely the redhibitory actions, were special remedies, unlike those that would be claimed for breach of warranty in the normal course of events.[273] Also, other implied warranties arise either "as an inference of fact from the circumstances of the particular case; or it may arise as a result of a generalization or rule of law applicable to the kind of business carried on by the seller."[274] The seller's duty to disclose latent defects in the *res vendita* does not arise in either of these ways, and was initially imposed by law in the form of the aedilitian edicts.[275] For this reason, it must be accepted that the concealment of aedilitian defects must be approached differently to other types of warranties.[276]

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[268] Millner (1957) *SALJ* 189. "The very fact that (the defect) is latent, not discoverable by ordinary inspection, thrusts the buyer into a position of dependency on the seller's candour, thereby creating the typical relationship from which a duty of disclosure springs." This formulation appears to refer to an 'involuntary reliance' between the parties, which is one of the elements that courts look for when determining the existence of a duty to disclose. The potential use of involuntary reliance as a test for determining a duty to disclose in cases other than the recognised exceptions is discussed in the final chapter of this work.

[269] Zulman & Kairinos *Norman's Law of Purchase and Sale* 163; Hall *Maasdorp's Institutes of South African Law* 117. This approach is criticised in JC De Wet & AH van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed (1992) 235-236, and further discussed in *Crawley v Frank Pepper (Pty) Ltd* 1970 1 SA 29 (N) 36C-D.

[270] Hall *Maasdorp's Institutes of South African Law* 117.

[271] Zulman & Kairinos *Norman's Law of Purchase and Sale* 163.

[272] Millner (1957) *SALJ* 197.

[273] Millner (1957) *SALJ* 198; *Evan and Plows v Willis and Company* 1923 CPD 496.

[274] *Hackett v G & G Radio and Refrigerator Corporation* 1949 3 SA 664 (AD) 692.

[275] "It is this positive edictal duty imposed by law on all sellers which distinguishes silence in respect of redhibitory defects in the thing sold from silence in respect of other material matters as to which the law imposes no general duty to speak." Millner (1957) *SALJ* 198.

[276] Millner (1957) *SALJ* 199. Millner relies on the decisions in *Cloete v Smithfield Hotel (Pty) Ltd* 1955 2 SA 622 (O) and *Van der Merwe v Culhane* 1952 3 SA 42 (T) as authority for this statement.

As previously stated, one of the duties of the seller in modern South African law is a duty to disclose and assume responsibility for all latent defects in the object of sale which render the object unfit for its intended purpose.[277] It must be noted that this responsibility exists irrespective of the seller's knowledge or ignorance of the defect,[278] which is the same position as that in Roman law. If the seller breaches this duty of disclosure, and the *merx* later turns out to be defective, then the buyer will have certain remedies at his disposal.

3 4 2 Remedies available to the purchaser when the duty of disclosure is breached

These remedies are the *actio redhibitoria* and the *actio quanti minoris*,[279] which function alternatively to each other. Another possible remedy is a claim for damages, which can be instituted separately or alongside one of the aedilitian actions.

The *actio redhibitoria* allows the purchaser to rescind the contract, and is aimed at restoring the parties to the financial positions they occupied prior to contract conclusion.[280] The *actio redhibitoria* will only be available where the undisclosed defect is of a material nature, which is determined objectively, using the test of the reasonable man.[281] The enquiry will be whether a reasonable person having knowledge of the defect would have entered into the contract. If not, then the defect is material, and the purchaser would be entitled to rescind the contract.[282] In the event that the latent defect is not material, or where the purchaser has decided to keep the property despite the presence of a material defect, the purchaser may claim a reduction of the purchase price using the *actio quanti minoris*.[283] A defect is not material if it only renders

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[277] This rule is derived from the position in Roman law and Roman-Dutch law, most importantly Voet 21.1.1.2; Grotius 3.15.7; Van Leeuwen vol 2 145 and has been discussed at 3 3 1. The judiciary have accepted this rule, and have applied it in a number of cases including *Knight v Trollip* 1948 3 SA 1009 (D) 1012-13; *Crawley v Frank Pepper (Pty) Ltd* 1970 1 SA 29 (N) 36B-C; *Wastie v Security Motors (Pty) Ltd* 1972 2 SA 129 (C); *Waller And Another v Pienaar And Another* 2004 6 SA 303 (C). Also see Zulman & Kairinos *Norman's Law of Purchase and Sale* 163.

[278] PMA Hunt "General principles of contract" (1961) *ASSAL* 90 105; Hackwill *MacKeurtan's Sale of Goods* 138-139. "The liability which is imported by law into the contract arises from the mere fact of the sale." This point is confirmed in *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd And Another* 2006 3 SA 593 (SCA).

[279] Bradfield & Lehmann *Law of Sale and Lease* 35.

[280] Bradfield & Lehmann *Law of Sale and Lease* 35; Mostert et al *Die Koopkontrak* 210; AJ Kerr *The Law of Sale and Lease* 3rd ed (2004) 113.

[281] *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O).

[282] Bradfield & Lehmann *Law of Sale and Lease* 35.

[283] Bradfield & Lehmann *Law of Sale and Lease* 37; Hackwill *MacKeurtan's Sale of Goods* 155; Mostert et al *Die Koopkontrak* 218.

the *res vendita* partially unfit for the purpose for which it was bought.[284] If successful with this remedy, the purchaser will be able to claim the difference between the purchase price and the true value of the defective property.[285]

The purchaser may also be able to claim damages in delict. This would be possible if the seller knew or should have known that there was a defect in the *res* and kept silent in order to induce the purchaser to contract. As it is a delictual claim, fault is required. The role of fault when claiming delictual damages based on non-disclosure, specifically the possibility of grounding such a claim on negligent non-disclosure will be discussed at length in the following chapter on residual cases.[286] The amount awarded is determined with reference to placing the purchaser in the financial position that he would have been in had the seller not acted culpably.[287] The seller could also potentially be held liable for physical injury suffered by the purchaser as a result of the defect if the injury was reasonably foreseeable and the seller had a duty to take reasonable care in inspecting the property.

From this discussion it is clear that the seller's duty to disclose latent defects is very broad in scope, although this may be attributed to the fact that the defects are not easily discoverable by the buyer, who would then rely on the seller's disclosure in order to make an informed decision. This increased reliance by the buyer on the seller's candour seems similar to the fiduciary relationships, where one party is more than usually dependent on the other's disclosure, and lacks sufficient information to adequately protect their own interests. This reliance between the parties is a common thread in the exceptional situations discussed in this chapter, and the possibility of using it as a test for a duty of disclosure in other situations will be explored later in this discussion together with other possible standards.

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[284] Bradfield & Lehmann *Law of Sale and Lease* 37.

[285] Bradfield & Lehmann *Law of Sale and Lease* 37; *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400; *Scheepers v Handley* 1960 3 SA 54 (A); *Grosvenor Motors (Border) Ltd v Visser* 1971 3 SA 213 (E).

[286] See especially 4 2 5; 4 2 6 and the articles by Millner (1957) *SALJ* 189 and AJ Kerr "Negligent non-disclosure: the duty to call to mind and disclose" (1979) 96 *SALJ* 17 19.

[287] Bradfield & Lehmann *Law of Sale and Lease* 39; De Wet & Van Wyk *Kontraktereg* 345; *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

3 5 Statutory duties of disclosure

Apart from the common law instances discussed above, duties of disclosure can also be found in legislation. These statutory duties will be explored here, with the aim of identifying principles that the legislature used to determine which circumstances would demand the recognition of a duty to disclose.

3 5 1 National Credit Act 34 of 2005

There are a number of mandatory duties of disclosure that the National Credit Act imposes on credit providers.[288] These duties, which arise in every stage of the contracting process, are aimed at protecting consumers and enabling them to make informed decisions when involved in credit transactions. For purposes of this work the focus will be on the pre-contractual duties to disclose. These duties are contained in Chapter 5 of the Act.

The Act contains a number of measures aimed at creating a more informed consumer. It is suggested by Stoop that the provisions regarding disclosure are also intended as an indirect means of preventing over-indebtedness in South African consumers.[289]

Sections 74 to 77 of the Act regulate marketing practices. Section 76(4)(a)-(c) specifically regulates the content of credit advertisements. The section reads as follows:

> **76 (4)** An advertisement of the availability of credit, or of goods or services to be purchased on credit-
> (a) must comply with this section;
> (b) must contain any statement required by regulation;
> (c) must not-
> (i) advertise a form of credit that is unlawful;
> (ii) be misleading, fraudulent or deceptive; or
> (iii) contain any statement prohibited by regulation; and
> (d) may contain a statement of comparative credit costs to the extent permitted by any applicable law or industry code of conduct, but any such statement must-
> (i) show costs for each alternative being compared;
> (ii) show rates of interest and all other costs of credit for each alternative;
> (iii) be set out in the prescribed manner and form; and

[288] JW Scholtz *Guide to the National Credit Act* (2008) 6-16.
[289] PN Stoop "Disclosure as an indirect measure aimed at preventing over-indebtedness" (2008) 41 *De Jure* 352.

(iv) be accompanied by the prescribed cautions or warnings concerning the use of such comparative statements.

This section requires that advertisements "must contain any statement required by legislation", and also creates a prescribed form for certain information to be disclosed to consumers. According to Stoop, "it is thus clear that these marketing provisions aim at disclosing the total cost, charges and add-ons to credit."[290] This section also prohibits misleading advertising. The extent of this disclosure is an important step towards addressing the imbalance of power previously seen between credit providers and consumers, and fits in with the aim of empowering the consumer to make more responsible decisions.[291] Advertisements which omit information regarding actual costs and interest rates may be detrimental to the consumer. The omission of this type of information is potentially misleading in that the consumer would then contract without being appraised of all the relevant facts, and could then find themselves bound to onerous provisions. To avoid this, and to empower the consumer, the Act has incorporated section 76 and section 92, which expressly state the type of information to be disclosed as well as the form in which such disclosure must take place.

Section 92 of the Act provides for pre-contractual quotations in proposed credit agreements. The section reads as follows:

92. Pre-agreement disclosure. – (1) A credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.
(2) A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer –
(a) a pre-agreement statement –
(i) in the form of the proposed agreement; or
(ii) in another form addressing all matters required in terms of section 93; and
(b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121(3) if the consumer rescinds the contract.

[290] Stoop (2008) *De Jure* 352.
[291] These provisions fit into the new wave of consumer protection, and the spirit of promoting the consumer's interests is continued in the Consumer Protection Act 68 of 2008, which was introduced after the National Credit Act (see 3 5 4 below). The Consumer Protection Act's duties of disclosure will also be discussed in chapter 4, which deals with the general approach to duties of disclosure in South African law.

(3) Subject only to subsection (4), sections 81 and 101(1)(d)(ii), for a period of five business days after the date on which a quotation is presented in terms of subsection (2)(b) –

(a) with respect to a small agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at or below the interest rate or credit cost quoted, subject only to sections 81 and 101(1)(d)(ii);

(b) with respect to an intermediate or large agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at an interest rate or credit cost that –

(i) is at or below the interest rate or credit cost quoted; or

(ii) is higher than the interest rate or credit cost quoted by a margin no greater than the difference between the respective prevailing bank rates on the date of the quote, and the date the agreement is made.

(4) If credit is extended for the purchase of an item with limited availability, the credit provider may state that the quotation provided in terms of this section is subject to the continued availability of the item during the period contemplated in subsection (3).

(5) The Minister may prescribe different forms to be used in terms of this section in respect of –

(a) developmental credit agreements; and

(b) other credit agreements.

(6) A statement that is required by this section to be delivered to a consumer may be transmitted to a consumer in a paper form or in a printed electronic form.

(7) This section does not apply to any offer, proposal, pre-approval statement or similar arrangement in terms of which a credit provider merely indicates to a prospective consumer a willingness to consider an application to enter into a hypothetical future credit agreement generally or up to a specified maximum value.

From this we see that credit providers are bound to supply consumers with pre-agreement disclosure statements prior to the conclusion of a credit agreement. The content and format of these statements are set out clearly in the quoted section.

According to Stoop, "under the new policy on consumer credit, standardised disclosure of information and costs, in contracts and sales and marketing material, is required."[292] This section provides for such disclosure to take place in the form of pre-agreement quotations. The Act makes such pre-agreement quotations mandatory before entering into any kind of credit agreement.[293] As is apparent from section 92(1)-(2), the content of the quotation is quite extensive, and binds the credit provider for five business days. It has been argued that

[292] Stoop (2008) *De Jure* 352. This suggestion is supported by JM Otto in *The National Credit Act Explained* 2nd ed (2010) 44, where he says that the quotations referred to in this section "are in the nature of an option created by statute with the prospective consumer as the option holder."

[293] "A credit provider *must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.*" (Own emphasis)

this section essentially creates an option, which the prospective consumer can then choose to accept or ignore.[294]

The disclosure requirements serve to promote openness and equip consumers to make informed choices regarding credit agreements.[295] Also, the requirement that quotations be provided to consumers prior to them entering into credit agreements stimulates competition between credit providers, which would result in more fairly priced products being made available to the consumers. The aims of the disclosure measures in the National Credit Act are thus to empower consumers, and ensure that credit providers do not withhold important information in order to gain the "upper hand" in credit relationships. Although the elements of materiality and knowledge are not expressly mentioned in this Act's disclosure provisions, the focus is on the information of the reliant party, providing them with all of the relevant facts in order to place the parties to a credit agreement on a more equal footing.

3 5 2 Companies Act 71 of 2008

In terms of the Companies Act, the fiduciary duties of company directors[296] are "mandatory, prescriptive and unalterable, and apply to all companies."[297] As we have seen in 3 3 above, these duties have mainly been developed by the judiciary, and are thus changeable in order to reflect the times that they operate in. The codification of the fiduciary duties of company directors are also not static, and must thus allow for the development of company law in future. The phrase "partially codified" has been used to describe the setting down of these common law duties in statute. These statutory duties do not constitute a *numerus clausus* of directors' duties.[298]

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[294] Stoop (2008) *De Jure* 352.

[295] According to Otto (*The National Credit Act Explained* 44): "(t)he quotation gives the consumer the opportunity to consider his intended agreement and to shop around for better or cheaper credit."

[296] The common law fiduciary duties of company directors was briefly discussed at 3 3 above.

[297] Cassiem *Contemporary Company Law* 461.

[298] A criticism of the codification of these duties is that "The statutory statement of directors' conduct cannot be properly understood without knowledge of the common law. It regrettably provides arcane rather than clear and simple guidelines that are easily intelligible and informative to company directors and other users of company law (as was intended). More than before, it is now going to be difficult to get the legal profession to agree not only on what the directors' fiduciary duties are, but also on the exact contours of these duties." Cassiem *Contemporary Company Law* 462.

It has been stated that the overarching fiduciary duty of directors at common law is the duty to act in good faith and in the best interests of the company, and all other duties flow from this.[299] This duty of good faith and promoting the companies' best interests is codified in the Act,[300] and forms the basis of the directors' duty to disclose various types of information to different stakeholders in the company. Company directors have a number of duties of disclosure determined by statute, all of which are tied to the "core duty of a fiduciary", which is identified as being the duty to avoid a conflict of interest.[301] The provisions explored in this section set out the situations where company directors are bound to disclose certain information prior to contracting in order to avoid the conclusion of contracts which are prejudicial to one of the parties.

3 5 2 1 The duty to communicate information to the company

This duty is contained in section 76(2)(b) of the Act, which states that:

> **76.** (2) A director of a company must—
> *(b)* communicate to the board at the earliest practicable opportunity *any information* that comes to the director's attention, unless the director—
> (i) reasonably believes that the information is—
> *(aa)* immaterial to the company; or
> *(bb)* generally available to the public, or known to the other directors; or
> (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.[302]

The limitations in s 76(2)(b) are similar to the factors identified in insurance law as being of importance in instances where a duty to disclose is recognised, and the elements of knowledge and materiality have also been used by the judiciary when dealing with cases of non-disclosure that are not considered to be exceptional.[303] It is clear that the section only imposes a duty to disclose where the information is of a material nature, as immaterial facts need not be disclosed. The meaning of the term "material" for purposes of the Act is contained in s1, which provides that:

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[299] Cassiem *Contemporary Company Law* 475; *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) 627B.
[300] s76(3)(a) and (b).
[301] The common law fiduciary duties of company directors are explained at 3 3 above, and, as mentioned there, the Companies Act partially codifies these duties.
[302] Own emphasis.
[303] 3 2 2 above.

> ''material'', when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is—
>
> *(a)* of consequence in determining the matter; or
>
> *(b)* might reasonably affect a person's judgement or decision-making in the matter.

The materiality of facts is thus dependent on the circumstances of the particular case, but it can be deduced that the interest in question must not be a trivial one.[304] The emphasis placed on facts which affect a person's judgment or decision-making is the basis of this deduction, and it could reasonably be argued that only those facts which would influence the directors to contract (or to pass up an opportunity to contract) should be disclosed.

3 5 2 2 The disclosure of directors' personal financial interests

In addition to the disclosure of information which is material to the company and which is unknown to stakeholders, company directors are also bound to disclose any interests that they might personally have in a contract or proposed contract entered into by the company.[305] This duty is now contained in section 75 of the Act.

> **75.** (5) If a director of a company, other than a company contemplated in subsection (2)*(b)* or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director—
>
> *(a)* must disclose the interest and its general nature before the matter is considered at the meeting;
>
> *(b)* must disclose to the meeting any material information relating to the matter, and known to the director;
>
> *(c)* may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
>
> *(d)* if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph *(b)* or *(c)*;
>
> *(e)* must not take part in the consideration of the matter, except to the extent contemplated in paragraphs *(b)* and *(c)*;
>
> *(f)* while absent from the meeting in terms of this subsection—

[304] This can be compared to the definition of materiality in insurance law, which states that material facts are "those facts which are objectively and reasonably related to a decision when all the circumstances of the case are taken into account." (Reinecke et al *General Principles of Insurance Law* 136); see 3 2 2 above.

[305] This duty was contained in ss 234 to 241 of the Companies Act 61 of 1973.

(i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and
(ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

(g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

From section 75(5)(a)-(c) we can derive the types of personal information that must be disclosed by directors in the event of a potential conflict of interest. First, the director must disclose any personal financial interest that he or a related party has in the matter at hand. The director must also disclose any material information relating to the matter that he bears knowledge of. He may also disclose any other observations or pertinent insights relating to the matter. This latter disclosure is entirely discretionary, as evidenced by the use of the word 'may', and is normally only provided upon request. It is stated that section 75(5) becomes applicable when a director (or a related person) has a "direct material financial interest in a matter to be discussed by the board of directors".[306] Section 75(5) disclosure must obviously take place before the company enters into the proposed transaction, as the board will then be able to make an informed decision on whether they want to enter into the contract, and on what terms they would do so.[307]

It is also important to note that the directors' statutory duty is formulated in very general terms. It requires that a director disclose the fact that they have an interest, as well as the general nature of such interest, but no reference is made to disclosure of the extent thereof. This is due to s75(5)(c)'s requirement that *any material information relating to the matter* be disclosed, and not information relating to the interest of the director.[308] It is thus uncertain how much information directors are expected to provide regarding their interests and it has been suggested that:

[306] Cassiem *Contemporary Company Law* 517. In the same publication it is stated that "All non-pecuniary interests are excluded from s75."
[307] This was the rationale put forward in the UK Companies Act 2006, section 182 of which contains the equivalent provision to our s75(5).
[308] Own emphasis.

> "[p]erhaps the proper approach is that the amount of detail disclosed in each case depends in each case on the nature of the contract or matter to be considered at the board meeting and the context in which it arises."[309]

The wording of the Companies Act, also indicates materiality and knowledge as factors which are decisive in establishing liability for non-disclosure, and that the relationship between the director and his company is one where the director is bound to negotiate in good faith in order to protect the company's interests. These elements of materiality and knowledge, as well as the nature of the relationship are constantly referred to when discussing matters where a duty to disclose is always recognised. It is important to note that materiality in this case is determined with regard to the circumstances of the matter at hand, and is thus context sensitive, unlike the objective determination of materiality in the case of insurance and the seller's liability for latent defects.

3 5 3 Insolvency Act 24 of 1936

The unrehabilitated insolvent's duty of disclosure is contained in statute, and has been identified as one of the exceptional circumstances in which non-disclosure will always be actionable.[310] Provision is made for the insolvent's disclosure of a number of different types of information, found in sections 137(a) and 138(b)-(d) of the Insolvency Act:

> **137 Obtaining credit during insolvency, offering inducements, etc**
> Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year-
>
> (a) if, during the sequestration of his estate, he obtains credit to an amount exceeding ten pounds without *previously informing the person from whom he obtains credit that he is an insolvent*, unless he proves that such person had knowledge of that fact…[311]

This extract clearly places a duty on an unrehabilitated insolvent to disclose his insolvent status to any protected creditors. It is possible to construe this type of information as material, as it would certainly affect the creditors' judgment and decision to grant credit to the insolvent. Also, it is not expressly stated what type of knowledge is required on the part of the creditor.

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[309] Cassiem *Contemporary Company Law* 519. The dictum in *Gray v New Augarita Porcupine Mines Ltd* (1952) 3 DLR 1 14 is cited as authority for this suggestion.
[310] Hutchison & Pretorius *The Law of Contract* 134.
[311] Own emphasis.

Did he need to have actual knowledge, or is it sufficient for the insolvent's status to be something that he could reasonably have found out? From the wording of the article, it seems that there would have to be actual knowledge, as the insolvent is required to prove the creditor's knowledge of his insolvent status in order to escape liability for non-disclosure thereof.

> **138 Failure to attend meetings of creditors or give certain information**
> An insolvent shall be guilty of an offence and liable to imprisonment for a period not exceeding six months-
>
> (a) .....
>
> [Para. (a) deleted by s. 42 of Act 99 of 1965.]
>
> (b) if he fails, when thereto required in writing by the trustee of his estate, to give a true, clear and detailed explanation of his insolvency or fails to account correctly and in detail for the excess of his liabilities over his assets; or
>
> (c) if, at a meeting of the creditors of his estate, when thereto required by the trustee or the officer presiding or any creditor or by the agent of any of them, he fails to account for or to disclose what has become of any property which was in his possession so recently that in the ordinary course he ought to be able to account therefor; or
>
> (d) if he fails to comply with the requirements of subsection (13) of section twenty-three.

This section sets out the types of information to be disclosed when the insolvent is specifically required to do so. In these cases, he is bound to disclose these matters when required to by either the trustees or his creditors. The penalty for staying silent in response to a direct question was imprisonment. This section only provides that the listed information be disclosed when the insolvent is required to disclose it, which leaves open the possibility that, if he was never directly questioned about the information or required to provide it, any non-disclosure thereof would not be actionable.

3 5 4 Consumer Protection Act 68 of 2008

In addition to the common law writings and jurisprudence on actionable non-disclosure that have been discussed above, the provisions of the Consumer Protection Act[312] are of importance when discussing the approach to non-disclosure in South African law. The intended scope of this Act is every transaction for the supply and promotion of goods and

[312] Hereafter referred to as "the Act".

services as well as the goods and services themselves that occurs within South Africa, unless such a transaction is exempted by the provisions in section 5 of the Act. A "transaction" is defined as an agreement between two or more people for the supply of goods or services for consideration.[313] A once-off transaction does not fall within the scope of the definition, which refers only to transactions in the ordinary course of business.

The introduction of this Act has the potential to alter the general rule against non-disclosure, particularly when it comes to contracts of sale, by establishing set standards with which vendors' conduct must comply. Section 3(1)(d) provides that one of the aims of the Act is to protect consumers from any unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices, as well as any other deceptive, misleading, unfair and fraudulent conduct. This study focuses on the provisions in Part F of the Act, and especially s41, which contains the consumer's right to fair and honest dealing.

3 5 4 1 Section 41

When discussing non-disclosure during the contracting process, s41 of the Act is of particular importance. This section contains the consumer's position regarding fraud, misleading or deceptive representations by suppliers. It can be accepted that non-disclosure could under certain circumstances amount to a representation. Section 41 reads as follows:

> **41. False, misleading or deceptive representations.**
> (1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—
> (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
> (*b*) use exaggeration, innuendo or ambiguity as to a material fact, *or fail to disclose a material fact if that failure amounts to a deception*; or
> (*c*) *fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation*,
> or permit or require any other person to do so on behalf of the supplier.

The italicised parts of s41(1)(b) and (c) are of particular interest. Read together, these provisions place clear statutory duties of disclosure on suppliers.

[313] s1.

Section 41 provides a statutory duty to speak that must be adhered to, provided the other circumstances are present. The provision of s41(1)(b) contains one of these circumstances, mainly that the supplier must not fail to disclose a *material fact* (own emphasis). The qualification of the duty to disclose in this way echoes the judiciary's requirement that only material facts need be disclosed, and there is no duty on the seller to disclose any other information not material to the matter. However, we are not told what materiality means in the context of the CPA. It may therefore be necessary to have regard to other instruments as well as the common law position in order to interpret statutory terms. The common law definition of materiality and the definitions found in other legal instruments will be consulted in the following chapters, and we will revisit the potential meanings of s41 in light of that discussion.

Section 41 does not expressly indicate what state of mind the non-disclosing party must have. In the common law, the judiciary has expressed some support for Millner's threefold division of types of non-disclosure,[314] namely active concealment, designed concealment and simple non-disclosure. This division may also be instructive in interpreting s41. Active concealment involves allowing another party to proceed on an erroneous belief caused by one's own prior action, whereas designed concealment refers to the situation where a party knowingly keeps silent about a fact that he knows the other party is ignorant of. Lastly, there is simple non-disclosure, where a contracting party merely keeps silent without any fraudulent intent.

It appears that s41 can accommodate all three types of non-disclosure. The situation of active concealment may be addressed in s41(1)(c), which provides that a supplier, apart from being bound to disclose any material facts within their knowledge, has a duty to correct any "apparent misapprehension" on the part of the consumer, and that a failure to comply with this duty would constitute a false, misleading or deceptive misrepresentation. This section would ostensibly have the effect of widening the supplier's duty to disclose, as it provides that the supplier must correct any misapprehension held by the consumer that would amount to a deceptive representation, regardless of whether it was the supplier's individual action that led to such misapprehension.

[314] See *Orban v Stead and Another* 1978 2 SA 713 (W).

Section 41(1)(b) states that a supplier must not fail to disclose a material fact if such failure would amount to a deception on the part of the consumer. This subsection could accommodate both designed and active concealment, where a contracting party keeps silent about a material fact in the knowledge that the other party is ignorant thereof. It clearly prohibits such concealment in consumer contracts, and the supplier is thus bound by statute to disclose material information to the consumer.

There has been debate in South African law as to whether simple non-disclosure should be actionable.[315] It is also referred to as innocent non-disclosure or mere silence, and concerns instances where a contracting party simply keeps silent about certain information, but lacks fraudulent intent in doing so. It has been suggested that such non-disclosure should not be actionable, as it would not be fair to punish a party for a consequence that they did not intend. However, there is uncertainty whether mere silence should be actionable, as, regardless of intent, the other contracting party would still have been induced to enter into the contract by a misrepresentation, which they would not have done if they had had access to the correct information. The question is whether s41 applies to cases of innocent non-disclosure. The italicised part of s41(1)(b) above provides that the supplier must not "fail to disclose a material fact if that failure amounts to a deception". The wording of this section, as well as that in s41(1)(a) creates a liability for the supplier for any non-disclosure of a material fact if such non-disclosure would amount to a misrepresentation. There is no requirement in s41 that the supplier must have the intention to mislead the consumer in order for his non-disclosure to be actionable. The only requirement created in this section is that the supplier is bound to disclose information where the non-disclosure of such information would result in a misrepresentation to the consumer. The omission of the requirement of intent in s41 creates room for the possibility that suppliers could incur liability for innocent non-disclosure under the Act.

In the event that one of these sections is breached, the Act provides a number of remedies for the consumer. These remedies are contained in s69, which reads as follows:

[315] This is evident from the judgments in *Speight v Glass* 1961 1 SA 778 (D) and *Orban v Stead* 1978 2 SA 713 (W).

69 Enforcement of rights by consumer

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

(a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

(c) if the matter does not concern a supplier contemplated in paragraph *(b)*-

(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or

(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;

(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or

(iv) filing a complaint with the Commission in accordance with section 71; or

(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

From this we see that prior to approaching the courts, the consumer must first approach certain institutions that could provide alternative protection. This could be because these institutions may provide more cost-effective relief, compared to the courts. These legislative remedies provided in s69 must be exhausted before the courts can be approached and the common law remedies sought.[316]

Section 52 of the Act specifically outlines the courts' powers in the event that ss40, 41 and 48 have been contravened. The section reads as follows:

Powers of court to ensure fair and just conduct, terms and conditions

52. (1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—

(a) the supplier contravened section 40, 41 or 48; and

(b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).

[316] Further compare T Naudé "Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective" 2010 *SALJ* 515 525–528.

The court is bound to take the provisions of s52(2) into consideration when making an order. These provisions include the relationship between the parties and the specific circumstances of the matter at hand, as well as the respective bargaining power of the parties. If, after taking all of these circumstances into account, the court determines that the transaction or agreement was in fact unconscionable or unfair in any way, section 52(3) provides a list of possible orders that they could make:

> .
>
> (3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—
>
> (a) make a declaration to that effect; and
>
> (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
>
> (i) to restore money or property to the consumer;
>
> (ii) to compensate the consumer for losses or expenses relating to—
>
> (aa) the transaction or agreement; or
>
> (bb) the proceedings of the court; and
>
> (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

It appears that the court still has a discretion to make an award that they consider just and reasonable in the circumstances, provided that they give due consideration to the factors listed in section 52(2).

3 5 4 2 Non-disclosure and the consumer's right to fair, just and reasonable terms

Another right contained in the Consumer Protection Act which could find application in the law relating to non-disclosure is the consumer's right to fair, just and reasonable terms and conditions. The creation of such a right in legislation assists in achieving one of the aims of the Act, which is the protection of consumers against unfair, unjust and otherwise unconscionable practices.[317] Section 48 reads as follows:

> **48. (1)** A supplier must not—
>
> *(a)* offer to supply, supply, or enter into an agreement to supply, any goods or services—
>
> (i) at a price that is unfair, unreasonable or unjust; or

[317] s3(1)(d).

(ii) on terms that are unfair, unreasonable or unjust;

(b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or

(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—

(i) to waive any rights;

(ii) assume any obligation; or

(iii) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if— …

(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or

(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—

(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or

(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

Of particular interest in the context of non-disclosure is s48(2)(c). This section (italicised above) provides that a contractual term is unfair, unreasonable and unjust if a consumer has relied to his detriment on a false, misleading or deceptive representation or statement of opinion made by a supplier. It has been established in the discussion on s41 above that non-disclosure could constitute a representation under the requisite circumstances, such as where the information in question is material to the contract. From a reading of s48(2)(c), it appears that the consumer, in the event that a contract is concluded as a result of a misrepresentation by non-disclosure, would also be able to rely on this section as a means of challenging the contract. The inclusion of s48 provides the consumer with another ground for relief when faced with a contract concluded by misrepresentation. It is unclear why the legislature felt the need to include the reference to s41 in s48 at all. Any contravention of this section would also give rise to the remedies set out in ss69 and 52 of the Act, as the consumer can use s69 to enforce any right contained in the Act, and s52 specifically provides that the court can grant relief when ss40, 41 and 48 are contravened.

3 6 Conclusion

As stated at the beginning of this chapter, each of the instances discussed is an exception to the general rule against recognising duties of disclosure between contracting parties. However, after discussing some of these recognised exceptions, "the question is whether, outside these special cases, or perhaps incorporating them, a general test can be propounded for deciding whether in any particular case silence amounts to a misrepresentation."[318]

Keeping this question in mind while exploring the exceptions mentioned above, it is apparent that many situations contain comparable elements which necessitate the recognition of a duty to disclose. Would it be possible, or advisable, to attempt to use these elements with a view to formulating a general test for establishing a duty to disclose? In this regard it appears that there are certain recurring elements in some of the exceptional cases discussed above. In essence, they can be described as materiality, knowledge and the nature of the relationship between the parties.

The element of materiality has different meanings in different contexts. In terms of insurance law, material facts are described as those facts "which are objectively and reasonably related to a decision when all the circumstances of the case are taken into account. It poses the question not whether the reasonable person would have disclosed the fact in question, but whether the reasonable person would have considered that fact reasonably relevant to the risk and its assessment by an insurer."[319] This objective test for materiality based on reasonableness is also applied in the case of the seller's liability for latent defects.[320] The statutory definitions of materiality are somewhat different, and it appears that materiality is largely reliant on the specific circumstances of any given case. The Companies Act 71 of 2008 provides a definition of materiality which confirms this,[321] and states that the facts must be of consequence in determining the matter and have the potential to reasonably affect parties' judgment or decision-making skills.[322] Although the Consumer Protection Act 68 of

[318] Christie *The Law of Contract* 278.
[319] Reinecke et al *General Principles of Insurance Law* 136
[320] *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O).
[321] s1 Companies Act 71 of 2008.
[322] See discussion of the Companies Act at 3 5 2 above.

2008 expressly provides for non-disclosure of a material fact, no definition of materiality is provided, and it has yet to be seen how this will be interpreted in practice.

Knowledge is another factor present in these exceptional cases which could be a useful indicator of a duty to disclose in residual cases. In insurance law, the insured party only has a duty to disclose those facts which are within his private knowledge and which the insurer has no way of knowing.[323] This limitation of duties of disclosure to instances where one party has private knowledge is also seen in statute, as the Companies Act 71 of 2008 only provides for disclosure where the information to be disclosed is not already known to the other directors or easily ascertainable.[324]

In addition to the knowledge and materiality considerations, the nature of the relationship between the parties also seems to play a large role when determining the existence of a duty to disclose. This is especially seen in the discussion of fiduciary relationships.[325] The reason for imposing a duty of disclosure between contracting parties in this instance is the imbalance of power between them. This imbalance creates a strong dependence by one party on the other for the disclosure of information. This dependence is also seen in the instance of the seller's liability for latent defects, where the hidden nature of the flaw creates a reliance on the seller's candour. Legislation is also affected by this relationship of dependence. The relationship between a director and his company as well as that between a credit provider or supplier and a consumer is of such a nature that one party is always in a weaker position than the other, and the provisions of the National Credit Act, Companies Act and Consumer Protection Act are all aimed at addressing this imbalance.

The emphasis placed on materiality, knowledge and the nature of the relationship between the parties in these specific cases suggests that these features may be an integral part of recognising the duty to disclose in any given situation and could thus be of assistance to us when approaching instances of non-disclosure which fall outside the recognised exceptions.

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[323] See 3 2 2 above.
[324] See 3 5 2 above.
[325] 3 3 above.

CHAPTER 4: MISREPRESENTATION BY NON-DISCLOSURE IN SOUTH AFRICAN LAW: THE RESIDUAL GENERAL DUTY TO DISCLOSE

4 1 Introduction: the general rule

As established in the preceding chapter,[326] the general rule in South African law is that there is no inherent duty on a contracting party to disclose any information concerning the contractual terms that he has within his exclusive knowledge.[327] This is the same point of departure in many other modern jurisdictions.[328] However, it is also accepted that a non-disclosure would be actionable "when the circumstances are such that frank disclosure is clearly called for – or as it has frequently been said, when there is a duty to disclose."[329] Due to the sometimes serious disadvantages caused to contracting parties by a lack of disclosure during contracting, the courts have acknowledged the existence of misrepresentation by non-disclosure as a possible cause of action, and have stipulated that there is indeed a duty to speak in certain residual circumstances not covered by the special cases dealt with in the previous chapter.[330] This has largely been done on a case by case basis, and the problem exists that there is currently no unified standard in South African law by which we can identify the situations giving rise to such a duty to disclose.

In the conclusions of the preceding chapter it was argued that it may be possible to identify elements common to some of the exceptions which would be instructive in determining when indicate the need for imposing a duty to disclose should arise in other circumstances. The purpose of this chapter is first to examine the development of and current position regarding the general rule and the exceptional recognition of a duty to disclose. The focus will primarily be on the modern case law. Thereafter, in the light of discussion of these cases, as well as the conclusions drawn in the preceding chapter, it will be investigated whether certain general

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[326] 3 1 above.

[327] JW Wessels *The Law of Contract in South Africa* 2nd ed (1951) 329; AJ Kerr *The Principles of the Law of Contract* 6th ed (2002) 279; SW Van der Merwe, LF Van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 4th ed (2012); D Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* (2009).

[328] E Peel *The Law of Contract* 12th ed (2007) 424; R Zimmermann & S Whittaker (eds) Good *Faith in European Contract Law* (2000) 656; J Cartwright *Misrepresentation, Mistake and Non-disclosure* (2007) 535.

[329] Kerr *Principles of the Law of Contract* 279; *Gollach & Gomperts (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and others* 1978 1 SA 914 (A).

[330] *Hoffmann v Moni's Wineries Ltd* 1948 2 SA 163 (C); *Dibley v Furter* 1951 4 SA 73 (C); *Cloete v Smithfield Hotel (Pty) Ltd* 1955 2 SA 622 (O); *Speight v Glass* 1961 1 SA 778 (D); *Pretorius v Natal South Sea Investment Trust Ltd* (under judicial management) 1965 3 SA 410 (W); *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C).

standards can be identified which would indicate or determine when a duty to disclose arises between the parties.

The uncertain nature of the treatment of non-disclosure as a form of misrepresentation has led to a proliferation of case law on the topic,[331] with judges providing their own opinions regarding the circumstances in which a contracting party has a duty to disclose. In order to establish and evaluate the courts' approach to this issue, the relevant cases will be discussed in detail.

4 2 Judicial approach to duties of disclosure

As established in the previous two chapters, the roots of the South African legal position regarding non-disclosure can be found in Roman law and Roman-Dutch law. But there has also been an English law influence,[332] which has been important in the development of the South African legal approach to issues of non-disclosure.

It is unclear to what extent the Roman and Roman-Dutch legal position specifically regarding non-disclosure was incorporated into South African law. However, there are indications that the Cape courts supported the Roman and Roman-Dutch approach to the broader issue of fraud,[333] and recognised Labeo's by now familiar definition that it involves "(a)n artifice, deception, or machination, employed for the purpose of circumventing, duping or cheating another".[334] Cases involving non-disclosure could potentially have been dealt with in the scope of this definition.

As Lubbe has indicated, during the 19th century, the court increasingly made use of English law principles in order to expand on Labeo's approach to fraud.[335] However, contrary to the

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[331] See *inter alia*, *Hoffmann v Moni's Wineries Ltd* 1948 2 SA 163 (C); *Knight v Trollip* 1948 3 SA 1009 (D); *Dibley v Furter* 1951 4 SA 73 (C); *Cloete v Smithfield Hotel (Pty) Ltd* 1955 2 SA 622 (O); *Speight v Glass* 1961 1 SA 778 (D); *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W); *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C).

[332] This is especially evident in the development of the South African law of insurance, and the classification of contracts *uberrimae fidei*, discussed at 3 2 above.

[333] *Tait v Wicht* (1890) 7 SC 158 166.

[334] D 4.3.1.2

[335] G Lubbe "Voidable contracts" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 264 267. The English law influence is described as follows: "Fundamentally, relief came to be restricted to

position in Cape law,[336] and rather confusingly, some Griqualand West judgments appeared to be moving towards recognising that rescission could be granted on grounds of negligence, or a contracting party's failure to act in accordance with "acceptable practice", which is a concept derived from English law.[337] This confusion about applying the principles of English law, the desire to incorporate these principles and the reluctance to abandon the Roman and Roman-Dutch law rules already received at the Cape led to uncertainty in South African courts regarding the correct treatment of fraud.[338] This uncertainty has continued into our modern law.

Perhaps because of the difficulty of crystallising these various rules and principles into one which could be more generally applied, courts have adopted the general rule that non-disclosure is not actionable *per se*[339] and exceptional circumstances need to be present in order to make it so.[340] In addressing this issue, courts have adopted various approaches, and have relied strongly on the position in English law in deciding under which circumstances non-disclosure would be actionable.[341] In keeping with this position, which favours a strict approach to cases of non-disclosure, South African courts have traditionally been reluctant to hold parties liable for misrepresentation by non-disclosure. A few of the key judgments will now be discussed to identify the primary sources relied upon by the courts, and to follow their reasoning when faced with residual cases of non-disclosure.[342]

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instances of misrepresentation, that is to say, untrue statements of fact as opposed to mere statements of opinion, whether made expressly or by conduct, provided that such statements emanated from the other contracting party or his authorized representative." (footnotes omitted). For an elaboration of these principles see *Adamanta Diamond Mining Co Ltd v Wege* (1883) 2 HCG 172; *Atlas Diamond Mining Co Ltd v Poole* (1882) 1 HCG 20; *Commissioners of the Municipality of Cape Town v Truter* (1866) 1 Roscoe 412*; Tait v Wicht* (1890) 7 SC 158.

[336] Confirmed in *Tait v Wicht* (1890) 7 SC 158. See further the discussion in Lubbe "Voidable contracts" in *Southern Cross* 268-270, where it is mentioned that this decision was made with reference to English law, with the court especially referring to the decision in *Derry v Peek* (1889) 14 App Cas 337.

[337] *Atlas Diamond Mining Co Ltd v Poole* (1882) 1 HCG 20 referred to English cases, namely *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64; *Peeke v Gurney* (1873) LR 6 HL 377; *Smith v Chadwick* (1882) 20 ChD 27.

[338] Lubbe "Voidable contracts" in *Southern Cross* 268-270.

[339] See 3 1.

[340] These exceptional circumstances are explored in detail in chapter three of this work.

[341] Cases often referenced are *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805; *Bell v Lever Bros* [1932] AC 161, and reliance is often placed on G Spencer-Bower *The Law Relating to Actionable Non-disclosure* (1915).

[342] Judgments specifically dealing with the exceptions to the general rule regarding non-disclosure were explored in chapter three above, and the discussion here will take into consideration the principles applied in the exceptional cases.

4 2 1 *Stacy v Sims*[343]

The plaintiff rented property from the defendant under a verbal lease agreement. Subsequently, the defendant refused to perform and allow the plaintiff to take possession of the property due to the plaintiff being 'non-European'. The defendant then alleged that his failure to perform was due to the existence of a condition in the contract that the property would only be leased to a European, and that the plaintiff had misled him into thinking that the plaintiff's wife was European in order for them to live in the area. The plaintiff instituted a claim for £100 for the expenses incurred by renting other premises, as well as an amount of £500 as further damages, should the defendant fail to perform.

It was held that the defendant had failed to prove the alleged condition. When addressing the issue of the alleged concealment, the court looked at whether the plaintiff had a duty to disclose any information to the defendant. The point of departure was the following statement:

> "A contract of lease is not a contract *uberrimae fidei*, i.e., a contract in which it is the duty of a party voluntarily to disclose to the opposite party anything which he knows would affect the mind of the other party in entering into the contract. There are certain forms of contract, such as insurance, where it is the duty of a person, the owner of a property, for instance, in case of fire insurance, to disclose to the other party any fact which may affect the risk, but leases do not fall under those contracts, and if one were once to lay down that it was the duty of a prospective tenant to acquaint his landlord with any fact which might possibly affect the landlord's mind, it would be difficult to know where one was to stop."[344]

This judgment recognises the existence of a category of contracts called *uberrimae fidei* and confirms that there would only be a duty to disclose in contracts of this nature.[345] As mentioned in the previous chapter, the concept of *uberrimae fidei* contracts appears to have originated in English law,[346] in the context of insurance law. It required the "utmost good faith" from contracting parties, and if this was not observed, then it would be grounds for avoiding the contract.[347] This requirement of the utmost good faith was imported into South African law

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[343] 1917 CPD 533.
[344] 535.
[345] 535.
[346] Discussed at 3 1.
[347] The modern English law application of *uberrimae fidei* is discussed at 2 2 2 3 above.

through our law of insurance,[348] and it was accepted as a valid legal principle. The reference to *uberrimae fidei* in the extract seems to confirm that it was received into South African law, and its application was extended to cases other than insurance, albeit not leases.

The court also addressed the issue of the most appropriate remedy to award in this case. Although the plaintiff instituted a claim for damages, which is a delictual remedy, the court's approach was to consider the facts at hand and ask whether the contractual terms could still be enforced. In this instance, it was still possible to enforce the contract with minimal disruption to the parties, so the court made an order for specific performance. With regard to the remedy of damages, the reasoning for not awarding it in this case was that it would be difficult to quantify an amount that would serve as the equivalent to performance. No mention is made of the different requirements necessary to claim each remedy, or the distinction between contractual and delictual claims grounded on non-disclosure. The court strictly referred to contract law principles and awarded a contract law remedy.

This judgment is rather brief, and does not make much reference to authority, except for the few references to English law. No attention is paid to civil law sources. The judgment serves to confirm the reception of the *uberrimae fidei* concept into our law, and is indicative of the early courts' willingness to refer to English law principles. Unfortunately, the judgment does not provide much guidance about what contracts other than insurance would indeed be *uberrimae fidei*, or explore underlying tests or standards for imposing duties to disclose.

4 2 2 *Lewak v Sanderson*[349]

Lewak v Sanderson is another of the earlier cases addressing non-disclosure, and like *Stacy v Sims*,[350] it relies heavily on English law. However, here, English law is used to supplement and expand on the civil law principles, and the case provides an interesting illustration of the development of the concept of *uberrimae fidei* contracts.

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[348] See 3 2 2 above.
[349] 1925 CPD 265.
[350] 1917 CPD 533.

In an earlier action, the defendant sued the plaintiff for damages for adultery which the plaintiff had allegedly committed with the defendant's wife. After denying that he had committed adultery, the plaintiff consented to judgment being taken against him, as he was financially unable to defend the suit, and was under the impression that he would be imprisoned if he did not consent. Judgment was duly granted. Subsequently, the plaintiff claimed an order setting it aside on grounds that his consent was obtained by the defendant's fraudulent concealment of the fact that he himself was living in adultery at the time of instituting the action.

The two important issues in this judgment are the relevance of the defendant's alleged adultery and the impact of his non-disclosure thereof. The court accepted that a person suing for damages for adultery must approach the court with clean hands, and cannot claim based on adultery if he himself is committing adultery at the time of instituting the claim. This being accepted, the court went on to consider to what extent the non-disclosure of these facts invalidates the plaintiff's consent and the subsequent judgment, with reference to Roman law and English law principles.[351]

The court first considered the position in Roman law and found that there is authority for recognising that fraud can be committed by representation or concealment.[352] This authority was found in Hunter,[353] who in his work on the civil law states that:

> "*Dolus* occurs chiefly in two forms – either the representation as a fact of something that the person making the representation does not believe to be a fact (*suggestio falsi*) or the concealment of a fact by one having knowledge or belief of the fact (*suppressio veri*)."[354]

This statement is in keeping with the Digest's rules regarding *dolus*, which have been discussed in chapter two.[355] However, after referring to Hunter, the court proceeds to make a

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[351] 269.

[352] 269. "There is clear authority that under the Civil Law fraud might be committed not only by the *expressio falsi* but also by the *suppressio veri*."

[353] WA Hunter *A Systematic and Historical Exposition of Roman Law in the Order of a Code* 2nd ed (1880) 596.

[354] Examples of each of these are found in the Digest. See D.19.1.21.1; D.19.1.41; D.19.1.1.1; D.19.1.4; D.19.1.11.5; D.19.2.19.1; D.19.1.13, all of which address concealment in the context of sale contracts. In each of these instances, as discussed in chapter two above, we are dealing with *suppressio veri*, and in each instance, the concealment is considered to be fraudulent.

[355] Part 2 1 1 above details how Roman law recognised both representation and concealment as *dolus*, see especially the discussion of the Labeonic definition of *dolus*.

curious statement, namely that Roman law required the utmost good faith in all cases of contracts where the interests of both parties were being promoted.[356] This construction was unknown to Roman law and Roman-Dutch law, and it is significant that the court used an English law source as authority for this statement. As stated above in the discussion of *Stacy v Sims*, the concept of *uberrimae fidei* appears to have originated in English law, and it seems that the Roman law concept of good faith was developed by the English courts in such a way that their legal system now recognises the existence of degrees of good faith.

Taking this extract as authority for the Roman law position despite there being no evidence of the recognition of degrees of good faith in the Roman legal system, the court turned to English law, saying that "similar principles are to be found".[357] This attempt to mesh the civil and common law principles despite their obvious disparity is typical of the way in which mixed legal systems develop.[358] Although it was required that South African courts administer justice according to the law already in use, there were many instances where courts chose to implement the common law instead, using various means to do so. One of these means was declaring the civil law and common law to be similar with respect to a point of law, and then electing to use the common law principle to decide the matter.[359] This seems to have been the approach followed by the court, who, after an investigation of English law textbooks and cases, found that the English law was in line with the Roman law,[360] recognising that fraud could be committed by means of a representation or a non-disclosure.[361] However, it was also recognised that it is very difficult to determine which facts must be disclosed in any given circumstance, and thus it was submitted that each case must be evaluated on its merits in

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[356] 270. IF Redfield (ed) *Story's Commentaries on Equity Jurisprudence* 10th ed (1870) para 211. "In regard to extrinsic as well as to intrinsic circumstances Roman Law seems to have adopted a very liberal doctrine, carrying out to a considerable extent the clear dictates of sound morals. It requires the utmost good faith in all cases of contracts, involving mutual interest: and it therefore not only prohibited the assertion of any falsehood, but also the suppression of any facts touching the subject-matter of the contract, of which the other party was ignorant and which he had an interest in knowing."

[357] 270. This statement seems nonsensical, as there is no reference to degrees of good faith in the Roman authorities, whereas the English law draws a clear distinction between *bonae fidei* and *uberrimae fidei*.

[358] See J E du Plessis "Comparative law and the study of mixed legal systems" in M Reimann & R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2006) 477 491.

[359] Du Plessis "Mixed legal systems" in *Handbook of Comparative Law* 491.

[360] This conclusion was reached despite there being no evidence that Roman law recognised degrees of good faith.

[361] The court relied on E Fry *A Treatise on Specific Performance in Contracts* 4th ed (1903) 705, where it was stated that "In the chapter on Misrepresentation it has been seen that the suggestion of what is false is a ground for refusing specific performance and also in certain cases for rescinding contracts: the same results flow from the non-disclosure of a fact which is material, and which it is the duty of one party to the contract to disclose to the other, or from the act of suppression and concealment of a fact which is material, and which the other party would have come to know but for such suppression or concealment."

order to determine whether parties bear a duty to disclose,[362] a position which is echoed in later judgments.

The court did not elaborate on the remedy sought. The plaintiff instituted a claim for damages, but the court focused on the contractual principle of good faith (indeed *uberrimae fidei*) in deciding this matter. There is thus no clear distinction drawn between the two types of claim or what is required to be proven for either, similar to the judgment in *Stacy v Sims*,[363] where the court's main concern was which remedy would be able to be effected with the least amount of disruption to the parties. The lack of attention paid to the nature of the claim instituted appears to be characteristic of the earlier cases, and it is interesting to note how this changes in subsequent judgments.

This judgment differs from *Stacy v Sims* in that reference was made to both civil law and common law sources. One aspect that was carried over from previous judgments was the idea that parties to contracts *uberrimae fidei* (including, but not limited to, insurance contracts) always had a duty of disclosure towards each other. This concept was confirmed as correct, and the court, in linking it to Roman law, took a further step in establishing it as a part of the South African law.

4 2 3 *Hoffmann v Moni's Wineries Limited*[364]

This case raised the issue of non-disclosure in the context of an employment contract. The plaintiff was employed by the defendant in terms of a verbal contract of employment, and it was contended by the plaintiff that his employment was to continue for at least "one year certain".[365] However, the defendant's managing director terminated the plaintiff's employment approximately six months after the contract was entered into. One of the questions before the court was whether or not the defendant had been justified in terminating the contract, given that the plaintiff had failed to disclose that he was an unrehabilitated insolvent and had been sentenced to a term of imprisonment. It was argued that such non-disclosure was a sufficient ground for cancellation of the contract of employment.

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[362] 270.
[363] 1917 CPD 533.
[364] 1948 2 SA 163 (C).
[365] 164.

The point of departure when discussing this matter was determining whether or not the plaintiff was under a duty to disclose his status to a potential employer. Specific reference was made to contracts *uberrimae fidei*, which Searle AJ characterised as contracts where "there is a duty to disclose all material facts before an agreement is concluded and non-disclosure is a ground for termination."[366] Immediately following this statement, it was held that a contract of service would not fall into the category of contracts *uberrimae fidei*, and that there was no authority for such an assertion.[367] Searle AJ confirmed the approach followed in *Bell v Lever Bros*,[368] stating that the English law position would be applicable to South African law.[369] It was noted, however, that it would be possible, in certain situations, for the circumstances during the pre-contractual phase to create an obligation on parties to disclose information,[370] but that was not seen to be the case here.

It is evident that the court preferred to focus solely on the English law principles,[371] and was not prepared to include employment contracts as one of the exceptions to the general rule against allowing actions for non-disclosure. Provision was made in this judgment for a duty to disclose to be created during pre-contractual negotiations, but this was done in general terms, giving no specific guidelines as to how one would identify such situations.[372] Despite this vague acknowledgment, however, this decision was relied upon in subsequent judgments, and provides a good example of the early courts' reluctance to allow actions based on non-disclosure in residual cases.

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[366] 168.

[367] The court relied on the position in English law, and referred to the judgment in *Bell v Lever Bros. Ltd* [1932] AC 161 which also stated that a contract of service did not fall into the category of contracts *uberrimae fidei*, and thus no duty of disclosure would exist.

[368] [1932] AC 161.

[369] 168.

[370] 168. Searle AJ once again relies on English law, referencing G Spencer-Bower *The Law Relating to Actionable Non-disclosure* 120.

[371] No consideration is given to principles of Roman or Roman-Dutch law, and there is a clear bias towards applying common law principles relating to non-disclosure, a by now familiar approach evident from the discussions at 4 2 1 and 4 2 2 above.

[372] 168. "In any event however, although the circumstances occurring before or during the negotiation of a contract can and often do create an obligation to disclose such facts." Authority for this was found in Spencer-Bower *Actionable Non-disclosure* 120. This reliance on English law principles is in keeping with the approach taken in the judgments discussed above. However, the court is wary of relying too strongly on the common law principles, and primarily uses Roman and Roman-Dutch law sources in this judgment. This shows a shift away from the tendency to favour English law principles, and this judgment provides a good illustration of the interplay between civil and common law principles.

4 2 4 *Dibley v Furter*[373]

Although this case would at first appear to be one of the exceptions explored in chapter three,[374] it is really one of the residual cases. The plaintiff sued the defendant for the return of the purchase price of a farm and other movable property. The plaintiff claimed that the agreement of sale was rescinded, and duly tendered return of the *merx*, but also instituted a concurrent claim for damages. The basis for these claims was that after the sale agreement was concluded the plaintiff discovered that the farm had previously been used as a graveyard. The plaintiff alleged that the defendant had concealed this information in order to induce him to enter into the contract. The court accepted that the plaintiff had been ignorant of this use at the time of purchase.[375]

The plaintiff contended that the graveyard was a latent defect, and that the defendant had fraudulently concealed that fact. The first ground, latent defect, has already been discussed in the previous chapter. The focus in this discussion is thus on the ground of fraud, and whether the defendant's conduct in this instance amounted to a fraudulent concealment.

The plaintiff sought to rely on non-disclosure rather than an active misrepresentation as a ground for rescission, and it was questioned whether any action was available to him in this case. The court recognised that in certain circumstances, contracting parties deliberately suppressed facts for the purpose of inducing a contract.[376] In approaching this matter, the court took the following as their point of departure:

> "It must, however, be remembered that mere non-disclosure of the defect does not give rise by itself to the action for fraud. *The knowledge of the defect must be withheld with the object of inducing the other party to enter into the contract or with the object of concealing from the other party facts, the knowledge of which would be calculated to induce him to refrain from entering into the contract.* That the element of *dolus* is an essential for this form of action need not be stressed."[own emphasis][377]

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[373] 1951 4 SA 73 (C).

[374] This case concerns a contract of sale and the seller's duty to speak. However, as stated at 3 5, the seller's duty to speak only extends to latent defects in the *merx*, which is not the case here.

[375] 78A.

[376] 85A-C. "On the other hand, if it was not part of the contract in that it had not been stipulated for but had been used to induce the bargain, then, provided that the other necessary elements were present, it could found an action for rescission on the ground of fraud." See further Voet 4.3.4 and *Naude v Harrison* 1925 CPD 84.

[377] 88B-D.

This passage confirms that mere non-disclosure would not be sufficient to ground an action for fraud. Additional elements must be present. Here, the court emphasises the elements of knowledge and purpose or intent. These requirements merit further exploration.

First, the element of knowledge. Whose knowledge is relevant when determining whether a non-disclosure is fraudulent? It is not expressly stated that the party accused of acting fraudulently had to have exclusive knowledge of the concealed facts. It may be that the innocent party could have been able to obtain the relevant facts by taking further steps. However, the court does not consider such a possibility. There is only the suggestion that the innocent party would not have entered into the contract if he did have such knowledge.

Secondly, the defendant must have had a particular intent or object. In this regard we must ask whether he withheld knowledge for the express purpose of inducing the other party in some way to enter into a contract. In this way, the "use" of knowledge, so to speak, can be indicative of the existence of fraudulent non-disclosure.

Regarding the element of intent, it is further clear that fraudulent action is required, as Van Zyl J states that "the element of *dolus* is an essential for this form of action."[378] This would mean that acting deliberately without the intention to defraud the other contracting party would not suffice when seeking to claim based on fraud. Recourse is only available in situations where the concealment was fraudulent. It is evident that negligent or innocent non-disclosure is not regarded as sufficient grounds for rescission. It would seem that the underlying reason for this is that duties to disclose should only be imposed if the defendant had the particularly reprehensible state of mind associated with fraud. In this instance, the court found that the plaintiff was indeed entitled to rescission of the contract, as there was sufficient evidence to show that the defendant knew of the existence of the graveyards, knew that the plaintiff had no knowledge of the same and had kept quiet with the object of inducing the plaintiff to enter into the contract, which the plaintiff would not have done if disclosure had been made. The court in effect found that the defendant had acted fraudulently, which entitled the plaintiff to rescind the contract. It must be noted that although we are dealing with a contract of sale, the court ruled that the graveyard did not constitute a latent defect and thus the matter would not

[378] 88C-D.

be one of the exceptional circumstances discussed above.[379] Instead, this is one of the residual cases, and one which the court decided in terms of the law of contract, dismissing the claim for damages.

In terms of this judgment, the decisive factor in deciding whether to grant rescission was whether the party keeping silent did so fraudulently.[380] The element of *dolus* is highlighted. It may be questioned why this should be the main factor in determining whether a party is entitled to rescission, and whether there are no other considerations which must be taken into account.

4 2 5 *Cloete v Smithfield Hotel*[381]

The plaintiff and defendant entered into a contract of sale of immoveable property on which a hotel was situated, along with its furnishings, required licenses and goodwill. The plaintiff sought damages in the amount of £1,500. The action was based on a number of grounds, namely fraudulent misrepresentation, negligent misrepresentation, innocent misrepresentation, fraudulent non-disclosure, negligent non-disclosure, latent defects and the existence of an inherent term in the contract that the premises were fully equipped to run a hotel business. The court addressed each of these grounds, but for present purposes the focus need only be on the grounds of fraudulent non-disclosure and, to a lesser extent, negligent non-disclosure.[382]

With regard to these two grounds, the plaintiff alleged that the defendant was aware of problems in the *merx* at all relevant times. The sewerage system of the hotel was dependent on a septic tank situated on municipal property. Although the plaintiff was aware that the use of this property was at the municipality's discretion, he was unaware that shortly prior to the sale, the municipality had informed the defendant that the septic tank had to be removed. The plaintiff further alleged that it was the defendant's duty to mention these facts, which he fraudulently concealed from the plaintiff. In the alternative, the plaintiff alleged that the

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[379] 3 4.
[380] Own emphasis.
[381] 1955 2 SA 622 (O).
[382] According to MA Millner in his commentary on *Cloete v Smithfield Hotel* ("Fraudulent Non-disclosure" (1957) 74 *SALJ* 177), the first three grounds fell away because the court found that no positive representations had been made.

defendant's failure to disclose was negligent. The defendant denied having knowledge of the facts and that he had a duty to disclose anything to the plaintiff.

The court chose to interpret the plaintiff's allegation as a statement that the concealment of facts was in itself sufficient to constitute either fraud or negligence, independent of any prior representation.[383] In order to investigate the validity of this statement, the court first considered the familiar English law source, Spencer-Bower's *Actionable Non-disclosure*,[384] which sets out what should be alleged and proven by a party in order for them to institute an action for rescission based on non-disclosure. According to Spencer-Bower, It must be shown:

> "(A) That the party charged was under a duty to the party complaining to disclose to him the particular fact of which non-disclosure is alleged;
> (B) That the alleged undisclosed fact was a fact at the material date;
> (C) That the party charged did not disclose to the party complaining the alleged undisclosed fact at the time when he was under a duty to do so;
> (D) That the party charged had knowledge of the alleged undisclosed fact at the time when it was his duty to disclose it;
> (E) That the party complaining had no such knowledge at the above-mentioned material date."[385]

The first requirement, that there must be a duty on the accused party to disclose certain information, is in keeping with the position in South African law that non-disclosure may be actionable if "the circumstances are such that frank disclosure is clearly called for – or as it has frequently been said, when there is a duty to disclose."[386] The other interesting part of the extract is the reference to knowledge in D and E. The requirement that the accused party have knowledge of the relevant facts coupled with the requirement that the innocent party be lacking that knowledge is reminiscent of the court's statement regarding knowledge in *Dibley v Furter.*[387] From this list, we see that non-disclosure is not automatically actionable in situations where there is a duty to disclose. Some further element is needed, previously acknowledged as the presence of fraudulent intent on the part of the party charged. In

[383] 627G.
[384] Spencer-Bower *Actionable Non-disclosure* 150.
[385] Spencer-Bower *Actionable Non-disclosure* 149-150.
[386] Kerr *Principles of the Law of Contract* 279.
[387] 1951 4 SA 73 (C) 88B-D. Discussed at 4 2 4 above.

Spencer-Bower's requirements, it seems that knowledge is an important factor to consider when determining the mindset of the party charged.

From the previous case discussions, especially the discussion of *Dibley v Furter*, the crucial question was whether non-disclosure needed to be fraudulent in order to be actionable. The court in *Dibley v Furter* viewed fraud as a decisive factor in determining whether to grant a remedy for non-disclosure,[388] but in *Cloete* the ground of negligent non-disclosure was also alleged. Would it be possible to award a remedy where the party's conduct fell short of fraud but constituted fault in the form of negligence?[389]

According to Millner:

> "In principle, however, if there are cases where fraudulent non-disclosure is actionable under the *lex Aquilia*, one might argue that negligent non-disclosure would be actionable too, for *culpa* as well as *dolus* grounds an Aquilian action."[390]

However, having acknowledged this, he was careful to state that:

> "(A)rguments from principle have their limitations, and so gingerly was this question of negligent statements handled by the learned judges of appeal that its fragile alter ego, negligent concealment or non-disclosure, must tremble before knocking on the door of that august forum."[391]

This *caveat* suggests that the judiciary was not ready to allow claims for rescission based on negligent non-disclosure at this stage of the development of the law relating to non-disclosure and the court in *Cloete* did not go into detail regarding negligent non-disclosure as a possible ground for rescission. The recognition of the possibility of grounding a claim on negligent non-disclosure, however, opened the door for its use in later judgments.

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[388] 1951 4 SA 73 (C) 88C-D.

[389] Millner's response to the *Cloete v Smithfield Hotel* judgment ((1957) *SALJ* 177) begins with the recognition that "(a)fter a lengthy hibernation, the question of fraudulent non-disclosure has in recent years bestirred itself vigorously." At the time when *Cloete* was decided and Millner wrote his commentary, the time was ripe for the role of fault (especially in the form of fraud) in non-disclosure cases to be analysed further.

[390] Millner (1957) *SALJ* 177.

[391] 177-188.

In their exposition of the relevant legal principles the court relied on both English law and Roman and Roman-Dutch law.[392] Special attention was paid to the position in the latter systems and after consideration the court distinguished between two types of cases where non-disclosure is an issue. There is non-disclosure of redhibitory defects (giving rise to the aedilitian remedies) and other cases where fraud plays a role. In the first instance, the duty to disclose is considered to arise from a tacit warranty and in the second, fraud must be proven in order to ground an action for rescission on non-disclosure. On the facts, if the first approach is followed, then the court would deem the municipality's revoking the permission to use the land to be a latent defect, meaning that non-disclosure thereof would automatically ground an action. If the second approach is followed then it must be proved that the seller had the intention to defraud the buyer by keeping silent. After considering the facts, the court decided that the requisite intent was present.[393]

The importance of proving fraud when claiming rescission based on a non-disclosure was confirmed in this judgment, but the court did not provide any guidelines regarding the determining of fraudulent intent. From the judgment itself it appears to be a subjective test, in that the court considers the specific facts at hand in order to determine the defendant's state of mind. Later judgments will be explored to see whether a similar approach is followed.

4 2 6 *Flaks v Sarne*[394]

This case illustrates the operation of the rules on non-disclosure in relation to third parties. The respondents sold a property to a purchaser who could elect to substitute another buyer in

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[392] This judgment is another example of the processes of blending that characterize our mixed legal system, as also illustrated in *Lewak v Sanderson*. The result of considering both systems in the latter case was rather confusing, and in the present judgment it is clear that the court manages to keep the principles separate.

[393] 632G-633A. "Na my mening, het daar hier 'n plig op verweerder berus om aan eiser die feit dat die vergunning deur die Stadsraad teruggetrek is, te openbaar in terme van vereiste A. van *Spencer Bower*, hierbo aangehaal. Eerstens beskou ek die terugtrekking as 'n verborge gebrek waarteen verweerder die eiser stilswygend gewaarborg het. Tweedens, as hierdie beskouing nie geregverdig is nie, en as die bedoeling om te bedrieg ook deur eiser bewys moet word, bestaan daar hier die nodige gegewens waarvolgens die afleiding gedoen kan word dat eiser met verweerder onderhandel het in verband met 'n hotel met 'n rioolstelsel wat in werking was, dat verweerder ook redelikerwys moes afgelei het, van die vorige dreigement van eiser om die verdere onderhandelinge te be-eindig omdat meubels van betreklik min waarde nie in die voorgestelde koop ingesluit sou word nie, dat eiser seer sekerlik nie met die koop sou aangaan nie indien hy verneem dat die gemelde voorreg teruggetrek is, en dat hierdie materiële feit verswyg is met die bedoeling om te verseker dat die ooreenkoms gesluit sal word. Vereistes B. en C. hierbo is hier vervul, terwyl vereiste D. in die verweerskrif erken word. Wat vereiste E. betref, is die bevinding alreeds gemaak op 'n oorwig van waarskynlikhede dat eiser dit hier bewys het."

[394] 1959 1 SA 222 (T).

her place, which she duly did. The new buyer later became aware of certain defects in the house, which he alleged were present at the time when the original parties concluded the contract of sale. He further alleged that the respondents intentionally kept silent about these defects with the object of inducing the original buyer to enter into the contract, and that he would not have submitted himself as a substitute buyer if he had known about the defects. The appellant instituted a claim for damages based on this non-disclosure, which the respondents countered, saying that the absence of a valid contract between them meant that there was no causal link between the alleged non-disclosure and the appellant's loss.

The court accepted that if the appellant alleged and proved that there was a fraudulent statement, or indeed a fraudulent non-disclosure, and suffered loss as a result, then he could institute an action. In response to the respondents' contention that there was no causal link between their actions and the appellant's loss, given that a valid contract never came into being between them, the court stated that it was sufficient for the appellant to prove that the loss followed as a direct result of the fraud, which was alleged here.[395]

This being established, the court proceeded to consider the legal principles applicable to fraud by non-disclosure:

> "Fraud by non-disclosure is committed when the person charged was under a duty to disclose to another and failed to do so. A duty to disclose must exist in relation to the person who alleges he has been defrauded and who seeks to recover his loss suffered as the result of fraud. There is no such thing as a general duty to all the world to speak the truth or to make disclosure. Such a duty arises in relation to particular people in particular circumstances."[396]

This statement confirms the general rule discussed in the preceding chapter, namely that there must be a duty to disclose between parties in order for non-disclosure to be actionable.[397] However, the enquiry of whether non-disclosure could give rise to an action for damages may be divided into two parts. First, it must be questioned whether or not a duty to

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[395] "That the fraud may have induced him to enter into a contract which by law was void and that as a direct result thereof he suffered loss consequent on the void contract, he may be able to show that he was by the fraud caused loss because he was induced to alter his position to his prejudice; the fact that he allowed it by entering into an unenforceable contract but one which directly caused him loss may well be immaterial." 226A-B.

[396] 226C-D.

[397] Echoed in 4 2 5 above, where Spencer-Bower's requirements for actionable non-disclosure include the existence of a duty to disclose.

disclose exists. The court in *Flaks v Sarne* states that such a duty only arises in relation to "particular people in particular circumstances." This may be a reference to the class of contracts previously designated *uberrimae fidei,*[398] but, as we have seen there are also other instances in which the court has recognised duties of disclosure. The second part of the enquiry is whether the failure to comply with the duty as established is fraudulent. From the extract it seems that fraud is a necessary requirement in order to claim relief based on non-disclosure.

In this case, no allegation was made that the respondent owed the appellant any duty of disclosure. However, it was alleged that such a duty was owed to the original buyer, and that this duty was breached when the respondent failed to disclose.[399] Also, in the contract it was anticipated that another party could eventually become the purchaser, and it was argued that if this had been done validly, it was possible that the duty to disclose could extend to such a person, and consequently a breach of the duty could constitute fraud in relation to the substitute. Despite acknowledging this as a possibility, the court decided that this was not the case in the present instance, since the appellant never validly substituted the original purchaser.[400] In the context of this case it appears that this was the correct decision, as the court did not rule out the possibility of an 'informal' substitute claiming damages based on fraudulent non-disclosure:

> "Even if the substitution were 'informal' in the sense that it was adopted or ratified by all parties concerned but did not comply with legal requirements for validity, it is possible that such a duty could arise *vis-à-vis* the new party and that a breach of that duty would be a fraud on that party."[401]

Another difficulty arose in establishing a cause of action for damages based on non-disclosure. The court considered an important distinction between suing based on contract and suing based on delict found in *Trotman v Edwick*:[402]

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[398] Explored in chapter three above.
[399] In support of this it was suggested that "one of the circumstances which may give rise to a duty to speak the truth or make disclosure is that negotiations are taking place between parties in relation to such a contract as was here made between Zygielbaum and the respondents."226E-F.
[400] 226H-227A.
[401] 226F-G.
[402] 1951 1 SA 443 (AD).

> "A litigant who sues on a contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be returned to him."[403]

The effects of contractual and delictual remedies differ. While contractual remedies are aimed at either enforcing contractual provisions or restoring the *status quo*, delictual remedies are aimed at awarding compensation for loss suffered as a result of someone else's wrongful conduct. In this matter, the summons did not allege any patrimonial loss suffered as a result of the non-disclosure. The court dismissed the appeal, and therefore found that the respondents were not delictually liable. No mention is made of the role of damage or harm when claiming for rescission and the court does not specify whether it would be a requirement.

This judgment reflects the importance of drawing a clear distinction between instituting a claim based on non-disclosure in contract and in delict. This distinction is especially important in determining which requirements must be present in order to claim these forms of relief, and will be referred to again in later case discussions.

4 2 7 *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)*[404]

The question before the court was whether an order for rectification of the respondent's member register was to be granted in terms of section 32 of the Companies Act.[405] The applicants had requested that their names be removed from the member register of the respondent. This request was made on two grounds. The first was that there was no binding agreement between the parties that the applicants would take shares. If such an agreement was proven to exist, the applicants alternatively alleged that they would be entitled to set it aside due to being induced to take shares by a wrongful concealment on the part of the respondent of an agreement concluded between the respondent and a third party for the sale of company property.

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[403] 449.
[404] 1965 3 SA 410 (W).
[405] 46 of 1926.

The latter ground of wrongful concealment was considered at length by the court, following the applicants' failure to succeed on the first ground. Assuming that the contract to take shares was valid, the applicants contended that they were entitled to rescission as a result of the failure of the respondents' directors to disclose the existence of the contract between the respondent and Nova Estates. The court referred to authority which stated that rescission would only be possible if it could be established that the contract was induced by the misrepresentation of a material fact.[406] 'Misrepresentation' is defined here as "an assertion made by one party to the other of some matter or circumstance relating to the proposed contract".[407] A 'material fact' is described as a fact which would have the "natural and probable effect of influencing the mind of the person to whom it is made".[408] On the strength of these definitions, the court established that any non-disclosure of a material fact relating to the contract would not constitute a misrepresentation unless the party whose conduct was in question had a duty to disclose. The element of knowledge is also important, in that the person making a misrepresentation must be aware of the relevant information, which must be unknown to the other party.[409] This knowledge factor has been identified in previous judgments, and here the dual aspects are expressly stated. On the one hand, we have the knowledge of the person who keeps silent, and on the other we have the ignorance of the other party, and the representor's knowledge of their ignorance. The emphasis placed on this factor raises the question whether a duty of disclosure would arise in a situation where facts were publicly available or where the disadvantaged party could readily have obtained the information by exercising his best efforts.

On these grounds, it was stated that the applicants had to prove that there was a material fact unknown to them but known to the respondent at the time of contracting. They also had to prove that the respondents consequently had a duty to inform them of such a fact, and that, had they known of it, the applicants would not have entered into the contract to begin with.[410]

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[406] Wessels *The Law of Contract* 329.
[407] 415H.
[408] 416A.
[409] 416A. The court states that "[t]he person whose conduct is in question must be aware of the particular circumstance which was unknown to the other party." This element of knowledge as an indicator of a contracting party's fraudulent intent has been referred to in other judgments, especially in the discussions of *Dibley v Furter* and *Cloete v Smithfield Hotel* at 4 2 4 and 4 2 5 respectively. It also featured in the context of the exceptional circumstances discussed in chapter three.
[410] These requirements echo those listed in *Cloete v Smithfield Hotel*, which the court derived from English law principles. Although the court in the present judgment did not expressly adopt that list, the similarities between the requirements

The court had no difficulty in recognising that the information in question was indeed material and that the applicants bore no knowledge of it.

Regarding the existence of a duty to disclose the court considered the position in both erstwhile Rhodesian law and the South African common law.

As far as South African law is concerned, the court first recognised the existence of contracts *uberrimae fidei* and acknowledged that in these instances, contracting parties would bear a duty to disclose *inter se*. Vieyra J then refers to the by now familiar example of such a relationship the case of a contract of sale where the seller has knowledge of a latent defect in the *merx.*[411] In these situations, the seller's failure to disclose the existence of this defect to the buyer would always be actionable, regardless of whether or not *dolus* was present.[412]

However, the court also acknowledged that the duty to disclose could arise in circumstances other than contracts designated *uberrimae fidei*.[413] This was based on Millner's statement that:

> "The same relationship, and therefore the same duty of disclosure, can arise in any other negotiations which, in the particular case, are characterised by the *involuntary reliance* of the one party on the other for information material to his decision."[414][own emphasis]

As we have seen, this consideration of involuntary reliance between the parties was famously identified eight years earlier by Millner in his note on the *Cloete* case.[415] This is an important development, which raises the question whether involuntary reliance could in future be regarded as one of the indicators, or even *the* indicator of a duty to disclose in contracts that do not fall under the recognised exceptions. This question ties in with the observation made in the previous chapter that in the exceptional cases where duties to disclose arise, the

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seem to indicate that some of the English law principles regarding non-disclosure can be applied in the South African context.

[411] 418C.

[412] The seller's liability for latent defects finds its roots in Roman law, more specifically in D 18, which clearly states that the seller is always liable for latent defects.

[413] 418A.

[414] Millner (1957) *SALJ* 189.

[415] 4 2 5 above. Millner (1957) *SALJ* 189.

relationship between the parties is at times of crucial importance. To this question we will return when considering subsequent developments below.

On the facts, it had to be determined whether the applicants could rescind the contract on these grounds. It is not enough to prove that there was a duty to disclose a material fact known to the respondents, and that such duty was breached by the respondents. In order to succeed with their claim, the applicants also had to prove that they would not have entered into the contract were it not for the respondent's non-disclosure, meaning that the non-disclosure must have induced the conclusion of the contract. The court had no evidence that this was indeed the case, and needed to find a way to determine the applicants' mindset. Vieyra J relied on judgment in *Poole and McLennan v Nourse*,[416] and used a test of reasonableness. In such a matter, the court would have to look at all surrounding circumstances to determine whether it would be reasonable to suppose that the buyer would not have concluded the contract had he had the requisite information. Applying this test, the court found that it was reasonable to suppose that the applicants would not have entered into the contract had they been informed by the respondent, and they succeeded in their claim.

From this case discussion we can isolate a number of general principles accepted by the court when dealing with cases of non-disclosure. There is a general rule, in this case derived from the definition of 'misrepresentation', that non-disclosure does not automatically constitute a misrepresentation.[417] It is confirmed that non-disclosure would only be considered to be a misrepresentation if there was a duty to disclose a material fact which had the potential to influence the mind of the innocent party. This would be determined with reference to the individual circumstances of the case. Crucially, as we have seen, the court identified the nature of the relationship between the parties, and more specifically the presence of 'involuntary reliance', as an important factor to consider in this regard.

From earlier cases it appears that courts have also considered fraud to be a requirement when seeking rescission, and as seen in the preceding section, fraud is always required when

[416] 1918 AD 404 412. "It is not enough for the purchaser to say 'I would not have bought it had I known'. The Court must find that under the circumstances of the case it is reasonable to suppose that he would not have bought."
[417] This is in line with the position in *Hoffmann v Moni's Wineries Ltd* 1948 2 SA 163 (C); *Cloete v Smithfield Hotel* 1955 2 SA 622 (O) and *Speight v Glass* 1961 1 SA 778 (D).

instituting a claim for damages based on non-disclosure. In this instance, interestingly, the court makes no mention of fraud as a requirement for rescission, simply saying that:

> "A person is entitled to set aside a contract if he can establish that he was induced to enter into it by reason of a misrepresentation of a material fact: see Wessels *Law of Contracts*, vol. 1 para. 1020, and authorities there cited. It is immaterial for this purpose that the misrepresentation was an innocent one: see *Sampson v Union and Rhodesia Wholesale Limited (In Liq.)*, 1929 AD 468 at p. 480."[418]

The only requirements for rescission identified here are misrepresentation, materiality of the information and the inducement of the plaintiff to contract. In addition, the court expressly states that, for purposes of rescission, it is "immaterial" that the misrepresentation was innocent. This differs greatly from the position in previous cases, the majority of which listed fraud as an essential requirement. The court, in making this statement, opens up the possibility for allowing a claim for rescission in cases of innocent non-disclosure. Would this be advisable, and was this position echoed in any later judgments? Surely the defendant's state of mind would be relevant when imputing liability?

The only reference to the defendant's state of mind, however, is that they must be aware of the information which was unknown to the other party.[419] Awareness does not necessarily constitute fraud, as one can have knowledge of something without intending to defraud another by keeping silent about it. This judgment shows a shift in the way in which the courts had traditionally viewed the role of fault in non-disclosure, and in the investigation of later cases we will see whether the idea that fault is not a requirement was adopted.

4 2 8 *Meskin NO v Anglo-American Corporation of SA Ltd*[420]

The previous case discussions reveal that two general remedies are available to a party who has been disadvantaged by another's non-disclosure in the contractual context. On the one hand, we have a contractual claim for rescission and, on the other hand, a delictual claim for damages. In *Meskin*, the court distinguishes between these remedies and compares the contractual and delictual positions regarding non-disclosure and the concept of good faith.

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[418] 415H.
[419] 416A.
[420] 1968 4 SA 793 (W).

The requirements for these remedies differ, and this judgment is key in setting out the distinction.[421]

The plaintiff, a liquidator of a company, sued the defendants for damages on the company's behalf. The claim was based on the defendants' alleged failure to disclose the existence of an agreement concluded with a third party. The plaintiff alleged that disclosure of this agreement would have deterred the company from entering into the envisioned contract, and that it had suffered a loss as a result of the non-disclosure.[422] The court held that the plaintiff was alleging mere non-disclosure and not so-called 'active concealment'. Jansen J, in keeping with earlier judgments such as *Dibley v Furter,*[423] stated that in order for a non-disclosure to ground a claim for damages, there must be a duty to disclose, but the existence of such a duty is not sufficient. There are other requirements which must be met, most importantly the requirement of *dolus*.[424] As such, mere non-disclosure would not give rise to a claim for damages, although the court in *Pretorius v Natal South Sea Investments* suggested that innocent non-disclosure could well be a ground for claiming rescission.[425]

The issue between the parties was thus whether there was a duty on the defendants to disclose the fact that they had entered into a contract with a third party. The court's point of departure was that South African law does not recognise a general duty of disclosure between parties negotiating with the aim of concluding a contract.[426] It was submitted to the court that, despite this rule, there could be a duty of disclosure in negotiations other than contracts *uberrimae fidei*.[427] Following this, it was suggested that the court adopt the 'general test' proposed by Millner, namely using the relationship between the parties as an indicator of

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[421] An overview of this distinction was provided in the discussion of *Flaks v Sarne* at 4 2 6 above.
[422] 796C.
[423] From the discussion of this judgment at 4 2 4 above we see that the court requires that, in order to ground an action on non-disclosure, there be a duty to disclose between parties. However, non-disclosure is not automatically fraudulent, even if the defendant had knowledge of the facts unknown to the plaintiff. The defendant's silence must be accompanied by a fraudulent intent, which, would appear to be a subjective enquiry by the court, having regard to all of the surrounding circumstances of the particular case. This latter approach is taken by the court in *Cloete v Smithfield Hotel*.
[424] 800F.
[425] See discussion at 4 2 7 above.
[426] 796H. The court cited *Hoffmann v Moni's Wineries Ltd* 1948 2 SA 163 (C) and *Speight v Glass* 1961 1 SA 778 (D) as authority.
[427] 797B. "He (plaintiff's counsel) pointed out that the so-called contracts *uberrimae fidei* were not unique or exclusive in entailing a duty of disclosure." Also see *Iscor Pension Fund v Marine and Trade Insurance Co Ltd* 1961 1 SA 178 (T).

the existence of the duty to disclose.[428] The court considered various grounds for recognising a duty to disclose, but first had to decide which sphere of law governed this specific situation. Given that the plaintiff had instituted a claim for damages, the court approached this matter in terms of the law of delict, saying:

> "It seems to follow that the cause of action sought to be invoked cannot be contractual but must be delictual, viz. that the defendants by intentional unlawful conduct induced Titanium to act to its patrimonial loss."[429]

The "conduct" in this matter was an omission, and the court stated that a prerequisite for imposing liability for an omission was that the parties must have had a duty to act.[430] In the context of delict, the traditional rule is that there is no liability for omissions, but this is subject to certain exceptions.[431] However, there is the opinion that a duty to act could exist outside of these exceptional cases. Such a duty, it is suggested, would be determined by looking at standards of reasonableness, the legal convictions of the community and *boni mores*.[432] It is acknowledged that non-disclosure could be an omission giving rise to a claim for damages, but only if it is accompanied by the other requirements of the *lex Aquilia*, such as *dolus*.[433] From this, it is clear that in the law of delict there can never be liability for innocent non-disclosure, as fraud (*dolus*) must always be present. It has previously been questioned whether a negligent non-disclosure could also give rise to a delictual claim. The possibility was suggested by Millner in his article on fraudulent non-disclosure,[434] which was written in response to the *Cloete v Smithfield Hotel* judgment. Although the court in the present matter

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[428] 797C.
[429] 798F.
[430] 799D-E. "The difficulty is to determine whether in a particular case such duty existed. In the present instance the problem lies in the sphere of delict, but it also exists in other spheres such as that of criminal law and the law of contracts."
[431] 799E-F. These exceptions include prior conduct, control of dangerous things, public office, statute and a special relationship between the parties. This latter ground especially plays a role when discussing liability for non-disclosure between parties to a contract.
[432] 800A-C. The court refers to Van der Merwe and Olivier, who are of the opinion that "in gevalle van veroorsaking deur 'n late, die kernvraag steeds is of die gevolg wederregtelik is. Wederregtelik is die gevolg van 'n bate slegs indien die bate onredelik is, indien daar met ander woorde 'n plig op die dader gerus het om positief op te tree." This is described as the broader approach to determining the existence of a duty to disclose.
[433] 800D. The court references McKerron, who says that "mere non-concealment or non-disclosure of a fact may ground an action of deceit where a duty of disclosure exists. Such a duty may be imposed by statute, or it may arise out of a confidential or fiduciary relationship between the parties."
[434] Millner (1957) *SALJ* 177.

does not acknowledge this likelihood,[435] it would theoretically be possible to ground a delictual claim for non-disclosure on negligent non-disclosure.

Despite finding that the cause of action cannot be contractual, the court nonetheless expressed some views on non-disclosure in contract law and the distinction between the contractual and delictual treatment of non-disclosure. When discussing non-disclosure in the law of contract, the court accepts that all contracts are *bonae fidei*[436] and thus good faith is a criterion by which the parties' conduct during pre-contractual negotiations should be judged.[437]

However, it is acknowledged that *bona fides* is a vague concept, and it is difficult to know exactly what it entails. One of the difficulties regarding *bona fides* is that it has an ethical basis,[438] which is problematic in that ethical considerations differ greatly between individuals and communities. The court refers to a famous example we encountered earlier, namely Cicero's narrative of the merchant who shipped grain to a famine-ridden country.[439] It will be recalled that the question arises whether he is bound to disclose his knowledge of other ships bringing in the same cargo at a later date, which would lead to his disadvantage as he would have to lower his prices. From the discussion in chapter two, we know that keeping silent in this situation might be considered morally wrong. But does this necessarily mean that such silence would be legally wrong? Despite Cicero's strong leaning towards considering silence to be wrongful in such a case,[440] the court in *Meskin* cautions against taking a strictly moral view of things, as ethics often set an ideal which cannot be practically realised.[441] This still

[435] The court specifically refers to *dolus* as a requirement and makes no mention of *culpa*.
[436] "Where a contract is concluded the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered to be fraud." 802A-B.
[437] 802A provides that good faith should be used as a criterion both in interpreting a contract and in evaluating the conduct of the parties "in respect of its performance and its antecedent negotiation."
[438] 802D.
[439] This example is explored in chapter two above, and raises the question as to when somebody's silence crosses the line from being good business acumen to being a wrongful concealment.
[440] "The fact is that merely holding one's peace about a thing does not constitute concealment, but concealment consists in trying for your own profit to keep others from finding out something you know, when it is for their own interest to know it."
[441] 803E. "Whatever ethics might prescribe, rules of law do not necessarily coincide with it: ethics often set an ideal that cannot be realised in view of the practicalities with which the law is faced."

leaves open the question as to when unethical behaviour crosses the line to become unlawful behaviour.[442]

It must be questioned what the effect of relying on *bona fides* as a criterion for judging parties' conduct would be. Although our law requires *bona fides*, it must be remembered that it is "a concept of variable content in the light of changing *mores* and circumstances"[443] and thus it is not possible to assign it a set meaning, as the concept evolves over time. Rather, the court suggests that the requirement of *bona fides* finds application through other legal principles.[444] This important suggestion is explored fully in the discussion of the role of *bona fides* below.[445]

The court then briefly refers to English and American authorities despite stating that these sources are "of doubtful persuasive value in respect of the problems arising in the instant case".[446] This is due to the fact that "fraud bears a wider meaning in the law of contract than in the law of delict"[447] in English and American law, which would make it difficult for someone from another legal system to appreciate which sources would be authoritative on the subject of circumstances giving rise to a duty of disclosure.[448]

The court also challenges the assertion that the duty to disclose in this instance could have arisen from a fiduciary relationship between the parties.[449] Although these types of relationships usually create a duty of disclosure between contracting parties, no such relationship was found to exist in this instance.[450] Having rejected this argument, and having established that the contractual treatment of non-disclosure has no bearing on the present

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[442] Millner formulates this problem as follows in his article at (1957) *SALJ* 189, where he states: "Where silence is purposeful, how shall we in law draw the line between what is permissible and what is fraudulent? In the last resort it is difficult to see how such conduct may be tested save in the light of what would ordinarily be regarded as legitimate behaviour of fair dealing between man and man, taking into account the nature and full circumstances of the transaction." The court links this test of Millner's to the delictual standard of "die algemene regsgevoel van die gemeenskap", as both are deemed to rest on the same basis, namely the mores of today.

[443] 804D.

[444] 804E. Examples are the involuntary reliance test proposed by Millner (1957) *SALJ* 177-180, and the delictual standard of the legal convictions of the community, which is similar to *bona fides* as they both reflect the "*mores* of to-day".

[445] 4 4 1.

[446] 804H.

[447] 804H.

[448] For a full discussion of this, see 804H-807B of the present judgment.

[449] As established at 3 3 above, fiduciary relationships are exceptional situations in which a duty of disclosure is always recognised.

[450] 807C.

matter, the court proceeded to consider the delictual principles applicable in cases of non-disclosure.[451]

The "broader approach in delict" mentioned earlier in the judgment took the view that a duty to disclose could arise based on the "algemene regsgevoel van die gemeenskap" or *boni mores*. The court seemed to favour this approach, saying that it was consistent with the standard of the *bonus paterfamilias* which underlies the *actio legis Aquiliae*.[452] Despite this, the court is wary of stating that South African law recognises every duty flowing from *boni mores* as a legal duty.[453] Even if we were to go so far as to assume this to be the case, the limits of *boni mores* would still have to be set. The suggestion is also made that perhaps *boni mores* in the context of non-disclosure do not extend beyond the recognition of a duty of disclosure in fiduciary relationships, which, as mentioned above, is already one of the exceptions to the rule.[454] The court appears to be cautious in extending the scope of *boni mores* further than the expectations of parties in a certain type of contractual relationship, saying that

> "[i]t seems, however, most unlikely that the standard could be higher than that suggested by Millner in respect of 'designed concealment' *in contrahendo*, with the practical yardstick of 'the involuntary dependence of one party upon the other for information material to his decision'."[455]

It was this yardstick of involuntary dependence that was eventually relied on in this instance to decide whether a duty to disclose in fact existed.[456] Having regard to all of the circumstances of the case, the court rejected the assertion that such dependence was present in this matter.[457]

It is clear that this judgment emphasises the importance of certain policy considerations in determining the existence of duties of disclosure. In the contractual sphere, the principle of

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[451] "The solution to the present problem must be sought in the field of delict other than *in contrahendo*." 807B-C.
[452] 807F.
[453] "It is, however, doubtful whether our law has reached the stage of recognizing every duty flowing from *boni mores* as a legal duty, even if it be accepted that the *bonus paterfamilias* is in certain respects a reflection of the *boni mores* of his time and society." 807F-G.
[454] 807H.
[455] 808A.
[456] "In view of what has been said above, the question then becomes: is there the involuntary reliance of one party upon the other for information material to his decision?" 808F-G.
[457] 809A.

bona fides is identified as a possible criterion for judging parties' conduct throughout the contracting process. The issue is how this principle would be defined, as it is variable and can thus not be the sole measure of contracting parties' behaviour. In terms of the law of delict, liability for non-disclosure is treated in much the same way as liability for omissions, which only arises when there is a duty to act, or in this case speak. The duty is determined with regard to standards of reasonableness and the legal convictions of the community, which are influenced by *boni mores*. In addition to this, in order to succeed with a claim for damages based on non-disclosure, the non-disclosure must be accompanied by the requisite *dolus* and contain all of the elements of a delict.

An important issue dealt with in this judgment is the relationship between *bona fides* and *boni mores*. First, the court makes the statement that our law expressly requires *bona fides in contrahendo*, and points out that the content of this concept is variable.[458] The court proceeds to say that there is a strong resemblance between *bona fides* and the general delictual test of the legal convictions of the community.[459] However, Jansen J cautions that even if we assume "both to be correct in their relative spheres, and ultimately to rest on the same basis, the *mores* of to-day, it does not follow that those *mores* prescribe in all cases the same duty of disclosure as *in contrahendo*."[460] From this, it is clear that in the contractual context, there would be other considerations which affect whether a duty of disclosure is recognised. The court relies on the writings of De Groot[461] and Pufendorf,[462] which highlight equality as a consideration giving rise to a duty of disclosure. De Groot puts it succinctly, saying that "(i)n all contracts nature demands an equality, in so much that the aggrieved person has an action against the other, for overreaching him."[463] In the law of contract then, a duty to disclose would arise in instances where the disclosure of information is required in order for the parties to contract on an equal footing. This consideration is not seen to be relevant in cases of delict, and is thus another factor to consider in instances where we seek to establish a duty to disclose in the contractual context.

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[458] 804D.
[459] 804E.
[460] 804E-F.
[461] De Groot *De Jure Belli ac Pacis* 2.12.8.
[462] Pufendorf *De Jure Naturae et Gentium* 5.3.2
[463] De Groot *De Jure Belli ac Pacis* 2.12.8.

4 2 9 *Orban v Stead* [464]

An important case addressing the application of the contractual principles surrounding non-disclosure is *Orban v Stead*. The applicant claimed rescission of a contract for the sale of land based on fraudulent non-disclosure. It was alleged that the applicant had purchased property from the respondent, who failed to inform him that a portion of the property did not belong to the respondent. The applicant contended that he would never have purchased the property had he known that the whole enclosure did not belong to the respondent, and thus the respondent bore a duty to disclose the true boundary line and to prevent the possibility of the creation of any misunderstanding on the part of the applicant. The respondent argued that no such duty rested on him.

As stated, the cause of action was fraudulent non-disclosure. With regard to the terms of the agreement (the property was sold *voetstoots*), it was accepted that the applicant would have to prove fraud in order to rescind the contract.[465]

In order to do so, the court first had to establish what would constitute fraud in this instance:

> "Fraud in relation to a contract consists of a precontractual representation of a false fact. This representation must be made with knowledge that it is false and with the intention that it be acted on. The representation must be material, which means that it is likely to induce a reasonable man to act on it. This representation must be one of the causes of the representee concluding the contract. The representee must, of course, be ignorant of the falsity of the representation. The representation can be express or by conduct. *Silence can also amount to a representation*. A fraudulent non-disclosure takes place when a person is under a duty to disclose to another and fails to do so."[466]

Here we find a concise list of what must be proven in order for a representation to be fraudulent. The court expressly states that, in the context of contract, a precontractual representation of a false fact may constitute fraud. Such representation appears to be a key, minimum requirement, and the rest of the requirements all relate to the representation. Once

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[464] 1978 2 SA 713 (W).

[465] King AJ referred to the decision in *Wells v South African Aluminite Co* 1927 AD 69, which stated that "[o]n grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud."

[466] 717E-G. Own emphasis.

again, the issue of knowledge is raised. The representor must have knowledge of the false fact and the representee must be ignorant of it. But knowledge is not enough; there must also be the intention that the representation must be acted upon. This is the same requirement highlighted in *Dibley v Furter*[467] and *Cloete v Smithfield Hotel*,[468] and is a recurring element considered by the court in determining whether to grant rescission based on non-disclosure.

The above extract further requires that the representation (in this case the non-disclosure) itself must be material, in that it would induce a reasonable man to act. From this, we see that even if one party was influenced to contract by another's silence, he would still not be able to claim relief unless the non-disclosure would have induced a reasonable person to contract. Materiality in this context is linked to causation, as the representation is only material if it in fact induced a party to contract.

The materiality of the representation itself is a separate enquiry to the materiality of the undisclosed facts. However, the type of information concealed is also a relevant concern, as silence on inconsequential details would not affect the "innocent" party in any way. The knowledge held by the accused party must be of material information, which has previously been defined as information which would have the "natural and probable effect of influencing the mind of the person to whom it is made".[469] Although the court discusses fraudulent representations in this passage, provision is also made for misrepresentation in the form of silence, and it is accepted that fraudulent non-disclosure could be a cause of action. This being established, it must be asked what would constitute such fraudulent non-disclosure, and is there any possibility of grounding an action for rescission on a non-disclosure which is not fraudulent?

In addressing these questions, King AJ identified three possible types of non-disclosure,[470] namely active concealment, simple non-disclosure and designed concealment.[471] This

[467] 1951 4 SA 73 at 88B-D; also see 4 2 4 above.
[468] 1955 2 SA 622 (O); see 4 2 5 above.
[469] *Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) 416A.
[470] In each instance of non-disclosure, it must be asked what remedy is being sought, as simply referring to "actionable non-disclosure" can create confusion as to the requirements to be complied with for the different types of remedies, either contractual or delictual.
[471] 717-718.

distinction is based on Millner's classification of different types of non-disclosure.[472] By exploring each of these types we can identify aspects which would possibly lead to the recognition of a duty to disclose in each instance.

Active concealment is described as "…allowing the other party to proceed on an erroneous belief to which one's own acts have contributed."[473] It must be acknowledged that in this type of non-disclosure we are not dealing with true silence. Rather, we are dealing with a situation in which a contracting party's prior conduct creates a false impression in the mind of the other party, which the first contracting party omits to correct. It is argued that active concealment amounts to positive misrepresentation, and not non-disclosure, given that there has been a prior positive act by the guilty party.[474] It has been stated that this type of silence is always actionable, as the fraudulent nature of the concealment is apparent.[475]

There is also simple non-disclosure, which refers to mere silence unaccompanied by any intent to deceive another party. This category of non-disclosure is the most problematic, as it leads us to question whether action could be taken against somebody who merely kept silent, and was lacking the fraudulent intent that characterises cases of active concealment and designed concealment. In order to answer this question, the definition of fraud must be consulted. As indicated in the previous chapter, the Roman law definition of fraud set out by Labeo[476] made provision for "…any craft, deceit or contrivance employed with a view to circumvent, deceive, ensnare other persons."[477] According to Millner, this definition requires that there be deceitfulness on the part of the person who keeps silent in order for their silence to be fraudulent.[478] In the case of simple non-disclosure, however, the silent party's silence is inadvertent, and it would be unfair to take action against such a person in the same way one

[472](1957) *SALJ* 177-180. It appears that Millner developed this distinction based on case law and academic writings.
[473] F Pollock *Principles of Contract* 13th ed (1950) 451.
[474] Millner (1957) *SALJ* 180.
[475] Millner (1957) *SALJ* 180. Also see *Trotman v Edwick* 1951 1 SA 443 (A); JB Moyle *Contract of Sale in the Civil Law* (1892) 59. This situation is listed as an exception in Hutchison & Pretorius (eds) *The Law of Contract* 134 and is discussed as such in chapter 3 above.
[476] See 2 1 above for a more complete discussion.
[477] D.4.3.1.2.
[478] Millner (1957) *SALJ* 194.

would if he had acted intentionally. From the preceding case discussions, it appears that courts are hesitant to impose liability in instances of simple non-disclosure.[479]

Despite identifying *dolus* as a necessary element, and acknowledging that simple non-disclosure "could not rightly be described as fraudulent, lacking as it does the stamp of chicanery and deceit",[480] Millner argues that, in such instances, perhaps *dolus* could be inferred if there was knowledge on the part of the seller.[481] In making this argument he refers to other judgments, and states that there appears to be a "judicial conflict on the issue."[482] However, Millner supports the distinction drawn in *Cloete v Smithfield Hotel*[483] between non-disclosure of latent defects and residual cases involving non-disclosure.[484] The court was of the opinion that it was only in the first class of cases that mere silence on the part of the seller would amount to fraud.[485] Millner explains this argument as follows:

> "The seller who in the face of this duty remains silent may be regarded as declaring not that there are no defects, but that he knows of no defects. If he does know of a defect at the time of the sale he cannot be heard to say that he was unaware of the positive duty of disclosure imposed upon him by the edict and his silence takes on the colour of a fraudulent misrepresentation."[486]

The seller's knowledge in this instance is the basis for presuming *dolus*, and in such cases, it is argued, there should be liability for simple non-disclosure.[487]

Finally there is designed concealment. In such a case it must be established that a contracting party purposely kept information from the other party with the intention of inducing

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[479] 718D-F. This is expressly stated in *Dibley v Furter*, where the court at 88B says that "It must, however, be remembered that mere non-disclosure of the defect does not give rise by itself to the action for fraud." See further *Cloete v Smithfield Hotel* 1955 2 SA 622 (O) and its discussion at 4 2 4 above.

[480] Millner (1957) *SALJ* 194.

[481] Millner (1957) *SALJ* 195. Here, Millner relies on Curlewis J's statement in *Erasmus v Russell's Executor* 1904 T.S. 365 at 376.

[482] Millner (1957) *SALJ* 196.

[483] 1955 2 SA 622 (O).

[484] "It is respectfully submitted that the distinction made in *Cloete's* case is a perfectly valid one and that it may be justified in another way. For even though the seller is not deemed to say 'I warrant that the *merx* has no latent defect', yet he is bound to disclose all latent defects (*morbus et vitia*) *known* to him. This was enjoined by the edict on all sellers in imperative terms. It is this positive edictal duty imposed by law on all sellers which distinguishes silence in respect of redhibitory defects in the thing sold from silence in respect of other material matters as to which the law imposes no general duty to speak." (Millner (1957) *SALJ* 198)

[485] 632.

[486] Millner (1957) *SALJ* 199.

[487] Millner (1957) *SALJ* 200.

him or her to enter into the contract.[488] Designed concealment differs from active concealment in that there is no positive action, and there is true silence on the part of the guilty contracting party. The difficulty arises in discerning which circumstances of designed concealment would amount to fraud.

The court in this matter was of the opinion that, in cases of designed concealment, a duty to disclose would arise from the surrounding circumstances of a case.[489] In this regard the court expressly states that a duty to disclose "also arises where, because of the facts of any case, there is an involuntary reliance of the one party on the other for material information."[490]

King AJ supports the idea that the relationship between contracting parties can be consulted in order to determine whether a duty to disclose arises in any given circumstance, using a fiduciary relationship as an example of one that always gives rise to a duty to disclose.[491] It has been suggested that it is the element of dependence in these relationships that gives rise to the duty of disclosure between the parties, as one is necessarily dependenton the other to provide him with certain information.[492] This dependence of one party on the candour of the other can also be described as an involuntary reliance, as the former has no choice but to rely on the latter for information.[493] In order to prove that there was an involuntary reliance, however, it would have to be established that the party relying on another for information had no other means of acquiring such information.[494] Only then would the other party have a duty

[488] 718B-C; Millner (1957) *SALJ* 180.
[489] 718B.
[490] 718C. This view is supported by Millner (1957) *SALJ* 188: "The key to this question must lie in the precise relationship between the parties, i.e. whether or not the relationship is one in which the ordinary contemplation of the parties is or ought to be that A will disclose to B material facts of a particular kind of which he knows B to be ignorant."
[491] 718C. This exception is also discussed at 3 3 above, and the relationship between the parties has been raised in the cases of *Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) and *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W).
[492] Millner (1957) *SALJ* 189.
[493] Millner looks at the types of cases which always create a duty of disclosure, and identifies contracts *uberrimae fidei* and fiduciary relationships as examples of such cases. He suggests that the common element in such cases is the element of dependence, and states that it is "characteristic of negotiations of this type that many material facts are accessible to (one party) alone so that the other party is obliged to depend on him, i.e. to trust him to disclose them. In short, a relationship of involuntary dependence springs into being in these circumstances which, in so far as it obliges the one to repose confidence in the other, has a quality comparable to those subsisting fiduciary relationships which admittedly give rise to a positive duty of disclosure."
[494] Millner (1957) *SALJ* 189.

to disclose, as nobody bears the burden of informing another of something that they themselves can discover if they exercise the effort to do so.[495]

In discussing the existence of a duty to disclose, the court in *Orban v Stead* applied the same factors identified in previous case law and the exceptional circumstances identified in chapter three above, namely knowledge, materiality of the representation, and the nature of the relationship between the parties. The involuntary reliance test proposed by Millner was relied upon in this judgment as the proper standard to use when determining the existence of a duty to disclose.

4 2 10 *Novick v Comair Holdings Ltd*[496]

Although this matter specifically concerned duties of disclosure under the common law as well as statutory duties of a company director,[497] the court's discussion of the law relating to general requirements for rescission due to misrepresentation is relevant for present purposes. In this instance, the respondents sought to avoid a contract concluded between themselves and the applicants based on a number of grounds. Two of these grounds are relevant when discussing non-disclosure, namely an alleged failure on the part of the applicants to comply with a statutory duty of disclosure and the ground of misrepresentation. As mentioned in the previous chapter, statutory duties of disclosure must always be complied with, in this instance the provisions of the Companies Act 61 of 1973. More importantly, the court's treatment of misrepresentation should be focused on, especially the requirements to be proven by a party wishing to avoid a contract. It was accepted by the court that:

> "The party seeking to avoid a contract on the ground of misrepresentation must prove the following elements of his case.
>
> *(a)* That the representation relied upon was made.
> *(b)* That it was a representation as to a fact. A promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy of its content; it can, however, often be construed as a representation that the person making it is of a particular state of mind.

[495] This rule is established in *Speight v Glass* 1961 1 SA 778 (D), where it was decided that there was no duty on the respondent to disclose a plan to construct a public road, as the information was available to the public, and the applicant could have discovered it for himself.
[496] 1979 2 SA 116 (W).
[497] Discussed at 3 3 and 3 4 2 above.

> *(c)* That the representation was false. In relation to an ordinary representation of fact, what must be shown is that the fact was not as represented. When a prediction, opinion or estimate is relied upon, what must be shown is not merely that it was, or turned out to be, erroneous, but that it did not represent the *bona fide* view, at the time when it was expressed, of the person who expressed it.
> *(d)* That it was *material*, in the sense that it was such as *would have influenced a reasonable man* to enter into the contract in issue.
> *(e)* That it was *intended to induce* the person to whom it was made to enter into the transaction sought to be avoided…
> *(f)* That the *representation did induce the contract*. That, as I understand it, does not mean that the misrepresentation must have been the only inducing course of the contract. It suffices if it was one of the operative causes which induced the representee to contract as he did." (own emphasis) [498]

This list provides a general context within which all claims for rescission based on misrepresentation can be evaluated. More specifically, it lists requirements of materiality, intent and inducement. These requirements should presumably also be met if a claim for rescission is based on non-disclosure. As we have seen, comparable elements have in the past been identified by the judiciary as indications that a party engaged in actionable non-disclosure.[499]

As in *Orban v Stead*, the requirement in (d) above is that the representation must be material. In that judgment, the court stated that it would only be where the representation would have induced a reasonable person to contract that relief would be available to the wronged party. The test for materiality of the representation is thus objective, and linked to the element of inducement. In discussing the requirement of inducement, the court is careful to state that this "has always been regarded as a necessary element, whether it was fraudulent or innocent misrepresentation that was relied upon."[500] From this we see that inducement does not necessarily constitute an intention to defraud, and we must consider the state of mind of the person who kept silent in order to determine whether they are fraudulent. The mere fact that the silence in fact induced the transaction is not sufficient to constitute fraudulent intent on the part of the party accused of concealment. There must be something extra which would

[498] 1979 2 SA 116 (W) 149D-F. Note that the requirement that the representation must have induced the contract in order for the party to seek redress does not specifically provide that the inducement must have led to a valid contract. This leaves room for the view of the court in *Flaks v Sarne* 1959 1 SA 222 (T), namely that it is sufficient for a party to prove that there was a fraudulent statement (or indeed, silence) which induced him to act in the manner he did.
[499] These requirements have been highlighted in *Dibley v Furter* 1951 4 SA 73 (C), *Cloete v Smithfield Hotel* 1955 2 SA 622 (O) and *Flaks v Sarne* 1959 1 SA 222 (T). They are also echoed in the later case of *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA).
[500] 150A.

constitute a conscious intention to defraud the other party by keeping silent. Although the *Novick* case does not expressly deal with misrepresentation by non-disclosure, the principles identified as necessary to claim rescission on the grounds of representation can be applied to residual cases of non-disclosure.

4 2 11 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*[501]

This is an insurance matter, and is one of the most cited cases in South African law regarding the construct of *uberrimae fidei* contracts. Insurance contracts have traditionally been classified as contracts *uberrimae fidei,* contracts where parties are held to a standard of the 'utmost good faith'.[502] One of the consequences of imposing the highest good faith on parties was that parties to insurance contracts had an absolute duty of disclosure. This judgment explores the development of the concept of *uberrimae fidei* in modern SA law, and effectively erases it from our legal system. Although the matter deals specifically with the case of insurance, which is an exception, it also has implications when discussing a general residual duty of disclosure.

As stated in the preceding chapter and the exploration of *Stacy v Sims* above,[503] we know that this term *uberrimae fidei* originated in English law.[504] The court in *Mutual and Federal* traces the term from its English law roots,[505] and discusses the reception of the concept of *uberrimae fidei* contracts into South African law.[506] The court investigated Roman law and Roman-Dutch law authorities in order to see whether they recognised different levels of good faith, and came to the following conclusion:

> "The Romans were familiar with *bona fides* and *mala fides* but they never knew *uberrima fides* as another category of good faith. I have been unable to find any Roman-Dutch authority in support of the proposition that a contract of marine

[501] 1985 1 SA 419 (A).
[502] See 3 2 above, which sets out the history of insurance contracts as well as their classification as *uberrimae fidei*. For further examples of the courts' treatment of *uberrimae fidei* see *Stacy v Sims* 1917 CPD 533 and *Lewak v Sanderson* 1925 CPD 265.
[503] 3 2 and 4 2 1 above.
[504] 3 2 above.
[505] 431H.
[506] 432A. "Without investigating our own law on this aspect, our Courts have under influence of English law attached to a contract of insurance the label *uberrimae fidei*."

> insurance is a contract *uberrimae fidei*. On the contrary, it is indisputably a contract *bonae fidei*."[507]

The court then had to ask, in the absence of any authority for recognising the construct of *uberrimae fidei* contracts, what the legal basis would be for recognising a duty to disclose between contracting parties, especially in the context of insurance law. The court made the observation that "the duty of disclosure (in insurance law) is the correlative of a right of disclosure which is a legal principle of the law of insurance."[508] The court further stated that the duty of disclosure in insurance contracts arises *ex lege*, not from an implied term or from a requirement of *bona fides*.[509]

As a result of this, and taking into account the lack of historical authority for recognising the concept of *uberrimae fidei*, the court made the following statement:

> "By our law all contracts are *bonae fidei*. Yet the duty of disclosure is not common to all types of contract. It is restricted to those contracts, such as contracts of insurance, where it is required *ex lege*. Moreover, there is no magic in the term *uberrima fides*. There are no degrees of good faith. It is entirely inconceivable that there could be a little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room for *uberrima fides* as a third category of faith in our law…*Uberrima fides* is not a juristic term with a precise connotation. It cannot be used as a yardstick with a precise legal meaning…In my opinion *uberrima fides* is an alien, vague, useless expression without any particular meaning in law. As I have indicated, it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our law of insurance has no need for *uberrima fides* and the time has come to jettison it."[510]

An observation that warrants discussion is the idea that the duty to disclose is not based on the principle of utmost good faith, but rather arises *ex lege*, due to the type of contract in question and the legal principles involved in that contract.[511] However, this may be interpreted to limit the cases where a duty to disclose is recognised to those previously designated *uberrimae fidei.* If this were Joubert JA's intention, it would leave no room for cases where policy considerations would require the recognition of new duties of disclosure. However, if

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[507] 432B-C.
[508] 432H.
[509] 433A.
[510] 433B-F.
[511] 432. This differs from the judgment in *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W), where the court relied strongly on the principle of *bona fides* as a criterion governing the conduct of contracting parties *inter se,* and in so doing indirectly giving rise to a duty to disclose.

this were not his intention, then it should be asked when such duty could be said to arise *ex lege* outside the established categories. The judgment provides no guidelines for determining this, and it would seem that the recognition of a duty to disclose is indeed limited to specific categories of contracts.

In terms of insurance law, parties are required to disclose material information. In determining what type of information is material, previous judgments have adopted the definition set out in *Pretorius v Natal South Sea Investment Trust Ltd*,[512] which states that material information would have the "natural and probable effect of influencing the mind of (a) person".[513] In the present judgment, the materiality of facts is determined by considering the circumstances of the case objectively, as the reasonable person would.[514] The court relies on Roman-Dutch authorities and our current law, and uses this test to determine whether the undisclosed information would be reasonably relative to the risk in question. If the facts would be regarded as such by the "average prudent person" then it would be material, and should thus be disclosed. It must be noted that the court relied on cases from the law of delict in setting this standard,[515] and it is interesting to see how the delictual and contractual principles regarding non-disclosure can overlap in certain instances. The overlap of principles can, however, also lead to confusion, and it must be remembered that the remedies for each differ in their requirements.

4 2 12 *McCann v Goodall Group Operations (Pty) Ltd*[516]

As seen in the discussion of *Meskin above*,[517] a failure to disclose may ground a contractual or delictual action. In *McCann v Goodall Group Operations (Pty) Ltd*[518] liability for non-disclosure was considered in light of a claim for delictual damages. Fault is one of the requirements for a delictual claim to be successful. As we have seen, the case law traditionally focussed on fault in the form of fraud. Millner in particular doubted whether

[512] 1965 3 SA 410 (W) 416A.
[513] 416A.
[514] 435. Reasonableness was also recognised as a standard by which to determine materiality of the representation in the discussion of *Novick v Comair Holdings* 1979 2 SA 116 (W) at 4 2 10 above.
[515] *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A).
[516] 1995 2 SA 718 (C).
[517] 4 2 8.
[518] 1995 2 SA 718 (C).

negligent non-disclosure could be actionable, suggesting that it would be answered some time in the future.[519] In *McCann* the court had to consider this question.

The plaintiff sold vehicles to the defendant, and in the course of the sale relied on an alleged fraudulent misrepresentation made by the defendant. In terms of this representation, the defendant had informed the plaintiff that he was a registered wholesale trader and was thus exempt from paying general sales tax when purchasing the vehicles. As a result, the plaintiff did not charge the defendant the general sales tax as required by law, but was later held liable for the payment thereof by the Receiver of Inland Revenue. The plaintiff then instituted a claim for damages against the defendant in order to recover this amount. In the event that a fraudulent misrepresentation could not be found, the plaintiff instituted an alternative cause of action grounded on negligent misrepresentation.

In the court a quo, it was found that there had been no fraudulent misrepresentation, as it could not be proved that the defendant had actively represented himself as a registered wholesale trader. Regarding the alternative cause of action, however, the court held that the defendant's past experience as a motor vehicle salesman meant that he must have known that registered wholesale traders were exempt from paying general sales tax. The defendant must also have known that traders selling to the public had to be registered and hold a general sales tax certificate, and that sellers could be penalised for not charging the general sales tax to any buyer that was not a registered trader. Taking into account the defendant's experience in the field, and the knowledge that he was expected to have, the court a quo found that the defendant was under a duty to disclose that he was not a registered wholesale trader. It was held that he had breached this duty by failing to disclose this information to the plaintiff, and his omission in this regard would amount to a negligent misrepresentation.

The reasoning of the judge in the court a quo was that there was in essence no difference between an express negligent statement and a tacit one. On strength of this, it was suggested that someone who omits to say something when circumstances require him to do so acts negligently. The present circumstances were deemed to be similar to those in *Bayer South*

[519] Millner (1957) *SALJ* 177-178.

Africa (Pty) Ltd v Frost,[520] and would thus comply with the requirements for the *lex Aquilia*. The appeal court criticised this approach on various grounds.[521] One of these grounds is that there was no actual misstatement made in the present case, as there was in the *Bayer* matter, as we are dealing here with a failure to disclose information. On appeal it was acknowledged that a positive misstatement and a non-disclosure can both constitute a misrepresentation,[522] whether fraudulent or negligent.[523] It has been confirmed that, in South African law, a negligent misrepresentation can give rise to delictual liability.[524] Having established that a misrepresentation can take the form of an omission, it would follow that negligent non-disclosure could also lead to delictual liability. In this regard the court in *McCann* referred to an article by Kerr,[525] which supported this conclusion.[526] Accepting that good faith is one of the principles governing pre-contractual negotiations, Kerr sets out his reasoning as follows:

> "Does good faith require a party to put his mind to problems which, in all the circumstances, can fairly be said to present themselves? Would a *bonus paterfamilias* do so? If he would, and the party in question does not, is this not negligence?"[527]

Recognising the existence of an action based on negligent non-disclosure, it must be asked what kind of remedy such an action would give rise to. Kerr favours the view that cancellation would be an appropriate remedy, as cancellation is the remedy claimed in cases of negligent misrepresentation and non-disclosure is "closely related to misrepresentation".[528] Kerr makes no statements about claiming damages, but the court in *McCann* allowed for this type of claim, and set out guidelines for claiming damages based on negligent non-disclosure.

When it comes to establishing liability for this type of non-disclosure, this can only be successful if it can be shown that the non-disclosure was wrongful. This is determined by establishing whether the defendant has a legal duty to disclose material information to the

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[520] 1991 4 SA 559 (AD).
[521] 721G-722A.
[522] 722A.
[523] 722F.
[524] Confirmed in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); D Hutchison 'Damages for negligent misstatements made in a contractual context' (1981) 98 *SALJ* 500.
[525] AJ Kerr "Negligent non-disclosure: The duty to call to mind and disclose" (1979) 96 *SALJ* 17-23.
[526] Kerr (1979) *SALJ* 17-23. This article was written following the judgment in *Orban v Stead*, and explored the possibility of allowing an action based on negligent non-disclosure.
[527] Kerr (1979) *SALJ* 22.
[528] Kerr (1979) *SALJ* 22.

plaintiff, and consequently fails to do so.[529] Establishing the existence of such a duty is problematic, as evidenced throughout this work. The question is whether there is any similarity in the way this problem is approached in the law of delict as opposed to the contract law approach.

The general rule regarding non-disclosure in the law of contract is in line with the position in delict, namely that:

> "There is no general rule in our law that all material facts must be disclosed and that non-disclosure thereby amounts to misrepresentation by silence, but in certain circumstances this is undoubtedly the rule."[530]

The question, again, is how one would determine which of these circumstances would create a duty to disclose. When discussing the existence of a duty to disclose in the law of contract, the court adopted the familiar suggestion by Millner that, when dealing with an instance of designed concealment, a duty to disclose would arise where there is an:

> "Involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances."[531]

As established in the discussion of *Orban v Stead*,[532] Millner emphasises the importance of the nature of the relationship between the parties when it comes to determining the existence of a duty to disclose. The knowledge element is also included in this "involuntary reliance" test, and plays an important role in imposing liability for a non-disclosure. In the situation where the facts do not fall within the "exclusive knowledge" of the other party, it is unlikely that there would be a duty to disclose. This is due to the fact that nobody is bound to look after the interests of another, and if the facts are readily available upon a diligent inspection, or

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[529] 723C. More recently, it has been confirmed that "our law now firmly recognises that a negligent misrepresentation will give rise to delictual liability provided all the necessary elements of such liability are satisfied. *It is submitted on behalf of Axiam that there can in law be a misrepresentation by silence. That is undoubtedly so*…Silence or inaction as such cannot constitute a misrepresentation unless there is a duty to speak or act." (own emphasis) *Axiam Holdings Ltd v Deloitte & Touche* 2006 1 SA 237 (SCA) para 15.

[530] Christie *The Law of Contract* 276-277. Confirmed in *Speight v Glass* 1961 1 SA 778 (D) 781H; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433C.

[531] Millner (1957) *SALJ* 185.

[532] 1978 2 SA 713 (W).

accessible to both parties, the 'wronged' party cannot claim that the other party had a duty to inform him of the relevant facts.[533]

When it comes to determining the existence of a duty to disclose in the context of delict, the prevailing opinion is that this should be done with regard to policy considerations, more specifically the legal convictions of the community or public interest.[534] This confirms the judgment of Jansen J in *Meskin v Anglo-American Corporation of SA Ltd*,[535] which used the "broad approach" to determine the existence of duties of disclosure. As stated above, the legal convictions of the community and *boni mores* were highlighted by the court in Meskin,[536] in addition to the standard of the *bonus paterfamilias*.

Returning to the question of negligent non-disclosure, the court isolates certain principles that would assist the identification of a situation as one where a non-disclosure was negligent.[537]

> "*(a)* A negligent misrepresentation may give rise to delictual liability and to a claim for damages, provided the prerequisites for such liability are complied with.
> *(b)* A negligent misrepresentation may be constituted by an omission, provided the defendant breaches a legal duty, established by policy considerations, to act positively in order to prevent the plaintiff's suffering loss.
> *(c)* A negligent misrepresentation by way of an omission may occur in the form of a non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.
> *(d)* Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid."[538]

The court then provides examples of circumstances which could give rise to a duty to disclose, but is careful to point out that the list of situations is not absolute, as there are other circumstances in which a duty of disclosure could exist. A duty of disclosure can arise when the material fact in issue falls within the exclusive knowledge of one party, and the other is

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[533] This was also suggested in *Speight v Glass* 1961 1 SA 778 (D), and is confirmed in this judgment.
[534] J Neethling, JM Potgieter & PJ Visser *Law of Delict* 2nd ed (1994) 50-51. See further *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A-C; *Kadir v Minister of Law and Order* 1993 3 SA 737 (C) 740F-J; *Clarke v Hurst NO and Others* 1992 4 SA 630 (D) 650G-653B for a full discussion of these policy considerations.
[535] 1968 4 SA 793 (W).
[536] 4 2 8.
[537] These principles were endorsed by the majority of the court in *Axiam Holdings Ltd v Deloitte & Touche* 2006 1 SA 237 (SCA) para 15-17, who confirmed that the principles used by the court in *McCann v Goodall Group Operations* 1995 2 SA 718 (C) were the correct ones to use in determining which circumstances created a duty to disclose.
[538] 726A-D.

reliant on the frank disclosure thereof. This amounts to the involuntary reliance test proposed by Millner.[539] It could also exist where a party has knowledge of certain unusual characteristics relating to the proposed contract, and policy considerations require that he inform the other party thereof. Another possible situation is in the case where a party has previously made a statement or representation to the other which later turns out to be an incomplete representation. There would then be a duty on the representor to rectify the disclosure, as not doing so could mislead the representee.

From the preceding case discussions, it has become obvious that our judiciary have historically been inclined to award remedies in cases where non-disclosure has been fraudulent.[540] This requirement that silence be fraudulent in order for it to be actionable is also seen in Millner's article,[541] where, although it is not expressly stated, the intention in the classification of instances of non-disclosure is to highlight which instances should be actionable. In this classification, Millner argues that designed concealment should be able to ground an action as there is an element of *dolus*, which is not seen in all instances of mere non-disclosure.[542] The deciding factor seems to be the presence of fraud. If we accept this, then it would appear that the involuntary reliance proposed by Millner for determining a duty to disclose should only be applicable in cases of fraudulent non-disclosure. However, it has been acknowledged earlier in this discussion that our law also allows for causes of action grounded on negligent non-disclosure,[543] and thus the court in *McCann*, in applying the involuntary reliance test to this matter extends its application to instances of negligent non-disclosure.

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[539] Millner (1957) *SALJ* 185.

[540] *Dibley v Furter* 1951 4 SA 73 (C) 88B-D; *Cloete v Smithfield Hotel* 1955 2 SA 622 (O); *Flaks v Sarne* 1959 1 SA 222 (T) 226A-D; *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W); *Orban v Stead* 1978 2 SA 713 (W) 717E-G.

[541] Millner (1957) *SALJ* 185.

[542] The exception is in cases where the seller is silent regarding a latent defect, and it was suggested by Millner that the seller's knowledge in this case would create a 'presumed *dolus*', which would mean that even innocent non-disclosure in such a case would be deemed fraudulent.

[543] There is not much authority for this, and it was suggested as an alternative cause of action in instances where the circumstances of the case do not quite constitute fraudulent non-disclosure. For a full discussion, see Kerr (1979) *SALJ* 17-23. The court here confirms its validity as a cause of action.

4 2 13 *ABSA Bank Ltd v Fouche*[544]

This matter is similar to *McCann*, as it also concerns delictual liability for non-disclosure. The respondent entered into a contract with ABSA Bank (the appellant) in terms of which the respondent hired a safety deposit box. This contract contained a term which stated that the clients bore the risk of anything happening to the contents of the lockers. Sometime after the conclusion of the contract, a number of safe deposit boxes were broken into, including the respondent's box. The respondent initially brought a claim against ABSA Bank and was successful in the court a quo. However, when the matter went on appeal, the respondent accepted that she did not have a cause of action in contract. Alternatively, she sought to claim damages on the basis of fraudulent non-disclosure which induced her to enter into the contract. If this could not be proved, then she sought to rely on negligent non-disclosure which has been confirmed as a legitimate basis for a cause of action.[545]

The point of departure was that "it is by now settled law that the test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure."[546] Reliance is placed on the judgment in *Bayer South Africa (Pty) Ltd v Frost*,[547] which, as we saw above, dealt with a claim in delict. It is asserted by the court that in both the contractual and delictual treatment of the duty to disclose, the touchstone for establishing such duty is the legal convictions of the community.[548] It is interesting to note that all of the cases cited as authority for this statement are delictual cases. It may therefore be questioned whether this standard really applies across the board, and whether other principles may perhaps be more suited for use in the contractual context.

The court does address the principles required when dealing with non-disclosure in the contractual sphere, saying that "the policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesised into a

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[544] 2003 1 SA 176 (SCA).
[545] *McCann v Goodall Group Operations* 1995 2 SA 718 (C). Also see the discussion at 4 2 12.
[546] Para 4.
[547] 1991 4 SA 559 (A).
[548] Para 4. Authority for this is cited as *Carmichele v Minister of Safety and Security and Another* 2001 1 SA 489 (SCA) 494E-F; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 317C-318J. This test has been confirmed as the correct one to use when determining the existence of a duty to disclose in the law of delict. See further fn 123 above.

general test for liability."[549] The question arises what the court envisions the content of these policy considerations to be, and whether they look for the same elements identified in previous judgments as indicative of a duty to disclose in the contractual context.

The 'general test' referred to by the court appears to have two parts.[550] First, a duty to speak must be established. This is done in the following way:

> "A party is expected to speak when information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial management)* 1965 (3) SA 410 (W) at 418E-F)."[551]

We see that the recurring knowledge requirement is relevant in this first part of the test, and is thus one of the factors to consider when establishing that there was in fact a duty. It is confirmed that the information must be within the exclusive knowledge[552] of one party, and that the other party must have no other means of obtaining it. In addition to this, the type of information concealed is important. Here, the information must be such that the right to be informed is "mutually recognised by honest men in the circumstances". It has previously been stated that the type of information concealed must be material, in the sense that it would be calculated to induce someone to contract. However, in this judgment, emphasis is placed on the behaviour normally expected of honest men in certain circumstances, which would seem to be more of a policy consideration.

As established in previous case discussions, it is not sufficient to prove that there was a duty to disclose. There are certain elements which have been identified in previous judgments as being useful in this instance, most notably that the representation had to be material, and that the representation had to induce the defendant to enter into the contract. No definition is provided for materiality in this context, but it would presumably be the same as that found in

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[549] Para 5.

[550] This two-part test has been identified in previous judgments, namely *Flaks v Sarne* 1959 1 SA 222 (T) and *Orban v Stead* 1978 2 SA 713 (W).

[551] 180I-181B.

[552] In his *The Law of Contract*, Christie defines exclusive knowledge as "knowledge which is inaccessible to the point where its inaccessibility produces an involuntary reliance on the party possessing the information". This definition links the knowledge requirement to Millner's test of involuntary reliance.

Orban v Stead, where the representation would have influenced the reasonable person to enter into the contract.[553]

From this judgment we see that, when dealing with cases of non-disclosure, it must first be determined whether there was a duty to speak, and it is clear that this duty only arises in respect of material facts.[554] Further, the representation itself must be material,[555] and must have induced the party to enter into the contract.[556] With regard to inducement, in instances where fraudulent misrepresentation is alleged, it must be clear that the defendant intended to induce the plaintiff to enter into the contract. It is only where all of these things are proved that a party will be able to claim relief based on non-disclosure.

The court in this matter has explored the contractual and delictual principles regarding non-disclosure and has pointed out some similarities between the two. Recognising that the contractual standard of *bona fides* and the delictual standard of *boni mores* are both based on ethical considerations, specifically the *mores* of today, the focus when dealing with cases of non-disclosure appears to be on the behaviour expected from honest men in the circumstances. This reliance on a standard based on what the community views as acceptable behaviour seems to suggest that perhaps the distinction between the contractual and delictual standards used when imposing duties of disclosure is not that clear, and that, effectively, the same test is applied. This suggestion will be explored in the following chapter, when the potential standards for determining the existence of duties of disclosure are comprehensively discussed.

4 3 Conclusions

The judgments discussed here trace the development of the law relating to non-disclosure in South Africa, and many have contributed principles that have helped to shape the law as it stands today.

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[553] See 4 2 9 above.
[554] Para 5. The test for materiality of facts can be seen in *Pretorius v Natal South Sea Investment Trust Ltd* 1965 3 SA 410 (W) 416A, namely that the facts must be material from the perspective of the reasonable person.
[555] Para 6. Also see the discussions at 4 2 9 and 4 2 10 above.
[556] Para 6.

Initially, liability for non-disclosure in the context of contract law was essentially limited to contracts branded as *uberrimae fidei*, exemplified by the insurance contract.[557] No proper provision was made for residual cases, and the reasoning for this was that the type of contract designated *uberrimae fidei* required parties to act with the utmost good faith, which meant that a duty to disclose was automatically recognised in these instances. This construct was adopted from English law, and the Roman law principles were "bent" to fit in with it, leading to considerable confusion about its application in the South African context.[558] However, in later years, courts recognised that the concept of *uberrimae fidei* contracts was never a part of Roman law, and abolished the application of such a concept in our law.[559]

As the law developed, the courts started to pay more attention to the types of actions available in cases of non-disclosure and the requirements for these remedies.[560] The judiciary allowed parties to claim rescission in the contractual sphere and damages in terms of the law of delict. In each sphere, it has been acknowledged that there can be no question of liability for non-disclosure if the parties did not have a duty to disclose *inter se*.[561] However, the way in which the duty is established, and the further requirements for relief are not the same. From the discussion in this chapter, it is clear that there is still uncertainty about these requirements, and this uncertainty has given rise to a number of questions.

One of the main issues to be explored is the relevance of standards like good faith, *boni mores* when deciding to award relief based on non-disclosure. These considerations have repeatedly been identified by the judiciary as being of importance in measuring contracting parties' behaviour, and must be investigated to see how they would operate in cases of non-disclosure, and what role they would play in the respective spheres of contract and delict. Such an investigation also entails obtaining more certainty about the specific considerations that influence imposing a duty to disclose, especially the exact relationship between the parties.

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[557] This is especially seen in earlier cases such as *Stacy v Sims* 1917 CPD 533; *Lewak v Sanderson* 1925 CPD 265 and *Hoffman v Moni's Wineries* 1948 2 SA 163 (C).
[558] See the discussion of *Lewak v Sanderson* 1925 CPD 265 at 4 2 2 above.
[559] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A).
[560] This was especially evident in the following judgments made during the 1950s: *Dibley v Furter* 1951 4 SA 73 (C); *Cloete v Smithfield Hotel* 1955 2 SA 622 (O); *Flaks v Sarne* 1959 1 SA 222 (T).
[561] See discussion of *Flaks v Sarne* 1959 1 SA 222 (T) at 4 2 6 above.

Another issue that requires further attention is the question of materiality and what it would mean in different contexts. The materiality of the facts may be distinguished from the materiality of the representation itself. This distinction and the role of materiality in cases of non-disclosure will also be explored in the following chapter.

Finally, the question of fault has also arisen from the present discussion. As one of the elements of a delict, fault is always required when claiming damages for non-disclosure. However, it is still uncertain to which extent fault should be required when claiming rescission based on non-disclosure, a question which warrants further discussion.

These issues, as well as other relevant considerations, will be investigated in the following chapter. I will attempt to draw some conclusions regarding these uncertainties with reference to the historical and comparative perspectives explored earlier.

CHAPTER 5: CONCLUSION

5 1 Introduction: historical background

The aim of this thesis has been to investigate the meaning and consequences of misrepresentation by non-disclosure in the South African law of contract. As evidenced by the discussions in the preceding chapters, non-disclosure has been recognised as a form of misrepresentation in our law, and, under the right circumstances, may give rise to remedies for the wronged party.

To place the conclusions regarding the modern law and how it may be developed in context, the historical background will be recounted briefly. It will be recalled from the discussion in chapter two that some of the earliest indications that non-disclosure could constitute a misrepresentation and provide a remedy for the representee are found in Roman law. Initially, no provision was made for situations where someone was induced to conclude a contract as a result of another's silence. The construction of *aliud simulare, aliud agere* was followed, which only imputes liability for positive acts. However, it was later recognised that there are cases where a party's silence could induce another to act to the latter's detriment, and that it was necessary to regulate these instances in some way.[562] It came to be accepted that the definition of fraud could be extended to include non-disclosure, and that the *actio de dolo* could be available to those who were disadvantaged as a result of another's silence. Crucially, it further came to be accepted that even if the accused party's misconduct could sometimes fall short of actual deceit or trickery, the *exceptio doli* could nonetheless be awarded, essentially because it was not equitable for the other party to bring an action.[563] Such conduct was deemed to be contrary to the principle of *bona fides.* The law developed so that violating this principle could be a direct ground for challenging a party's conduct even where it was not accompanied by the fraudulent intent traditionally required.[564] The *exceptio doli* later became a sort of "catch-all" provision based on the principles of fairness,

[562] See 2 1 1 1.
[563] R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 668. Further see 2 1 1 1 above.
[564] The line between *bona fides* and *dolus* has also been described as a "strong inverse relationship" in S Vogenhauer & J Kleinheisterkamp (eds) *Commentary on the UNIDROIT Principles of International Commercial Contracts PICC* (2009) 438.

reasonableness and *bona fides,* and was used in all cases where a contracting party's conduct constituted bad faith.[565]

However, in later civil law an important development took place. The notion of a distinction between contracts that were subject to good faith and those which were not was abolished, which had the implication that there was no more need for a procedural mechanism called the *exceptio doli*. This was already the position in Roman-Dutch law and it is essentially still the position in modern South African law, which essentially accords good faith the role of underlying principle of the law of contract, but not as the basis for equitable judicial discretions to award relief. The role of *bona fides* in relation to cases of misrepresentation by non-disclosure will be returned to later in this chapter.

A further important development in the civilian tradition was the continued recognition of non-disclosure as a form of misrepresentation; from Roman-Dutch law it was later received into South African law. This recognition gave rise to an important challenge. Once it was acknowledged that non-disclosure could constitute a misrepresentation under the right circumstances, the question arose how to determine precisely what these circumstances were. Initially, it was thought that the construction that certain contracts were *uberrimae fidei,* which was adopted from English law in the early 20th century, could be the main instrument to be used for this purpose.[566] In earlier cases such as *Stacy v Sims*[567] and *Lewak v Sanderson*,[568] the courts were only willing to impose liability for non-disclosure in instances where the parties were required to act with the "utmost good faith".[569] However, this construction was rejected in modern South African law,[570] on the ground that it never formed part of the Roman or Roman-Dutch law.[571] As we have seen, rather, despite its civilian-

[565] D Hutchison "Good faith in the South African law of contract" in R Brownsword, NJ Hird & GG Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 213 216.

[566] This construction is mentioned a number of times in this work, firstly in the discussion of modern English law at 2 2 2 3 above, then in the development of the South African law of insurance at 3 1 and 3 2, and finally in the case discussions in chapter four.

[567] 1917 CPD 533.

[568] 1925 CPD 265.

[569] Discussed at 4 2 1 and 4 2 2 above.

[570] This was expressly done in the by now familiar majority judgment in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433C-D.

[571] According to Spencer-Bower, "The Roman Law distinguishes between actions *bonae fidei*…and actions which are not. It does not erect into a third and superlative class, with a special name, such transactions and relations which English law designates *uberrimae fidei*." (*The Law Relating to Actionable Non-disclosure* (1915) 149).

sounding name, it appears to be a purely English law creation, and is still used in English law to distinguish the types of contract in which parties can incur liability for non-disclosure.[572] Nonetheless, despite the rejection of the *uberrimae fides* concept in modern South African law, there are still specific instances in which parties always have a duty to disclose, namely those contracts previously designated *uberrimae fidei.*[573]

Outside of these special cases, the judiciary has also shown a willingness to impose liability for non-disclosure.[574] However, the difficulty of establishing duties of disclosure in these residual cases leads us to ask which factors could be used to establish liability for non-disclosure. From the case evaluations in the previous chapter, it has emerged that, in reality, the enquiry as to whether non-disclosure is actionable is more complicated than simply imposing duties of disclosure when dealing with specific contract types. In the development of the law relating to non-disclosure, the courts' focus shifted from the automatic application of a test based on *uberrimae fides* to considering the type of action instituted by parties, and the requirements for instituting such actions.[575] More specifically, parties could claim relief in the form of contractual actions for rescission and restitution, or delictual claims for damages. The crucial distinction between these remedies will now be considered in more detail, as the requirements for imposing liability differ in each.

5 2 Non-disclosure in contractual context: the standards of 'involuntary reliance' and 'good faith'

In terms of the law of contract, rescission is the appropriate remedy to set aside a contract if a party has been disadvantaged by another's silence. As indicated earlier, the party seeking to rely on this remedy must cross a number of hurdles.[576]

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[572] P Giliker "Formation of contract and pre-contractual information from an English perspective" in S Grundmann & M Schauer (eds) *The Architecture of European Codes and Contract Law* (2006) 301 302.
[573] Discussed in chapter three.
[574] Discussed in chapter four.
[575] This shift is most clearly seen in the judgments dating from the early 1950s, and is explored at 4 2 4, 4 2 5 and 4 2 6 above.
[576] See the discussion of *Flaks v Sarne* 1959 1 SA 222 (T) at 4 2 6 above.

5 2 1 The duty to disclose

First, he must prove that the other party had a duty to disclose the relevant information.[577]

The first part of the enquiry is how one would establish the existence of a duty to disclose in the residual cases. The courts have identified various factors as being instructive in this regard. In the light of the preceding chapters, these factors may be summarised as follows.

The consideration referred to most often is the nature of the relationship between the parties.[578] It has been suggested by the judiciary and academic writers that the important matter to consider when looking at the relationship between the contracting parties is whether there is an involuntary reliance of one party on the other for the disclosure of specific information.[579] As indicated in chapter four, most judgments base their discussion of involuntary reliance on a famous article by Millner,[580] in which he submits that:

> "[t]he key to this question must lie in the precise relationship between the parties, i.e. whether that relationship is one in which the ordinary contemplation of the parties is or ought to be that A will disclose to B facts of a material kind of which he knows B to be ignorant."[581]

This submission is derived from a consideration of the situations recognised by law as creating a duty of disclosure, specifically when dealing with contracts previously designated *uberrimae fidei*.[582] In these contracts the one party is often so reliant on the other that he cannot adequately protect his own interests.[583] However, this element may also be present in

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[577] See 4 2 6 and 4 3 above.

[578] See 3 3, 3 6, 4 2 7, 4 2 8, 4 2 9 and 4 3 above. This factor is identified in the discussion of the specific circumstances where a duty to disclose is recognised as well as in the residual cases

[579] (1957) *SALJ* 177; see the discussions at 4 2 8, 4 2 12, 4 2 13 and 4 3 above. This construct has been cited with approval by other authors such as RH Christie in *The Law of Contract in South Africa* 6th ed (2011) 279. It was also confirmed in case law as a strong indicator of the existence of a duty to disclose. See specifically the judgments in *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W); *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 797C; *Orban v Stead* 1978 2 SA 713 (W) 718C.

[580] *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W).

[581] Millner (1957) *SALJ* 188.

[582] On linking involuntary reliance to contracts *uberrimae fidei*, specifically insurance contracts see Christie *The Law of Contract* 279.

[583] Hutchison & Pretorius *The Law of Contract* 135. The same element has been identified in German law as being indicative of a contract being voidable on grounds of fraud, and is explored in O Lando *Principles of European Contract Law* Volume 1 & 2 (1994) 256. Fiduciary relationships are characterised by this type of reliance, where the one party

residual cases, outside of contracts *uberrimae fidei.* This signifies that the type of contract is not decisive when determining the existence of a duty to disclose, but that the focus should rather be on the individual circumstances of the transaction.[584]

A factor which contributes to creating an involuntary reliance is the requirement that the knowledge to be disclosed must be exclusively within the domain of one party. It has been suggested that the knowledge in such a case must be "inaccessible to the point where its inaccessibility produces an involuntary reliance on the party possessing the information."[585]

Another important factor identified by the courts and the legislature when determining the existence of a duty to disclose is the requirement of materiality. It has been stated on more than one occasion that it is only where the information in question is material that the disadvantaged party would be able to claim rescission based on non-disclosure.[586] This is also apparent from the quote of Millner above, which recognises that the facts to be disclosed must be of a "material kind".

It should be borne in mind, though, that materiality means different things in different contexts. In insurance law, materiality is determined by asking whether the reasonable person in the position of the insured would have considered the undisclosed information to be reasonably relevant to the risk and the assessment thereof by the insurer.[587] Although this is very specifically tailored to insurance contracts, this objective test of reasonableness is also used to determine materiality in sale contracts when dealing with latent defects.[588] Relevance is usually a strong indicator of materiality, as a fact is only material if it is relevant to the parties' decision to contract. This position is confirmed by legislation,[589] and also by the judiciary, who

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necessarily depends on the other to act in their best interests. In these types of relationships, a duty of disclosure always exists between parties, and this exception to the general rule is discussed fully at 3 3 of this work.

[584] Hutchison & Pretorius *The Law of Contract* 135; *Orban v Stead* 1978 2 SA 713 (W). In his article at (1957) *SALJ* 189, Millner appears to agree with this, as he states that the same type of relationship can arise in other situations where there is an "involuntary reliance of one party on the other for information material to his decision".

[585] *Absa Bank Ltd v Fouche* 2003 1 SA 176 (SCA) 181F-G; Christie *The Law of Contract* 279.

[586] *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) 416A.

[587] Discussed at 3 1 above.

[588] *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O).

[589] Section 1 of the Companies Act 71 of 2008 provides a definition of materiality which states that facts are only material if they are significant in the circumstances of a particular matter, and are likely to affect the judgment or decision-making of the parties involved. This section is discussed fully in 3 5 2 1 above. s92 of the National Credit Act 34 of 2005 also states that consumers must be provided with all information which would be relevant to their decision to contract. Although it is

have defined material information as "information which has the natural and probable effect of influencing the mind of the person to whom it is made".[590] The use of materiality as a factor in determining whether a party's failure to disclose is reprehensible is confirmed in case law,[591] and it works together with the requirement of knowledge to indicate whether a party intended to defraud another by their non-disclosure.

In the conclusions of the previous chapter, our attention was drawn to the difference between the requirement that the duty to disclose must relate to a material fact and the requirement that the misrepresentation itself had to be material.[592] The latter requirement will be addressed below as a factor which plays a role in inducing the party to contract.[593]

Thus far, the focus was on specific factors that indicate when a duty to disclose arises.

The important question now arises whether there is any room for resorting to more general standards. We may now return to considering the principle of *bona fides,*[594] which, as indicated earlier, is one of the underlying principles of modern South African contract law. Despite the recognition that *bona fides* plays a role in all contracts, there has been consistent debate about its nature, scope, meaning and function in our law.[595] In this regard it is significant that the judiciary has largely rejected the idea that good faith is a free-floating principle, able to be applied as a test on its own. However, it has been accepted that good faith can function as a catalyst for developing specific new common-law rules,[596] in this case, the general rules relating to when duties to disclose could arise. There is still a minority view that good faith should be a separate criterion, and function as the sole test for determining

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not expressly stated that the information must be material, it can be deduced that it is not necessary to disclose information which would have no bearing on the consumer's decision-making. Also see the discussion of this section at 3 5 2 1 above.

[590] *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) 416A.

[591] *Orban v Stead* 1978 2 SA 713 (W) 718C; *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C) 726C.

[592] See 4 3 above.

[593] See 5 2 2 below.

[594] *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W). It was also suggested in the discussion of *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA) at 4 2 13 above that the court's identification of the conduct of "honest men in the circumstances" as decisive in establishing a duty to disclose could be one way of giving effect to *bona fides*.

[595] SW Van der Merwe, LF Van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 4th ed (2012) 199-200.

[596] *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA).

whether liability for non-disclosure happens in any given situation.[597] It would be difficult to set a limit on this test, and its variable nature means that it would find expression in different ways depending on the particular circumstances at hand. For this reason, it appears that the view of good faith as a 'catalyst', or as fulfilling a 'midwife function' by facilitating the birth or development of new rules is the correct one to adopt. The rules and standards applied by the judiciary in residual cases of non-disclosure can therefore be said to be manifestations of this principle, without it being possible for a party to rely on the vague assertion that a duty to disclose arises merely because good faith demands it.[598]

At this juncture we can return to the judgement of Jansen J in *Meskin v Anglo-American Corporation of SA Ltd*, and especially to the following statement.[599]

> "It is now accepted that all contracts are *bonae fidei* (some are even said to be *uberrimae fidei*). This involves good faith (*bona fides*) as a criterion in interpreting a contract (Wessels, op. cit., para. 1976) and in evaluating the conduct of the parties both in respect of its performance (Wessels, para. 1997) and its antecedent negotiation. *Where a contract is concluded the law expressly invokes the dictates of good faith, and conduct inconsistent with those dictates may in appropriate circumstances be considered to be fraud*; but where no contract is concluded, where at most there are abortive negotiations for a contract, the good faith that is a concomitant of the concluded contract does not become operative. It follows in such a case a duty to disclose, if any, must flow from considerations other than contract. In the premises it seems that authorities dealing with a duty to disclose *in contrahendo* are not, strictly speaking, appropriate to the present case. The problems in that sphere are, however, somewhat analogous and there may be some features throwing light upon the cognate question in delict. *The answer to the question whether in respect of a concluded contract there existed a duty to disclose in contrahendo, is to be found, as pointed out, in the dictates of good faith.* What this entails has crystallized to some extent, but certain aspects may still be considered uncertain. Good faith, as an objective standard, must rest largely upon an ethical basis."[600]

According to this extract, good faith can function as a separate criterion, and conduct inconsistent with the dictates of good faith would be fraudulent. The standard is based on

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[597] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA).

[598] The same conclusion is reached in modern South African law, where the *bona fides* principle has been identified as having a "midwife function", finding application through other legal rules. The judgments in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC) and *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) confirm this interpretation. This view is supported by M Lambiris, "The *exceptio doli generalis*: an obituary" (1988) 105 *SALJ* 644-651.

[599] 1968 4 SA 793 (W). See 4 2 8 above.

[600] 802A-B (own emphasis).

ethical considerations, and the court referenced Cicero's famous example of the grain merchant. In this example, it was questioned whether the merchant, having brought grain to sell in a famine-ridden country, would be bound to disclose his knowledge of the imminent arrival of other ships bearing the same cargo, which would substantially lower his prices. As we recall from the discussion of this example in chapter two, and again in chapter four, Cicero considered the merchant's silence in such a case to be wrongful, as it would be morally wrong to keep silent. However the court in *Meskin*, despite recognising that good faith is based on ethical considerations, cautions against relying solely on moral grounds for imposing legal liability.[601] Later in the judgment, we see that the court ultimately relies on the involuntary reliance test proposed by Millner, and uses this test as a way to give effect to the dictates of *bona fides*.[602] From this it is clear that, even where good faith is accepted to be the main criterion by which contracting parties' conduct is judged, it can only be applied using more concrete criteria. This is also seen in a number of international instruments, where, although the main criterion is good faith, a list of other criteria is provided which must be considered when applying the good faith criterion.

In the international sphere, we see a marked difference in the way in which duties of disclosure are approached in common law and civil law respectively, especially where the issue of good faith is concerned. As seen in the overview provided in chapter two, common law systems are traditionally resistant to the idea of recognising duties to disclose and of imposing liability for non-disclosure between contracting parties.[603] The only exception, as we have seen, is in the case of contracts *uberrimae fidei*, in which parties are bound by the highest level of good faith.[604] At a number of points throughout this work, the construct of *uberrimae fides* has been criticised, and it has been abolished in modern South African law.[605] By contrast, civil law systems do not recognise varying degrees of good faith,[606] and rather take the view that good faith and fair dealing are general underlying principles of the law of contract which are given effect to through other legal rules.[607]

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[601] 803E.
[602] 808F-G.
[603] See 2 2 2 above for a full discussion.
[604] 2 2 2 3 above.
[605] This issue has been discussed at 2 2 2 3, 3 1, 4 2 1, 4 2 2 and especially the discussion of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) at 4 2 11 above.
[606] See *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 432A.
[607] See the discussion of German law at 2 2 3 above.

This notion that good faith and fair dealing constitute underlying principles of the law of contract is echoed in the international instruments governing contract law. The UNIDROIT Principles of International Commercial Contracts (PICC) sets these principles as the minimum standards of behaviour between contracting parties,[608] informing the way in which they conduct themselves throughout the contracting process. This formulation is found in Article 1:7 of the PICC and, as underlying principles, good faith and fair dealing cannot be used as a specific test for the liability of contracting parties. Article 1:102 of the Principles of European Contract Law (PECL) as well as the more recent Article 49 of the Common European Sales Law (CESL) also makes provision for the application of these principles in contract law. As part of the section in the PECL dealing with freedom of contract, good faith and fair dealing are presented as overarching principles for parties' conduct to abide by.[609] However, these principles are not as absolute as the PICC, as parties are given the option of excluding them, and are only required to "have regard" to these principles when contracting. It is clear that there is a need to determine which legal rules would give effect to the general principles of good faith and fair dealing in imposing liability for non-disclosure.

In a commentary on the UNIDROIT principles, it is suggested that

> "(t)he 'reasonable commercial standards of fair dealing' test for imposing a duty to disclose can be regarded as a manifestation of the general duty laid down in Art 1.7 that each party must act in accordance with good faith and fair dealing in international trade."[610] (footnotes omitted)

It is further suggested that the vague nature of the good faith standard requires that specific circumstances be identified in which disclosure would be required. In this regard some examples of specific circumstances where duties of disclosure would normally be imposed have been identified.[611] These include relationships of trust and confidentiality, contracts *uberrimae fidei*, and the situation where a party fails to answer a direct question posed to him by the other. These examples bear a marked resemblance to some of the specific instances

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[608] 2 2 4 1 above.
[609] 2 2 4 1 above.
[610] JE du Plessis 'Article 3.8' in S Vogenauer and J Kleinheisterkamp *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009) 438.
[611] Du Plessis 'Article 3.8' in Vogenauer & Kleinheisterkamp *Commentary on the UNIDROIT Principles* 438.

recognised in South African law as situations where duties of disclosure are always imposed. In these circumstances, it would seem that disclosure is demanded due to "reasonable commercial standards of fair dealing".

Guidance about the application of a good faith standard is also provided in Article 4:107(3) of the Principles of European Contract Law (PECL), which provides a list of circumstances where good faith and fair dealing would require that duties of disclosure be recognised. The article reads as follows:

> (3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
> (a) whether the party had special expertise;
> (b) the cost to it of acquiring the relevant information;
> (c) whether the other party could reasonably acquire the information for itself; and
> (d) the apparent importance of the information to the other party.

The Common European Sales Law (CESL) specifically provides that, in the case of fraudulent non-disclosure, the main standard used when imposing duties of disclosure between contracting parties is the standard of good faith and fair dealing.[612] Article 49 of the CESL addresses fraud, and Article 49(3) sets out some of the circumstances which must be considered "in determining whether good faith and fair dealing require a party to disclose particular information". These circumstances include:

> (a) whether the party had special expertise;
> (b) the cost to the party of acquiring the relevant information;
> (c) the ease with which the other party could have acquired the information by other means;
> (d) the nature of the information;
> (e) the apparent importance of the information to the other party; and
> (f) in contracts between traders good commercial practice in the situation concerned.

This list bears clear similarities to the list contained in Article 4:107 of PECL, as virtually identical wording is used in four of the circumstances listed here. Two extra provisions are included, namely the nature of the information concerned and the importance of good

[612] Article 49(1) Common European Sales Law.

commercial practice. The nature of the information and the apparent importance thereof is identified as the most important consideration when giving effect to the dictates of good faith.[613] If it is clear that the information in question is essential for the other party's decision to contract, and it is also known to the party with the information that the other is ignorant thereof, the argument is that a duty of disclosure should be recognised in such an instance.[614]

Interestingly, this latter criterion of the nature and importance of the information appears to comprise the factors of knowledge and materiality identified in South African law as being important in establishing the existence of duties of disclosure. This is also seen in the identification of accessibility of information as a relevant consideration, and it would appear that where the other party could not reasonably acquire the information and the non-disclosing party had sole access to it, there would be a duty to disclose. Materiality is evident from the fact that the apparent importance of the information is a relevant concern. If the information was important to the other party, and was inaccessible to him, then it would stand to reason that the party with knowledge of and access to the relevant facts would bear a duty to disclose. In this way, concrete expression is given to the seemingly abstract demands of good faith. The lists provided in PECL and CESL are by no means exhaustive, but do provide some indication of the types of factors used to give effect to principles of good faith and fair dealing.

South African law does not expressly identify good faith as the main standard for determining the duty to disclose as the international instruments do, but it is clear that, even in the event that good faith is recognised as the main criterion, other considerations are still consulted in order to give effect to it. This may lead one to conclude that it is doubtful whether it is really necessary for South African law to give more express recognition to the standard of good faith, as the application of similar considerations by the judiciary gives rise to a similar result.

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[613] R Schulze (ed) *Common European Sales Law (CESL) Commentary* (2012) 270.
[614] Schulze *CESL Commentary* 270.

5 2 2 The representation must be material and must induce the victim to act

It has already been established that a duty of disclosure can only exist in respect of material facts,[615] and materiality of the facts has been identified in a number of judgments as an indicator of a duty to disclose. However, materiality has also been raised as a relevant enquiry with regard to the representation itself. The courts have identified that the representation (or in this case non-disclosure) itself must be material.[616] If the non-disclosure is not material, then it appears that the court would not be willing to impose liability.

Materiality in this context is determined with reference to the conduct of the reasonable person.[617] In other words, was the non-disclosure of such a nature that it would have induced the reasonable person to act? It appears that there must be a causal link between the non-disclosure and the actions of the wronged party. In this way, the requirements of materiality and inducement are linked, as, for the non-disclosure to be material, it must have been likely to induce the reasonable person to enter into the contract. Although materiality as it relates to the facts and materiality of the representation made are seemingly two separate enquiries, it is interesting that both are determined with regard to the standard of reasonableness. Nevertheless, it must be remembered that the application of the reasonableness test differs according to whether we are determining materiality of the facts or materiality of the representation itself.

Both of these enquiries are important when imposing liability for non-disclosure. First, we must consider whether the facts were material in order to determine whether a duty to disclose existed. Once such a duty has been established, it remains to be seen whether a subsequent failure to speak would be material, in that it would be likely to induce the reasonable person to act. From the judgments discussed in the previous chapter, it appears that both of these requirements must be fulfilled in order for a party to successfully rely on non-disclosure as grounds for relief.[618]

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[615] See 5 2 1 above.
[616] *Orban v Stead* 1978 2 SA 713 (W) 717E-G; *Novick v Comair Holdings* 1979 2 SA 116 (W) 149D-F.
[617] See 4 2 9 and 4 2 10 above.
[618] For a discussion of the requirement that the non-disclosed facts be material, see *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) and the evaluation thereof at 4 2 7 above. For a discussion of the materiality of the representation see 4 2 9 and 4 2 10 above.

5 2 3 Fault

It is accepted that a party seeking rescission based on a positive misrepresentation does not have to prove that it was made culpably. However, when claiming rescission based on non-disclosure, the favoured position appears to be that the non-disclosure must be fraudulent or negligent. Christie supports this, saying:

> "All the authorities on which the doctrine of involuntary reliance is founded treat it in the context of fraud as a duty not to conceal material facts. They do not even mention the possibility of liability for innocent non-disclosure through ignorance or inadvertence, and indeed the concept of innocent misrepresentation by silence, outside the special field of insurance, presents the difficulty that the intent to induce the other party to enter into the contract cannot exist unless the silence has been deliberate. It would seem to follow that involuntary reliance, as a test for deciding whether in any particular case silence amounts to a representation, must be confined to cases in which the silence has been deliberate."[619]

From this it is clear that mere non-disclosure when there was a duty to disclose is not sufficient to ground an action for rescission.[620] The party who failed to disclose must have been either fraudulent or negligent in doing so in order to successfully claim on grounds of non-disclosure.[621]

The court in *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)*[622] admittedly suggested that an action could be grounded on mere or innocent non-disclosure, but this was not applied in any subsequent cases. The requirement of fraud when imposing liability for non-disclosure is also expressly recognised in some international instruments as a necessary requirement to hold a party liable for non-disclosure.[623] This latter position appears to be the correct one, especially in light of the difficulty identified by Christie,[624] namely that it cannot be said that someone intended to induce another to contract unless they deliberately kept silent. Policy grounds such as fairness must play a role in such a situation, as it would be

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[619] Christie *The Law of Contract* 279.
[620] *Dibley v Furter* 1951 4 SA 73 (C) 88B-D; *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 800F; *Orban v Stead* 1978 2 SA 713 (W) 718D-F.
[621] This is confirmed by the judgments in *Dibley v Furter* 1951 4 SA 73 (C) 88B-D; *Cloete v Smithfield Hotel* 1955 2 SA 622 (O); *Flaks v Sarne* 1959 1 SA 222 (T); *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W); *Orban v Stead* 1978 2 SA 713 (W).
[622] 1965 3 SA 410 (W)
[623] See Article 3.8 of the UNIDROIT PICC.
[624] Christie *The Law of Contract* 279.

unfair to penalise someone for an innocent non-disclosure, given that they lacked the necessary intent to defraud another party. Extending the scope of liability for non-disclosure in this way could be unduly onerous on the party keeping silent. This being said, it is interesting to note that the Consumer Protection Act 68 of 2008 does not appear to require fault.[625] In terms of the Act, a supplier must not "fail to disclose a material fact if that failure amounts to a deception".[626] No mention is made of fault, which leaves open the possibility that suppliers can be held liable for innocent non-disclosure. The effect of this provision has yet to be seen, but it could possibly lead to the recognition of liability for innocent non-disclosure in other types of contract in the future.

As mentioned above, the question of knowledge plays a role in establishing a duty to disclose, as an involuntary reliance is created where facts are within the exclusive knowledge of one party, and the other necessarily relies on him for such information to be disclosed.[627] Knowledge is also relevant in determining whether the party keeping silent intended to defraud the other.[628] It must be asked whether the accused had knowledge of the non-disclosed facts, and also whether the disadvantaged party was truly ignorant of the information.[629] If there was no way for the latter to discover the information, the facts would then be within the exclusive knowledge of the accused. Further, if the accused knew of the other party's ignorance and kept silent regardless of this knowledge, then that may be indicative of that party's intention to defraud the other contracting party by keeping silent.[630]

5 3 Non-disclosure in delictual context: 'legal convictions of the community' and '*boni mores*'

5 3 1 The disclosure must be wrongful

[625] See 3 5 4 above.
[626] s41(1)(b).
[627] This is confirmed in Millner (1957) *SALJ* 189 and *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA). English law also recognises that knowledge plays a role in imposing a duty of disclosure as such a duty would only exist where the facts were within the knowledge of the party keeping silent. The judgment in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 confirms this.
[628] This element was one of the common features of the case discussions in chapter four above, and has also been identified in English law, specifically in the writing of G Spencer-Bower *The Law Relating to Actionable Non-disclosure* (1915).
[629] *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) 416A.
[630] See the discussion of *Dibley v Furter* 1951 4 SA 73 (C) at 4 2 4 above.

As we have seen in the previous chapter, the general rule is that there is no liability for omission, but this rule is subject to certain exceptions, similar to the general rule regarding non-disclosure in the law of contract.[631]

In order to impose liability for an omission in the law of delict, there must be an unlawful failure to disclose information.[632] Duties of disclosure in the law of delict are determined by taking standards of reasonableness, the legal convictions of the community and *boni mores* into consideration.[633]

This latter criterion of *boni mores* bears a strong resemblance to the *bona fides* criterion used in contract law when determining the existence of a duty to disclose. Both of these considerations have an ethical basis, and reflect the accepted mores and standards of behaviour expected by the wider community. It has been cautioned that this does not necessarily prescribe the same duties of disclosure in both spheres.[634] However, there is also the view that the tests for recognising a duty of disclosure in the law of contract and the law of delict are essentially the same, as the touchstone for each is the legal convictions of the community, and the same types of considerations are used to give effect to the dictates of *bona fides* and *boni mores*.[635] In the *ABSA* case,[636] the court uses the behaviour of "honest men in the circumstances" as a measure of determining the existence of a duty to disclose, and includes the requirements of knowledge and materiality as factors which would influence such behaviour.[637] It may be argued that this reliance on ideal standards of behaviour between contracting parties is simply another way of giving expression to policy considerations and the legal convictions of the community. If so, then there may in truth be no difference between the standards applied in the law of contract and the law of delict when determining the existence of a duty to disclose, as both standards ultimately rely on the *mores* of today.

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[631] See 4 2 8 above.
[632] *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA) para 5.
[633] *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 800A-C.
[634] 804E-F.
[635] *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA).
[636] 2003 1 SA 176 (SCA).
[637] See the discussion at 4 2 13 above.

As we saw in the previous chapter, the court in *Meskin v Anglo-American Corporation of SA Ltd*[638] also investigated the meaning of *boni mores* in the context of non-disclosure. It was suggested that *boni mores* would only require a duty of disclosure in fiduciary relationships, where the relationship between the parties is of such a nature that one party is reliant on the other for disclosure of information. This caution about extending the scope of *boni mores* beyond the expectation that parties to a specific type of contract would have a duty of disclosure is evident from the following statement:

> "[i]t seems, however, most unlikely that the standard could be higher than that suggested by Millner in respect of 'designed concealment' *in contrahendo*, with the practical yardstick of 'the involuntary dependence of one party upon the other for information material to his decision'."[639]

From this judgment, it appears that the courts in giving effect to the dictates of *boni mores* also rely on the involuntary reliance construction used in the law of contract as a means of determining whether a duty of disclosure exists between contracting parties in any given circumstance.[640]

5 3 2 Other requirements

As in the law of contract, it is not sufficient to establish a duty of disclosure. Something further must be proved in order to succeed with a delictual claim for damages based on non-disclosure. Apart from a material misrepresentation and inducement,[641] the party seeking to institute such a claim must further prove fault. From a reading of the case discussions in the preceding chapter, it is obvious that initially the fault requirement would only be satisfied if *dolus* was present, and the non-disclosure was fraudulent. However, the law has developed in such a way that it is now also possible to ground a claim on negligent non-disclosure. Following the judgment in *Cloete v Smithfield Hotel*,[642] Millner suggested the possibility of basing an action on negligent non-disclosure.[643] This suggestion was not applied until the

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[638] 1968 4 SA 793 (W)
[639] 808A.
[640] In view of what has been said above, the question then becomes: is there the involuntary reliance of one party upon the other for information material to his decision?" 808F-G.
[641] See *ABSA Bank Ltd v Fouche* 2003 1 SA 176 (SCA) para 6; and as to the meaning of these concepts see 5 2 2 above
[642] 1955 2 SA 622 (O).
[643] This possibility was also acknowledged by AJ Kerr in his commentary on *Orban v Stead*, found at (1979) 96 *SALJ* 17-23.

more recent judgments in *McCann v Goodall Group Operations*[644] and *ABSA Bank Ltd v Fouche*,[645] in which the courts allowed for the fact that when claiming delictual damages, proving that a party's silence was negligent would satisfy the fault requirement in the form of *culpa*. Ultimately, the position in contract and delict may be regarded as similar, inasmuch neither fields award relief in the event of innocent non-disclosure, and negligent non-disclosure has only rarely been actionable.

5 4 Consumer Protection Act: Section 41

Section 41 of the Consumer Protection Act 68 of 2008 addresses false, misleading or deceptive representations in consumer contracts. As discussed in chapter three above,[646] s 41 provides a statutory duty of disclosure, but limits the suppliers' duty to disclose material facts.[647] However, no definition of materiality was provided in the Act itself, leaving it open to interpretation. The common law meaning of materiality could be useful in this regard. Material facts are considered to be those which have the natural consequence of inducing parties to enter into a contract.[648] This interpretation would be applicable to consumer contracts, as the aim of the legislation is to equip the consumer with enough information to allow him to make an informed decision when entering into consumer contracts. Also, it would stand to reason that only information relevant to the type of contract would need to be disclosed.[649]

Another issue left open in s 41 is whether it would apply to instances of innocent non-disclosure. Traditionally, the common law position has been against imposing liability for innocent non-disclosure, with the judiciary requiring that either fraud or negligence must be proven in order to claim a remedy based on non-disclosure.[650] The international instruments have taken the same approach, dealing with non-disclosure as a form of fraud.[651] Section 41 seems to allow for the possibility that, under the Act, a supplier could be held liable for

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[644] 1995 2 SA 718 (C).
[645] 2003 1 SA 176 (SCA).
[646] 3 5 4 above.
[647] This is similar to the common law approach; see *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)* 1965 3 SA 410 (W) 416A and 4 3 above.
[648] See 5 2 1 above.
[649] 5 2 above.
[650] *Dibley v Furter* 1951 4 SA 73 (C) 88B-D; *Cloete v Smithfield Hotel* 1955 2 SA 622 (O); *Flaks v Sarne* 1959 1 SA 222 (T); *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W); *Orban v Stead* 1978 2 SA 713 (W).
[651] Article 3.8 UNIDROIT Principles of International Commercial Contracts; Article 49 Common European Sales Law.

innocent non-disclosure.[652] The Act only states that a supplier must not "fail to disclose a material fact if that failure amounts to a deception".[653] It seems that if the consequence of non-disclosure is the deception of the consumer, then the consumer would have a remedy against the supplier in terms of the Act,[654] regardless of the supplier's state of mind. This differs from the general common law position, although it has been suggested in *Pretorius v Natal South Sea Investment Trust Ltd (under judicial management)*[655] that an action could be grounded on mere or innocent non-disclosure.[656] In this regard, it would seem that the Act would be of broader application than the common law, and suppliers could potentially be liable for innocent non-disclosure of material facts.

5 5 Summary

It has been enquired throughout this discussion whether difficulties relating to imposing liability for non-disclosure may be alleviated by the identification of a single principle or test, which could be used in all situations to indicate when disclosure is required.[657] After considering the exploration of the development and approach to non-disclosure in South African law, it may be concluded that there is in fact no such unifying principle which would be applicable to all cases of non-disclosure. Apart from the recognised exceptions where disclosure is always required between parties to a contract, the residual instances have been dealt with on a case by case basis, with the circumstances of each being considered in order to decide whether liability should be imposed. Historically, there has been some reliance on principle of good faith, and in modern law this principle is recognised as a value underlying the law of contract, which provides a general standard measuring the conduct of contracting parties *inter se*. But it was argued that these principles cannot be used as separate tests for liability in cases of non-disclosure. Ultimately, there is a need for specific standards which are always present in instances where liability has been imposed for non-disclosure. In this

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[652] 3 5 4 1 above.
[653] s41(1)(b).
[654] The consumer must first exhaust the statutory remedies (a list of which is provided in section 69 of the Act), and would only then have recourse to the courts in terms of section 52. See 3 5 4 above.
[655] 1965 3 SA 410 (W).
[656] See 4 2 7 above.
[657] Hutchison suggests that "the law might better be stated in terms of a unifying principle spelling out when disclosure is required". ("Good faith in contract" in *Good Faith in Contract* 230.)

regard the case law reveals that there are certain factors which are repeatedly regarded as relevant in situations of non-disclosure. As we have seen, these factors were developed separately in the context of deciding whether to award contractual claims for rescission and restitution, and delictual claims for damages.

It has been established that both when instituting an action in contract and delict it must be established whether there is in fact a duty to disclose, and whether certain other requirements have been met, especially whether the failure to comply with this duty was either fraudulent or negligent. In determining whether the duty exists, an important difference is that the law of contract does not resort to general standards such as wrongfulness. However, there are notable similarities in the specific factors that courts regard as relevant in this context. These factors have the potential to evolve over time, depending on the specific circumstances of each case. This ensures that legal development of the law could continuously take into account changing values. In this regard it is concluded that the South African common law could also benefit from taking cognisance of developments in foreign law, and especially provisions on non-disclosure in some model instruments. Furthermore, some of the conclusions drawn above could also assist in the application of legislative provisions aimed at protecting consumers from non-disclosing suppliers.[658]

[658] See 5 4 above on s41 of the Consumer Protection Act 68 of 2008; also see 3 5 4 and 5 4 above.

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