

Patent and latent defects in a property

Do your due diligence to ensure there are no undisclosed faults in the property you wish to buy

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The sale and purchase transactions of immovable properties usually involve investment of huge amount of money. Therefore, before finalising a sale purchase transaction, buyers must be cautious about the title and other related aspects of the property that they intend purchasing. Usually due diligence is required to discover defects in the property, some of which may not have been disclosed to the purchaser by the seller.

In general, it is the duty of the buyer to make proper enquiries about the property he intends to purchase. A buyer can discover defects in a property even on ordinary inspection. Defects that can be found out by ordinary inspection are known as patent defects.

However, there are certain defects that the buyer cannot, discover for himself. Such defects are known as latent defects. Some material defects are considered to be material

latent defects, because if the buyer was aware of them, he might not have entered into a contract for purchase of the property at all. The rights that interfere with the right of ownership or restricts the right of transfer, or affects the title, are considered to be a material latent defect.

The Transfer of Property Act 1882, provides for safeguarding the interest of buyers, by putting the onus on the seller to disclose all material information in relation to title of the property that he intends to sell/transfer.

Under the Act, the seller is duty bound to disclose such material latent defects in a property to the prospective buyer. To give an example, a defect in the title of the property is considered to be material latent defect. This is because the seller has a title that is exclusively within his own knowledge and he is bound to state it explicitly.

The seller is duty bound to disclose any restrictive agreement/understanding and any breach of a agreement/understanding by him with respect to the property which is proposed to be sold to the buyer and any such non disclosure may entitle the purchaser to repudiate the contract.

A material defect, of which the seller is aware, but the buyer

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- All defects which can be found out by ordinary inspection are known as patent defects
- Defects which the buyer, with ordinary care, cannot discover himself are known as latent defects
- The rights of a buyer that interfere with the right of ownership or restrict the right of transfer, or affect the title, may be considered to be a material latent defects
- The Transfer of Property Act 1882 ("Act"), provides for safeguarding the interests of buyers, by putting the onus on the seller to disclose all material information regarding the title of the property

is not aware, and which the buyer could not with ordinary care discover, should be disclosed by the seller to the buyer.

However, a seller cannot be faulted for not disclosing something that could not be said to have known to him at the time of entering into an agreement/understanding/arrangement with the buyer regarding the sale of the



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property.

To sum up, it is the duty of the seller to disclose to the prospective buyer the material latent defects in a property before entering into any kind of understanding/arrangement/agreement with the buyer with respect to the property.

An omission by a seller to make such a disclosure about the material latent defects in a

property to the buyer is considered to be fraudulent. The buyer can repudiate such a contract. Also, in such cases, specific performance of contract in favour of the seller cannot be enforced on the buyer. In other words, a buyer is not bound to complete the sale of the property if there are defects in the property that are material and also latent, that is to say, not discoverable

by exercise of ordinary care, or if the title of the property is not free from reasonable doubt.

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