

HANDLING DISPUTES WHEN DEALING WITH EARLY OCCUPATION

Lets start by unpacking a standard occupation clause...

POSSESSION & VACANT OCCUPATION

Possession of the Property shall be given and taken on registration, from which date all benefits and obligations of ownership shall pass to the Purchaser and from which date all risk in the Property shall pass to the Purchaser.

The Seller shall, up to the date of registration, keep the Property in the same condition that it is in on the date of signature to this Agreement, subject to reasonable wear and tear.

Vacant occupation of the Property shall be given and taken on _____ (“the Occupation Date”).

From the Occupation Date, the Purchaser will be liable for the payment of occupational rent in the amount of R_____ per month which amount will be payable by the Purchaser to the Seller on the ___ day of each month up to the date of registration.

Risk And Possession

- Does this transfer on date of occupation or date of transfer?
- Ask the question and ensure that both parties are aware of the implications

Rates

- Who is responsible for paying the rates and/levies during the occupation period?
- Again, ensure that parties are aware of what the contract stipulates to avoid any disputes

Property Conditions Report

- Prioritize the completion of the property conditions report by the Seller.
- Encourage the Seller to be as transparent as possible.
- This will avoid being accused of being dishonest or misrepresenting the true condition of the property.
- This further avoids a situation where, upon occupation, the Purchaser finds defects in the property and now threatens to delay the transaction until the defect is rectified or threatens to cancel the agreement.

Voetstoots Clause

- This clause states that the seller shall NOT be liable for latent defects in the property, and that the purchaser buys the property “as is”..
- This means that the Seller is will not be liable for defects that cannot be seen with the naked eye.
- Consequently, should the purchaser occupy the property early and come across latent defects, they cannot hold the Seller liable.
- To avoid disputes relating to defects, it is advised to:
 - Complete the property conditions report
 - Explain to the parties what the implications of the voetstoots clause are.

WHEN PREVENTATIVE MEASURES FALL SHORT

There are three common contractual dispute resolution processes which parties may utilize instead of taking matters to court and wasting excessive legal fees namely, negotiation, mediation and arbitration.

Negotiation

This is the most common form of ADR. Parties have different positions and needs and these need to be identified. Here both parties try to meet the interest of the other party and at the same time benefit themselves.

Feature: Both parties have legitimate needs and it is possible to provide an outcome to meet those needs. The aim is to obtaining a win-win situation.

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Here parties must attempt to do the following:

- Recognise each other as legitimate stakeholders
- Recognise their interdependence
- Accept different/overlapping and even conflicting interests.
- Have a commitment to change
- Parties must focus on problem-solving
- Solutions must be creative
- Try and trade between issues and needs and vague silence
- Keep a single text/record of issues/ needs of parties
- Identify areas of agreement, areas of disagreement and areas of possible agreement.
- Be open-minded, flexible and have good communication skills.

If this process fails, parties may then attempt to resolve their dispute through mediation.

NEGOTIATION PROCESS

- Parties will have to set up a meeting of their own accord. Should this not be logistically possible, email correspondence, phone calls and virtual meetings (ZOOM) can be used.
- Parties must then attempt to ensure that the meeting is civilised as far as possible. One party to speak at a time.
- Parties will then state their side of the story/ defences to each other and try to come up with solutions.
- The solutions need to meet the interests of both parties and each party needs to consent to them.

Mediation

- In practice, parties usually agree and appoint a third party to act as mediator, to assist in resolving disputes.
- It is expected that the mediator use whatever techniques are necessary to assist the parties in the dispute but cannot prescribe a settlement unless parties ask for the mediator's opinion.
- It should be noted that the findings of a mediator are not binding, unless agreed by the parties beforehand that it will be binding.

As an estate agent acting as a mediator in disputes arising out of sale agreements, mediation techniques and elements may be helpful.

MEDIATION PROCESS

Where the negotiation process fails, parties will then have to seek the help of a third party to arrive at a solution.

Who Is To Mediate

A person best suited for this role is someone who is:

- Independent and unbiased. Someone with no financial or personal interest attached to either party.
- Someone that is able to identify the key issues that need to be resolved.
- Someone with experience in the property industry and a clear technical knowledge of not only the factual position of both sides but also the law that is involved.
- See extended notes below:

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OPTIONS

- Estate Agent,
- Rental Housing Tribunal,
- the Conveyancer assigned to do the transfer.

Estate Agents

- Estate Agents act on behalf of an owner/ seller where he/she markets the property being sold or the rental space available.
- An important factor is that a skilled estate agent will have the experience and legal knowledge that is needed to negotiate a deal that benefits both parties.
- Even though estate agents act on behalf of sellers/ owners, they also add value to the buyer/ tenant as they act as a link to ultimately negotiate an agreement that best suits both parties involved, thereby fulfilling the criteria of possessing independent and unbiased qualities.

The Rental Housing Tribunal

- The Rental Housing Tribunal will lay down general principles and advise disputing parties in reaching solutions to problems relating to residential dwellings through mediation.
- The benefits of approaching this tribunal is the fact that it employs experts in this field; the system is user-friendly and there are minimum costs involved. Legal representation is permissible but unnecessary.
- This is used in extreme cases. Something everyone wants to avoid.

Conveyancer/Attorney

- A conveyancer usually has the right combination of knowledge to mediate in this dispute as they would be able to apply applicable objectivity.
- It would, however, be advisable for the parties to seek a conveyancer that had not acted in favour of either one of the parties so as to not prejudice the other party.

SCENARIOS

1. The Parties agree to early occupation and an addendum is signed to provide for early occupation.

The Purchasers have moved in, and there's some portion of the property is significantly broken, battered or bruised – maybe a portion of the roof, or a door, or a broken window or something similar. Maybe even something more expensive, like a leaking roof/pool. What are your options?

Look at the contract and the property condition report

If the Seller declared that the portion of the property is in fact damaged, the voetstoots clause will protect the Seller.

Communication is absolutely essential to prevent property disputes. Engage with all parties from the outset and determine who is responsible for the damage (if any). Here you will be guided by the Agreement of Sale.

Should the Agreement of Sale be silent, parties will have to negotiate how the damage is to be rectified.

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2. **The Seller consents to the Purchaser starting with renovations to the property before date of transfer. Purchaser proceeds with the renovation process, later however, it comes to the Seller's attention that the contractors have taken occupation of the property. The seller thus seeks to claim occupational rent from the Purchaser. Purchaser claims that he/she had not in fact taken occupation of the property.**

Again, be guided by the provisions of the Agreement of Sale.

In some instances, parties may verbally agree to certain terms but it is always advised to reduce any verbal agreement to writing.

The question to address is whether Purchaser (or in this case the Purchaser's contractors) is deriving benefit from having access to the property.

Furthermore, whether the facilities or amenities within the property are being utilized.

Should this dispute arise, the parties will have to negotiate the terms of this type of occupation.

EXTRA NOTES ON MEDIATION

Who Is To Mediate

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- Someone that can identify the key issues that need to be resolved.
- Someone with experience in the property industry and a clear technical knowledge of not only the factual position of both sides, but also the law that is involved.

OPTIONS IN RELATION TO SCENARIO ON QUESTION:

- Estate Agent
- Rental Housing Tribunal
- Conveyancer

Estate Agents act on behalf of an owner/ seller where he/she markets the property being sold or the rental space available. Estate Agents also have the expertise and in depth knowledge to ascribe the most accurate and market-related value to the property, which will enable sellers to determine an appropriate selling price as well as the limit in which to negotiate. Very importantly, a skilled estate agent will have the experience and legal knowledge that is needed to negotiate a deal that benefits both parties. Even though estate agents act on behalf of sellers/ owners, they also add value to the buyer/ tenant as they act as a link to ultimately negotiate an agreement that best suits both parties involved, thereby fulfilling the criteria of possessing independent and unbiased qualities.

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A conveyancer usually has the right combination of knowledge to mediate in this dispute as they would be able to apply applicable objectivity. It would, however, be advisable for the parties to seek a conveyancer that had not acted in favour of either one of the parties so as to not prejudice the other one.

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THE PROCESS

The first two phases of mediation will take place, as outlined in previous slides, that being:

1. Introduction

- The mediator will have the floor and start the process off.
- The mediator will explain the process and ground rule, as well as explaining the number of sessions which will take place.
- The mediator will also make mention the process is voluntary and the parties may leave at any time should they wish to do so.
- At last, the mediator will have to express to the parties that the meeting is confidential (to protect the interests of both parties) and that his/her note-taking will not act as a record but to assist him/her in making his/her findings. The notes should be destroyed after the session.

2. Story-telling

This phase will be divided into three sessions:

- (i) This session should take between 30 minutes and an hour- where each party will be given an opportunity to give opening statements make complaints. After each party has put forward their story, the mediator will have to summarize their complaints, so that both parties are satisfied with the fact that the mediator is following the dispute, and he/she may also ask questions in order to ensure all issues are identified.
- (ii) The second session is called the 'caucus' or otherwise referred to as the "break-away" session. This is where the mediator will meet with the parties alone and individually for further clarity of the issues raised. This is also used as a mechanism to develop a sense of trust within the process- and for parties to further vent out their frustrations in a manner in which they were perhaps unable to in front of the other opposing party. This session should take between ten and twenty minutes.
[The above process will be followed by a light lunch break that is also between thirty minutes and an hour. =OPTIONAL]
- (iii) In the last session, the mediator will allow the parties to make closing statements, where he will also summarise the dispute and communicate to the parties his/her findings and/or decisions with regards to the dispute in question.

SOLUTION

This is where the third phase takes place, which is the problem-solving phase.

In order to resolve this dispute in this form of dispute resolution, the chosen mediator should consult the following as the basis of his/her authority regulating occupational interest agreed on between the parties:

- i) Offer to Purchase(OTP)
- ii) Agreement of Sale
- iii) Common law
- iv) Rental Housing Act(where applicable)

The OTP and the Agreement of Sale that the parties entered into will more than likely be identical to each other. Where the seller maintains that he/she is owed occupational interest by the purchaser, these two contracts must clearly state that 'where the purchaser takes occupation before the transfer of such property, the purchaser shall pay directly to the seller or the seller's conveyancer occupational interest monthly in advance from date of occupation to date of transfer.' The amount of the occupational interest should also be provided in conjunction with this clause.

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Under the South African Common Law, the seller can rely on the law of unjustified enrichment. This claim deals with circumstances in which one person is required to make restitution of a benefit acquired at the expense of another in circumstances which are unjust. Four steps need to be established under this claim:

- The purchaser has been enriched
- The enrichment is at the seller's expense
- The enrichment under the seller's expense is unjust, and
- There is no applicable bar or defence

The purchaser may rely on the following defences under this claim:

- Change of position
- Passing on
- Estoppel
- Bona fide purchase for value without notice
- Limitation periods
- Ministerial receipt
- Receipt under a valid contractual or statutory obligation; and
- Unclean hands

Where there is no defence on behalf of the purchaser, and where it is established that the builders were acting in accordance with the instructions of the purchaser, in other words, they were hired by the purchaser, the purchaser, in conjunction with the OTP and Agreement of Sale read together, will more than likely be ordered to pay occupational interest to the seller.

After the above phase has taken place, the last phase which is the **Agreement** phase will follow.

AGREEMENT

In this phase, the mediator will ensure all agreements and issues are addressed and understood. Furthermore, he/she will document his/her decision in writing for both parties to sign, with the date thereof also included.

For more information, contact us at info@stbb.co.za