

Dealing with Defects, Repairs and Maintenance Issues

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INTRODUCTION

When a purchaser takes occupation of a property before registration of transfer, the purchaser has the opportunity to live in the property purchased prior to the date of registration. One of the possible consequences of this early occupation is that purchasers from time to time experience issues in the property.

These issues range from defects not previously noted, to the discovery of new defects, to issues around repairs and maintenance. The purpose of this article is to provide some guidance as to how to deal with these issues.

SCENARIO

The guidance provided in this article will be by using a typical example encountered in practice. A seller sells a residential house to a purchaser with the standard voetstoots clause. In terms of the sale agreement the purchaser is entitled to occupation of the property on a certain stipulated occupation date, which date is before registration of transfer of the property in the deeds registry.

In the period after occupation date and before date of transfer, the purchaser raises the following issues:

- there is a leaking roof after rain;
- there is a wall with a large crack;
- there is damp in one of the bedroom cupboards;
- the pool pump has stopped working;
- the pool turns green;
- the drain becomes blocked;
- the air conditioners were struck by lightning;
- the geyser has burst.

VOETSTOOTS

The first principle to be understood is that the property is sold voetstoots which means the property is sold 'as it stands' or 'as is'. The Purchaser buys the property in the condition in which it is found at the date of sale regardless of the condition of the Property.

The seller must disclose to the purchaser all known latent (hidden) defects and the purchaser must inspect the property for all patent (visible) defects. The Seller is not protected by the voetstoots clause if he/she was aware of the latent defect; and he/she failed to disclose the defect; and he/she failed to disclose the defect with the intention of defrauding / causing loss to the Purchaser.

PASSING OF RISK

In terms of common law, risk in a property sold moves from the seller to the purchaser on date of sale. Most standard contracts amend this common law position and provide that risk passes from the seller to the purchaser on date of registration of transfer in the deeds registry i.e. if the house burns down before transfer, it is for the sellers account.

The seller further has the obligation to ensure the property is in the same condition (within reason) from date of sale until date of registration of transfer. Due to this obligation and as a result of the date for the passing of risk, where the property is in need of repairs after occupation (and the damage was not caused by the negligence or intentional conduct of the purchaser), the seller bears the obligation to attend to these repairs.

INSURANCE

Due to the date of the passing of risk, sellers must insure the property until date of transfer. Save where the purchase price is financed through a mortgage bond (where insurance is compulsory with the bond holder) or here the property is insured by the body corporate of a sectional title scheme, purchasers should be advised as a courtesy to ensure the property is insured from date of transfer.

DUTY TO MAINTAIN

On occupation of the property, generally speaking, the purchaser has the duty to maintain the property. This duty to maintain is akin to that of a tenant of the property. The risk remains with the landlord and the tenant must "look after" the property.

Examples of the duty to maintain are that the purchaser should ensure that the lawn is mowed, reasonably maintain the condition of the pool for example by using chlorine/ chemicals. The purchaser should tighten screws on door hinges etc.

The duty to maintain includes ensuring that the property is correctly utilised. i.e. don't pour fat into the drains causing a blockage.

SOLUTIONS TO ISSUES RAISED

Utilising the principles provided, the following are potential solutions to the issues raised in the fictitious scenario:

Leaking roof after rain

To the extent that this occurs before transfer, risk is with the seller and the seller would need to attend to the necessary repairs. To the extent that this happens after transfer, risk would have passed to the purchaser. The question that would arise post transfer is whether the seller was aware of the leak at the time of sale - a latent defect requiring disclosure.

Wall with a large crack

If the wall had a crack as at the date of sale this would be a patent defect and the seller would not have a liability as this should have been noted by the purchaser and dealt with at the time of sale.

Damp in one of the bedroom cupboards

This example is arguable and falls into a potential grey area. The damp needs to be categorized latent or patent. General consensus is that this type of damp is patent and the seller has no liability. If this damp was deliberately hidden by the seller, the seller would be liable if there was a failure to disclose.

The pool pump stopped working

Risk in the property is with the seller before transfer and provided that the pump malfunctions due to normal wear and tear, the seller would have a liability to fix this.

The pool turns green

If this is due to the purchaser not putting chemicals in the pool, the purchaser is liable as part of the duty to maintain.

The drain becomes blocked

The answer is the same as with the pool pump. Provided the pool pump does not malfunction due to misuse, the seller has a liability to repair.

The air conditioners are struck by lightning

Where this happens before transfer, risk is with the seller who will be liable to repair. In this case, the seller would claim against insurance as this is an insurable event.

The geyser bursts

The result is the same as with the air conditioner being struck by lightning – the seller has a liability and should claim through insurance. In sectional schemes, caution must be exercised as not all sectional insurance covers a burst geyser.

CONCLUSION

Advice must be taken before making a decision as to liability for defects, maintenance and repair issues.



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