

Monday Contemplation No 7

Patent and latent defects

In this Contemplation, we will discuss **the differences between patent and latent defects**.

A patent defect is a defect which is clearly visible via a reasonable inspection. If one bought a property that had a broken window which is clearly visible, then this would be a patent defect. The buyer has no recourse against the seller with regard to a patent defect. The buyer can see, so the buyer cannot complain about it after the fact.

A latent defect is a defect which is not clearly visible via a reasonable inspection. What is reasonable all depends upon the circumstances. One wouldn't expect for example, for a potential buyer of a property, to go climbing into the roof of a property to see the condition of the roof. Likewise, that potential buyer, is unlikely to be an expert and so would not know what they are looking at in any event.

Our common law says that the seller is responsible for all latent defects in that property that existed at the date of sale, even if the seller had no knowledge of those defects. In terms of the common law, the seller is responsible for three years from the date of discovery of the defect, not the date of sale! Hence, it is possible, that the seller could be responsible for a defect for many years after the date of sale. Obviously, the more time that passes, the more difficult it is to prove that the defect is a latent defect and not a maintenance requirement that the buyer, as the new owner, is now responsible for.

As a result of the seller's responsibility, the **common law also makes provision** for the property to be sold “**voetstoots**”. Voetstoots is a Dutch word that emanates from our Roman-Dutch law (common law) and it means “**as is**”. In other words, you buy the property as is, as it stands. Hence, when buying the property, open the cupboards, turn on the taps, check that the lights work and so on, because once the buyer has bought the property, they will not be able to make any claims against the seller for latent defects.

However, having said that, **the seller may not hide behind a voetstoots clause** to protect himself against such claims, when the seller has knowledge of those defects. Our Courts have held, that in order to get around a voetstoots clause, **the buyer would have to prove two things:**

That the seller knew of the defect; and
That the seller purposefully hid the defect.

Sounds easy in theory, but often very difficult to prove in practice. Hence, “caveat emptor” – [let the buyer beware]. Buyers are well advised to do their homework before buying a property.

In the next few Monday Contemplations, we will be discussing more around this topic, including some interesting court decisions and the property practitioner's responsibilities.