"Material Facts" – What and when you need to Disclose them to a Potential Purchaser

In NSW, a vendor wishing to sell their property must comply with certain disclosure requirements in relation to their property. There are also implied warranties in the contract that unless otherwise disclosed, the property is not affected by any *adverse affectations*. These warranties also apply to sales agents.

If an adverse affectation is not disclosed to a prospective purchaser before contracts are entered into, the prospective purchaser has a right to rescind (terminate) the contract following exchange. If a contract is rescinded in these circumstances, a vendor will need to return to the purchaser all deposit monies paid by them under the contract.

As demonstrated below, a vendor or estate agent may also be liable to a prospective purchaser for damages and loss suffered as a result of a failure to disclose an adverse affectation or if a vendor or their agent makes a misrepresentation.

What are adverse affectations?

Adverse affectations are outlined in Part 3 of Schedule 3 to the Conveyancing (Sale of Land) Regulation 2017 and include but are not limited to:

1. A proposal for re-alignment, widening or siting, or alteration of the level, of a road or railway by Rail Corporation New South Wales, Sydney Metro, Sydney Trains or Transport for NSW;

2. An order under Part 1 of Schedule 5 to the Environmental Planning and Assessment Act 1979 to demolish, remove, repair or make structural alterations to a building that has not been fully complied with;

3. An order under section 124 of the Local Government Act 1993 to demolish, repair or make structural alterations to a building that has not been fully complied with;

4. A notice to or claim on the vendor by any person, evidenced in writing, in relation to any encroachment/s, access orders and/or common boundary fencing between your property and a neighbouring property;

5. A Restore Works Order, Compliance Order or Repair or Remove Works Order as referred to in items 10-12 of Part 1 of Schedule 5 to the Environmental Planning and Assessment Act 1979; and

6. A building work rectification order (within the meaning of Part 5 of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020) that is in force.

Please note the above list is not the complete list.

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Noisy or difficult neighbours could derail the sale of your property

In the case of *Thillagaratnam v Doan* [2022] WASC 185, a purchaser was successful in their claim against a vendor for breach of contract and reckless fraudulent misrepresentation for failing to disclose the nuisance caused by a neighbour who lived in the first-floor unit immediately on top of the unit being sold.

For context, the neighbour has a long history of breaches of violence restraining orders, common assault and disorderly behaviour relating to other occupiers of the strata complex since 2001, and their antisocial conduct was widely known by the occupants of the strata scheme.

The vendors in this case did not disclose the history of the neighbour's conduct to the purchaser, and the Western Australian Supreme Court held that the vendors failure to disclose the neighbour's conduct constituted a breach of contract, as well as reckless fraudulent misrepresentation on the basis that this was a fact that they should, or ought to have knowledge of.

In order for a representation to be considered as recklessly fraudulent, it must be shown that the maker of the representation "lacked belief in the truth of the representation or makes it recklessly, not caring whether it was true or false." The purchaser was successful in establishing these grounds.

What is the NSW position?

Under the Australian Consumer Law, vendors and agents are prohibited from engaging in misleading or deceptive conduct, arguably the conduct above would also be called into question in NSW.

Additionally, agents are also required to disclose any information considered a "material fact" under the Property and Stock Agents Regulation 2022 to prospective buyers.

Recent amendments to the Property and Stock Agents Regulation 2022 identify the following items as "material facts":

1. Within the last 5 years whether the property has been subject to flooding from a natural weather event or bush fire;

2. The property is subject to significant health or safety risks;

3. The property is listed on the register of residential premises that contain loose-fill asbestos insulation required to be maintained under the Home Building Act 1989, Part 8, Division 1A;

4. Within the last 5 years the property was the scene of a crime of murder or manslaughter;

5. Within the last 2 years the property has been used for the purposes of the manufacture, cultivation or supply of a prohibited drug or prohibited plant within the meaning of the Drug Misuse and Trafficking Act 1985;

6. The property is, or is part of, a building that contains external combustible cladding—

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a. to which there is a notice of intention to issue a fire safety order or a fire safety order has been issued requiring rectification of the building regarding the external combustible cladding, or

b. to which there is a notice of intention to issue a building product rectification order or a building product rectification order has been issued requiring rectification of the building regarding external combustible cladding,

7. The property is, or is part of, a building where a development application or complying development certificate application has been lodged under the Environmental Planning and Assessment Act 1979 for rectification of the building regarding external combustible cladding,

8. One or more of the following orders, within the meaning of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020, is in force in relation to the property—
   a. a building work rectification order,

   b. a prohibition order,

   c. a stop work order.

Where to from here?

Whilst there is no requirement for the NSW courts to follow *Thillagaratnam v Doan* [2022] WASC 185 at this stage, however the NSW Courts and Tribunal may consider the principles and follow this decision in future in a misleading and deceptive conduct claim under the Consumer law or consider it a material fact, one relating to "health and safety".

Navigating the world of disclosure requirements, either as a prospective purchaser, a vendor or a sales agent can be complex and filled with potential pitfalls and traps.

Bannermans are specialist property lawyers who are adept at providing advice on your disclosure requirements as a vendor or a sales agent, as well as what to look out for as a prospective purchaser.

Please contact us for further information today.

Key takeaways

- Vendors must disclose material facts to potential purchasers to avoid legal repercussions.
- Failure to disclose adverse affectations can lead to contract rescission and financial liability.
- Adverse affectations include various legal orders and neighbour-related issues.
- Misrepresentation can result in legal claims for damages against vendors.
- Under Australian Consumer Law, misleading conduct is prohibited in property sales.

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