

Dear Colleagues

Beyers No v Ackerman - [2007] JOL 19692 (C) - is a judgment dealing with the law relating to latent defects and the voetstoets clause. The theory confirmed in this judgment is a useful refresher of the underlying principles. Judgment was reported on 14 November 2006 and Yekiso J was on the Bench.

Below we provide a basic review of the law concerning latent defects and voetstoets clauses, and then follows a summary of the Court's findings in the **Beyers** case.

The law concerning latent defects: a refresher

A patent defect is a defect that is clearly visible to the naked eye, for example cracked gutters and tiles or dripping taps. If a purchaser buys a house and afterwards notices that there are certain obvious defects which would have been revealed by a reasonably careful inspection of the property by the purchaser, then the purchaser has no claim against the seller in respect of these defects.

Latent defects, on the other hand, are defects that are not clearly visibly to the ordinary man - even if it would be apparent to an expert. These defects may be covered up or concealed. Very often they only become evident sometime after the date of sale or transfer, for example a leaking pool or a leaking roof after heavy rain.

In terms of our law, there is an implied term in a contract of sale (in other words, this position prevails even where the agreement is silent about the topic) that the seller warrants to the purchaser that there are no latent defects in the property. As a result, if it appears after the conclusion of the agreement that a latent defect in a house exists, the seller is liable for those defects whether he or she knew about it or not.

Because this implied term (known as the seller's warranty against latent defects) places such a heavy burden on a seller, most sellers include a clause in the contract to counter this common law provision. This clause typically states that the seller shall NOT be liable for latent defects in the property, and that the purchaser buys the property *as is*. This clause is commonly known as the *voetstoets* clause. 'Voetstoets' means, roughly translated, 'pushed with the foot'. It is almost as if the seller put the thing to be sold on the floor, and pushed it with his toes in the direction of the purchaser, saying: "there it is, but remember, you buy it warts and all, whether you can see the warts at first glance or not."

So, if an agreement contains a voetstoets clause, and if the seller did not know about latent defects in the property, and if latent defects manifested themselves after the sale, the seller will rightfully be able to say to the purchaser: sorry, this is your problem, fix it at your cost; I am protected by the voetstoets clause.

But what about latent defects which the seller knew about and did not bring to the purchaser's attention before the sale? And worse, what if the seller knew about them and deliberately concealed the defects (polyfiller can do wonders) with the purpose of inducing the purchaser to buy the property? Will such a seller be able to hide behind the voetstoets clause when the purchaser tries to hold him liable?

The law concerning this issue has been fine tuned over the years and it is now clear in law that, if a seller knew about a latent defect and deliberately concealed the defect so as to induce the purchaser to buy, the seller cannot hide behind the voetstoets clause; a

voetstoots clause only protects a seller against latent defects he did not know about, or, if he knew about them, he did not deliberately conceal them from the purchaser.

This is a consolation for the purchaser, but the burden of proof (proving that the seller did know about the defects and that he deliberately concealed them) is on the purchaser, which sometimes makes it difficult for purchasers to enforce their rights in practice.

The facts in Beyers NO v Ackerman

Beyers (as trustee in a trust and hereinafter referred to as 'Beyers') bought immovable property from Ackerman. The contract contained, amongst other things, the usual stipulation that the property is sold voetstoots and provided specifically that there shall lie no claim against the seller, Ackerman, for any defects that may be found to have existed on the property at the time of entering into the agreement.

The day *after* signing the sale agreement, Ackerman indicated to Beyers, via the estate agent, that she recently noticed one or two leaks in the thatch roof of the house and that she (Ackerman) offered to have these leaks repaired. These repairs were then attended to. On 2 further occasions, prior to transfer, Beyers noticed further leaks in the roof and advised Ackerman accordingly. Ackerman denied that these were latent defects, but still arranged for a thatching company to go out and fix the leaks since the leaks were in the same area in the roof as the previous leaks.

When at a later stage, after registration of transfer, further substantial leaks were found in the roof (and which would be costly to repair), Beyers again requested Ackerman to attend to the repairs. Ackerman replied that she had disclosed (to Beyers) those leaks of which she was aware at the time of contracting. As regards the 'new' leaks that Beyers now pointed out, she maintained she had no knowledge of these and can therefore not be held liable since she is protected by the voetstoots clause in the sale agreement. Beyers was of the opinion that Ackerman was aware of the leaks at the time of contracting and had deliberately concealed these defects. Beyers therefore instituted action against Ackerman for damages he suffered in the amount of the costs of the repair work required to fix the thatch roof.

Question before the court

On an investigation of the evidence offered and relying on reports by professional roof thatchers and building inspectors, the court found that the defects did exist in the property at the time of entering into the contract. The question the court then had to consider was whether Ackerman was aware of these defects at the time of contracting with Beyers.

Held

On an examination of the facts, taking into account the instruction initially given to the thatchers to fix the leakages the conceded to initially, the fact that Ackerman had lived in the house for 13 years, the court found that Ackerman had known of the defects and that she had deliberately refrained from disclosing the defects to Beyers. Judgment was accordingly awarded in Beyers' favour