



ELIZABETH McCAUL
Director
Deneys Reitz Attorneys
Conveyancing Department
Cape Town



DIANE CANTERBURY
Associate
Deneys Reitz Attorneys
Conveyancing Department
Cape Town

The effect the Consumer Protection Act will have on the sale of property

The Consumer Protection Act ("the CPA") has been a work in progress for a number of years and we will all be affected by it in one way or another in our everyday transactions. The ambit of the CPA is wide enough to have an impact on the sale of property, especially where developers, speculators or estate agents are involved.

Certain provisions of the CPA came into operation in April this year, dealing with the establishment of the national consumer protection institutions. The Act is technical and complex and the regulations are not yet available. The consequence is that the date the CPA will come into force has been postponed to 31 March 2011.

The full understanding of the impact the CPA will have on consumers is presently being analysed in a vacuum, resulting in a speculative discourse. The interpretation process of the CPA is ongoing, and only when its provisions can ultimately be tested in our courts will clarity be forthcoming.

The preamble to the CPA briefly summarises its aims:

"To promote a fair, accessible and sustainable marketplace for products and services by setting national norms and standards relating to consumer protection."

The CPA will bring about a complete turnaround from the position where the consumer typically assumed most of the risks in a transaction to the supplier now assuming these risks. A supplier will now have a far greater responsibility toward the consumer, with severe consequences should that supplier not adhere to the provisions of the CPA.

Agreements for the sale of land must always be in writing; if not, they are void. For property agreements to be valid they could notionally be reduced to writing in less than one page, and need only contain the names of the parties, property description, the agreed purchase price and, preferably, a date for payment of the price. Court cases and other disputes usually stem from deeds of sale being silent on important issues. As a result, deeds of sale are often very lengthy and cluttered with legal jargon. It is important to understand why certain extra clauses are now commonly included in a deed of sale. Some of these clauses are referred to as boilerplate clauses and deal with the way in which the agreement itself operates as opposed to the rights of the parties under the particular transaction. In the absence of boilerplate and commonly-used clauses, the parties must rely on the general system of the law (statutory law and common law) or the courts for interpretation of their obligations.

Statutory law is the written law or legislation enacted by parliament. Common law comprises Roman Dutch and English law and subsequent judicial decisions developing that law. It finds application if the parties to a contract have not agreed on a specific term which is contrary to the common law or did not include a certain clause in their deed of sale, for example the *voetstoots* clause (which is not regulated by statutory law).

Until the CPA has come into operation, parties to a sale agreement of property can agree to

any term in a contract, even if that term is unfair, one-sided or operates harshly against one of the parties, as long as it is not illegal or immoral and against public policy. In essence, the parties enjoy unrestricted freedom to contract.

The CPA sets out to change this free and unfettered contractual right, and will prescribe very specific fair practices into the process of negotiating and concluding contracts for the sale of property. In future our courts will have to exercise a value judgment when considering the content of contracts. It will mostly be the commonly used and boilerplate clauses that will fall under scrutiny, and our courts will insist that agreements are:

- clear and understandable; and
- contain fair, reasonable and just terms.

This means that:

- the clauses in the agreements must not be excessively one-sided;
- the terms must not be so adverse to the consumer as to be inequitable; and
- the consumer must not have relied on misleading or deceptive misrepresentations or opinions given by the supplier to the detriment of the consumer.

But not all contracts or contracting parties are in fact subject to the CPA. Firstly, the CPA is not intended to protect a company, close corporation, trust, partnership, association or other body corporate with an asset value or annual turnover exceeding a certain threshold. The threshold will be prescribed by the still outstanding Regulations. The Minister has, however, proposed a threshold of R3 million. This amount will be finally determined after all public comments are taken into account. All individuals are protected by the CPA.

The CPA also does not protect agreements that are not concluded in the ordinary course of the supplier's business. In considering the core concepts defined in the CPA, it is clear that transactions in the ordinary course of the supplier's business, which includes dealing in immovable property, are covered by the CPA.

By way of example:

1. A developer (as supplier) offers units in a

development for sale to a member of the public (as consumer); and

2. Speculator sells his house to a consumer.

Normal once-off private transactions between a seller and buyer of property for private purposes will not be subject to the CPA.

However, if an estate agent is involved in marketing the property and negotiating the sale between the seller and purchaser, this marketing service provided by the agent is covered by the provisions of the CPA.

It is important to look critically at the consequences that flow from the intervention of an estate agent in the negotiations between the parties.

1. The mandate agreement between the seller or the purchaser (whoever instructed the agent) and the estate agent is governed by the CPA and must be in fair and reasonable terms.
2. The marketing service which the agent supplies to the purchaser must also comply with the CPA. The consumer is entitled to:
 - responsible marketing;
 - honest dealings;
 - equality and privacy;
 - full disclosure of information.
3. The third potential consequence is the relationship between the seller and purchaser who conclude the deed of sale. Even though this agreement is often facilitated by an estate agent, the content of this agreement essentially remains a private, once-off transaction resulting from negotiations between the parties, albeit with the intervention of the estate agent. It seems to fall outside the scope of the CPA. Our courts will eventually have to draw the line and, either narrowly or broadly, interpret the provisions for these once-off transactions.

If the sale agreement falls under the CPA, some of the commonly used clauses will have to undergo amendment. Breach clauses are often one-sided and drafted in favour of the seller and are onerous to the purchaser in the event of breach of the agreement. The purchaser now has a right in terms of the CPA that the breach clause be fair and reasonable, and not so adverse to the purchaser so as to be inequitable.

Another example is the *voetstoots* clause. This clause is normally inserted for the protection of the seller or supplier and means that the property is sold "as is" – no matter its condition and without any guarantees. Such clauses are designed to protect a seller from liability for damages arising from hidden, unknown defects in the property. This legal principle does not apply if the seller is aware of the existence of a latent defect, and in bad faith fraudulently and deliberately conceals the defect from the purchaser. Currently, if the *voetstoots* clause is omitted from the agreement, common law prevails, resulting in the seller being responsible for latent defects in the property for three years from the discovery of the defect by the purchaser.

The CPA now introduces an implied warranty by the supplier (seller of the property) that the improvements on the property are reasonably suitable for the purposes for which they are usually intended, are of good quality, in good working order, free of defects and will be usable and durable for a reasonable period of time in normal use. It does not matter whether the prospective purchaser could see the defect or not, nor whether the seller fraudulently concealed the defect. The seller is deemed to have given an implied warranty of quality.

The *voetstoots* clause can no longer be inserted in agreements for property sold to individuals or small corporations in the ordinary course of business, unless it is watered down and contains a list of defects highlighted to the purchaser. The purchaser must be informed that the property is offered in a certain condition (for example with a specific defect), and must expressly accept the property in that condition. Defects must be disclosed expressly and a general clause that the purchaser accepts the property "as is" will not be acceptable.

Developers and estate agents must review their standard contracts to ensure that they are in line with the requirements of the CPA. Most importantly, the contracts must be drafted in plain and simple language and must contain terms that are fair, just and reasonable. Any defects in a property must be disclosed to the prospective purchaser, and must be reduced to writing and signed by both parties.

The effect of the CPA may seem harsh to certain members of the business community. However, it is important to keep in mind that the purpose of the CPA is to protect the rights of consumers and to empower them to bring these rights to fruition – a much needed goal in the economy in which we live. □