

Monday Contemplation No 13

Defects and the Property Practitioner Part 5

In the last few weeks, we have discussed the mandatory disclosure form and in particular Section 67 and Regulation 36.1 of the Regulations to the Property Practitioners Act 22 of 2019 which is the Regulation dealing with the mandatory disclosure form. Refer back to Defects and the Property Practitioner Parts 1 to 4.

Based upon our understanding of the Act and Regulations, here is what we know:

1. A property practitioner must not accept a mandate unless the seller or lessor has provided a completed and signed mandatory disclosure form.
2. A property practitioner must provide a copy of the mandatory disclosure form to a prospective purchaser or lessee.
3. The completed mandatory disclosure form must be attached to the agreement of sale or lease and **forms an integral part of the agreement**.
4. If the mandatory disclosure form is **not completed, signed or attached to the agreement**, the agreement must be interpreted as if no defects or deficiencies were disclosed to the purchaser.
5. A property practitioner who does not provide the mandatory disclosure form may be held liable by an affected consumer.
6. A consumer is entitled to undertake their own inspection of the property.
7. The disclosure of information by the owner of the property does not represent a warranty.
8. The owner represents that what is indicated in the mandatory disclosure form, is to the best of their knowledge, accurately noted.
9. Both the owner and any prospective purchaser may wish to obtain professional advice regarding the condition of the property or have a professional inspection undertaken.
10. A prospective purchaser acknowledges that they have been informed that professional expertise and/or technical skill may be required to detect defects in the property or non-compliant aspects of the property.

Here is what we also know:

1. Section 67 and Regulation 36.1 **do not change the law relating to latent defects and voetstoets clauses** in agreements of sale.
2. As a reminder, **in terms of our common law**, a seller is liable for all latent defects that existed in a property at the date of sale, for **three years from the date of discovery of that defect**. This is the reason why sellers use a voetstoets clause in the agreement of sale.

Voetstoets, meaning “as is”, means that the purchaser buys the property as is. Should any defects become apparent, the purchaser would have to prove that the seller knew there was a defect in the property and that the seller purposefully hid that defect, in order for the seller to be liable for the defect and lose the protection afforded by the voetstoets clause.

3. Notwithstanding the completion of the mandatory disclosure form and the inclusion of a voetstoets clause in the agreement of sale, the purchaser would still have to prove that the seller knew of a defect and purposefully hid the defect.

Here is what we are not sure of:

1. It is clear, that by completing the mandatory disclosure form, the seller is making certain disclosures regarding the condition of the property.

2. However, the disclosure by the seller, does not represent a warranty.

3. Hence, the apparent contradiction – disclosure does not represent a warranty, but completing the mandatory disclosure form, means that the seller is telling prospective purchasers about the condition of the property; good or bad.

4. Importantly, we await to see how the Courts rule on this contradiction and the view that is taken by the Courts regarding defects that become apparent after a mandatory disclosure form has or has not been completed by the seller.

And what do we learn from this:

1. As a property practitioner, you **MUST** ensure that you obtain a completed and signed mandatory disclosure form when you take a mandate.

2. Likewise, you **MUST** provide a copy of the form to prospective purchasers or lessees.

3. In addition, **ENSURE** that you attach a copy of the form to the agreement of sale or lease.

4. **A completed and signed form is an important protection for you, as a property practitioner** and will assist you in preventing a purchaser from taking issue with you and trying to claim restitution for defects that were not disclosed, as well as **preventing the PPRA from investigating charges of improper conduct** or levying a fine against you, for not complying with your obligations.

5. The mandatory disclosure form gives prospective purchasers and lessees a certain degree of peace of mind.

6. The mandatory disclosure form also provides the seller with an opportunity to disclose all defects or known issues in the property, but will still be protected by the voetstoets clause, for any defects that the seller was not aware of.

7. As a property practitioner, you also need to point out that both the seller and buyer, can obtain their own independent, professional advice regarding the condition of the property.