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WHAT DOES "VOETSTOOTS" MEAN

Recently in the press and on the television there has been much discussion about the voetstoots clause in property transactions particularly in light of the promulgation of the Consumer Protection Act which does not allow a voetstoots clause in an agreement. As explained in the previous article, the Consumer Protection Act does not apply to the situation where a once off seller sells his property and accordingly a once off seller is in fact entitled to utilize the voetstoots clause. Many people are not sure what is meant by voetstoots.

There are basically two kinds of defects which can manifest themselves in a property namely latent defects and patent defects. Patent defects are those which one can see with a normal inspection such as a cracked window, a hole in the wall created by the removal of a nail, smudges on the paintwork or a chip on one of the doors. Latent defects are those which the ordinary man in the street (in other words a person who is not an expert) would not see with a normal inspection. In properties this often includes leaking roofs, unsafe foundations, leaking pools and in some instances a damp problem.

In the common law a seller is never liable for patent defects unless the contract specifically provides that the seller is liable to repair such patent defects. Thus the seller would not be liable for a cracked window unless the contract provided that the seller had to repair the window. The seller would however be liable for latent defects. If one inserts a voetstoots clause in the agreement concluded between a purchaser and the seller then the whole situation changes and the seller is not liable for patent or latent defects (other than of course any obligations which are imposed upon the seller in terms of the agreement) unless the purchaser can show that the defect complained about is a latent defect, that such defect was hidden away and, that most important of all, such defect was hidden away with the intent to defraud. Still to this day many people forget this last requirement and think that one only has to show that there was a latent defect which was hidden away. You can imagine that it is difficult to prove that the seller intended to defraud the purchaser as it is difficult to prove a state of mind. Thus for example if the roof leaks the seller may very well say in a surprised voice "I see the roof is leaking. I am surprised to hear that because I had appointed somebody to repair the same. I therefore honestly believed that the roof was repaired. I see I am incorrect but I never knew that". Under those circumstances the seller would not have the intent to defraud as he believed the roof had been repaired even though it was still leaking.

Accordingly, unless the contract provides otherwise, there are effectively three periods which affect the liability of the seller or the purchaser when there is a voetstoots clause in the agreement. In respect of any defects which arose prior to the date of the signing of the agreement, the purchaser is liable unless the purchaser can show that such defect was latent, was hidden away and was hidden away with the intent to defraud. In respect of any defects which arise after the date of the conclusion of the agreement up to the date of transfer of the property into the name of the purchaser, the seller will be liable (unless of course the purchaser caused such defect) because of the fact that the risk in the property normally in terms of most contracts does not pass to the purchaser until transfer of the property into the name of the purchaser. Once the property has been transferred into the name of the purchaser, any defects which arise thereafter will be for the account of the purchaser unless the purchaser can show that the defects were latent defects which were hidden away with the intent to defraud.

Going Beyond

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