



Murder in the house – disclosing ‘material facts’

It’s reasonable to assume that most people wouldn’t want to live in a home where something horrid has occurred, such as a murder or other violent crime. This is even more so for purchasers with cultural, religious or superstitious beliefs.

Some obligations exist to disclose this type of information about a residential property (known as “material facts”) but who is responsible for doing so, and what can happen if these material facts are not disclosed to a purchaser?

Vendor’s Duty of Disclosure

There are statutory obligations on home owners in NSW to disclose certain information about their property when selling by attaching to Contracts for Sale mandatory “disclosure documents” such as a full title search, zoning certificate, sewer diagram, land tax certificate and if applicable, certificates relating to the compliance status of a swimming pool.

However, the common law doctrine of “caveat emptor” or “let the buyer be aware” still applies to the sale of residential property in NSW. Accordingly, there is no mandatory obligation on home sellers to disclose any further information about the state or condition of their property or its history. Real estate agents however, do have a statutory obligation to disclose to prospective purchasers “material facts” about a home they are selling on behalf of a home owner, and the failure to do so can result in the agent being fined and/or being sued by a purchaser for misleading and deceptive conduct.

Estate Agents Duties to Disclose “Material Facts”

Section 52 (1) of the Property, Stock and Business Agents Act 2002 (the Act) states that it is an offence against the Act if a licensed estate agent or registered salesperson in the course of performing their functions induces another person to enter into any contract or arrangement through:

- a statement, representation or promise which is false, misleading or deceptive (whether to the knowledge of the person or not) or;
- by concealing a material fact (whether intended or not).

Section 52 imposes an onus on the selling agent to inform the purchaser ‘of matters which could not be revealed through undertaking usual enquiries, such as usual enquiries being enquiries like a physical inspection of the property, professional building and pest inspections, and searches conducted by the purchaser’s solicitor or conveyancer.

The agent has a defence if the agent did not know about the material fact and had no reasonable cause to suspect a statement, representation, or promise was false, misleading or deceptive.



What Constitutes a “Material Fact”

NSW Fair Trading has stated that a “material fact” is “a fact that would be important to a reasonable person in deciding whether or not to proceed with a particular transaction” and that a fact about a property can be material in two ways:

1. it can become ‘material’ because, in the particular circumstances, it is known by the agent to be material to the particular purchaser, even though agents and purchasers may not typically regard the matter as ‘material’; and
2. it may become ‘material’ by the application of an objective standard which has regard to what a reasonably informed purchaser with a fair-minded understanding of the real estate market, including the role of a real estate agent, would regard as ‘material’.

“Material facts” can include “potential psychological stigma attached to a property which is likely to be shared by a significant proportion of the population” including where a property has been the scene of a serious crime during the current or previous occupation. While such circumstances may not represent a physical barrier to the use of the property “they may significantly affect the extent to which occupants would be comfortable using the property”.

NSW Fair Trading has indicated a number of other matters that may constitute “material facts” about a property depending on the nature of the property including;

- the recent history of use or activity in a dwelling, and;
- the neighbourhood surrounding the property which may not be immediately apparent upon inspection;
- whether the property contains asbestos; and
- if the agent is aware of some past damage to the property (e.g. water damage) which is not now evident on inspection of the property.

What it means for Vendors

If you use an agent to sell your property, you will need to enter into a Selling Agency Agreement with your chosen agent. This agreement will usually contain a “material facts” clause under which you:

- acknowledge that the agent has an obligation under the Act to disclose all material facts about the property to prospective and actual purchasers; and
- give the agent a warranty (i.e. a promise) that you have supplied the agent in writing with all relevant details and information pertaining to all material facts about your property; and
- authorise the agent to provide all material facts provided in writing by you to all prospective and actual purchasers of the property.

Whilst intent of the “material facts” clause is to assist the agent with their duty of disclosure, the agent still has an obligation to make their own assessment of the “material facts”. If you fail to disclose a material fact to the agent, and the purchaser suffers a loss, the purchaser may be able to take action against you and the agent under Section 30 of the Australian Consumer Law for false or misleading representations about the sale of land.

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