

The Duty to Disclose

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INTRODUCTION

This article briefly explores the duty of the seller and the property practitioner to disclose defects to prospective purchasers when selling immovable property, and the parameters of this duty.

DISCLOSURE AND PROPERTY PRACTITIONERS

The duty of an estate agent with regards to the issue of disclosures is set out in Regulation 34.3.2 of the Property Practitioners Act, 2019. (Previously Clause 4.1 of the Estate Agency Affairs Board Code of Conduct).

Regulation 34.3.2.1 provides that an estate agent shall convey to a purchaser or lessee all facts as are, or should reasonably in the circumstances be, within his personal knowledge and which are, or could be material to a prospective purchaser (or lessee).

If the obligation in Regulation 34.3.2.1 is broken down, there are four main requirements:

- The estate agent must disclose facts which are within the estate agent's knowledge, i.e. facts in respect of which the agent has actual knowledge;
- The estate agent must disclose facts which should be within their knowledge i.e. if the estate agents hold themselves out to be the area specialist, they need to be aware of issues affecting the area such as new roads planned or new hospitals etc;
- The estate agent must disclose facts which are material to purchasers. This implies that the estate agent should disclose facts which are known to be material to the purchaser;
- The estate agent should disclose facts which could be material to a purchaser. This requires wider disclosure and a broad exercise of this discretion.

The question arises whether an estate agent should disclose a particular fact or not, for example when the previous occupant was either murdered or died in the property.

The above must serve as a guide in every instance.

The answer to the question should be yes, disclosure of this fact is needed. In this example, the facts (i.e., there was a death) is within the knowledge of the estate agent and may be material to the purchaser. The estate agent should find the appropriate timing and method of disclosure of such a fact.

Bear in mind that adverse property conditions and / or incidents involving the property are likely to be known by neighbours etc. who will no doubt advise the purchaser in any event of such property conditions and/ or incidents after the sale has taken place.

Regulation 34.3.4.2 of the Act (previously clause 5.2 Code of Conduct) of the Act further provides that an agent shall not wilfully or negligently, in relation to his activities as an estate agent, prepare, make or assist another person to prepare or make a false statement, whether orally or in writing, knowing it to be false or knowingly or recklessly prepare or maintain any false books of account or records.

Regulation 34.3.4.5.1 (previously clause 5.5.1 Code of Conduct) provides that no agent shall wilfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property where a mandate is held.

Regulation 34.3.4.5.2 provides that an agent shall not use any harmful or misleading marketing techniques.

DISCLOSURE DOCUMENT

With the advent of the Consumer Protection Act, various forms of the disclosure document were created and used by agents. The Property Practitioners Act has since introduced a mandatory disclosure document.

From 1 February 2022, a Property Practitioner may not accept a mandate unless the seller of the property has provided him/her with a fully completed and signed mandatory disclosure document in the prescribed form. This mandatory disclosure document (which is prescribed in the Regulations), must be signed by the purchaser (or lessee) and annexed to the sale or lease agreement.

The Property Practitioners Act provides that if the mandatory disclosure document is not completed, signed and annexed, the agreement must be interpreted as if there were no defects or deficiencies on the property disclosed to the purchaser.

Failure by a Property Practitioner to comply may result in being held liable by an affected consumer. In addition, the regulations provide for a potential fine of a maximum sum of R15 000.00 for a failure to obtain the mandatory disclosure when taking a mandate.

The purpose of a disclosure document is to, in the first instance serve as a record of the condition of the property for the purchaser. The purchaser will enter into the sale agreement based on the disclosures made by the seller in such document.

The prescribed mandatory disclosure document is a broad based document that does not deal with detailed property issues.

The document deals mainly with broader property disclosures. Where agents require additional and more detailed disclosures and wish to prompt a seller, an additional annexure can be used. It is assumed that the mandatory disclosure document can be added to but portions thereof cannot be deleted or not used.

A clause in a sale agreement to the effect that the disclosure document is to follow or be provided in a certain number of days is incorrect, impractical and contrary to the Property Practitioners Act. The disclosure document MUST precede the sale agreement in every case and must be annexed to the sale agreement.

The second purpose of a disclosure document is to document the seller's instructions with regard to the condition of the property for the agent's protection. The document prevents the seller from alleging after the fact that the agent was advised of a certain defect which was not disclosed to the purchaser or was inaccurately conveyed.

The use of a disclosure document is however a "double edged" sword in that a poorly completed disclosure document can create more trouble than it is worth. The agent needs to impress on the seller the importance of the document and the importance of the need to complete the document properly and honestly. This can be more difficult than otherwise thought and the estate agent should actively assist the sellers in this process.

There is a tendency by sellers to not disclose for fear that disclosure will lead to a lower price or a delay in selling, alternatively to disclose insufficiently. There is also a tendency not to disclose issues in respect of which the sellers either do not apply their minds or in respect of that which they consider to be an acceptable defect.

Issues in the property should rather be disclosed and/or properly dealt with or remedied before sale to avoid legal disputes after sale. It is often the agent's reputation which is tarnished by non-disclosure.

As indicated above, the disclosure document is now obligatory and to the extent that same is not possible, for example where the seller is an executor of a deceased estate or has lived overseas for some years, the mandatory disclosure document must still be annexed to the sale agreement. The fact that the seller or the executor cannot complete the document must be noted on the document and the purchasers must be advised to properly inspect the property in the absence of a disclosure by the seller.

It is HBGSchindlers view that until the Property Practitioners Authority provides clarity, the mandatory disclosure document should be annexed to every sale or lease of immovable property, whether this be commercial or residential and or for vacant land.

HOW TO DEAL WITH DEFECTS

Where sellers are aware of defects in the property (for example a leaking roof or the absence of building plans), same must either be remedied before sale by means of a proper repair with a transferrable warranty or disclosed in writing in the mandatory disclosure document or sale agreement.

It must be born in mind that most sale agreements have a clause to the effect that "no representation and/or warranties made by the parties prior to the agreement are binding on the parties unless included in the agreement". This means that any disclosures must be in writing and included in the agreement if they are to be relied upon.

FIXTURES AND FITTINGS CLAUSES

There are essentially two types of fixtures and fittings clauses. One that makes a representation that "all fixtures and fittings are in good working order" and another that only warrant that these are the Seller's "exclusive property and fully paid for".

Estate agents who have the former clause have an additional task of ensuring that all the fixtures and fittings are in working order. This must be specifically brought to the seller's attention and the necessary disclosures and/or repairs should be made.

HOME INSPECTORS

These may be used, however the clause must be clear as to, by when the inspection must take place, the consequence of this not taking place, whether the sale lapses if unacceptable defects are found and the obligation of the seller to correct any defects found.

Sellers must further understand the risk that the inspection report may bring to light defects the seller was not previously aware of and which then need to be disclosed to new purchasers due to the seller's new found knowledge.

CONCLUSION

The issue of disclosure needs to be carefully considered in every case. In the event that the Mandatory Disclosure document is needed or clauses are required relating to sellers being unable to disclose, home inspectors, etc., same may be requested from our offices by emailing conveyancers@hgbschindlers.com.



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