



Houses with a history — Disclosure obligations and ‘psychologically stigmatised’ property

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Recently, the disclosure obligations of real estate agents have been examined in the context of ‘psychologically damaged’ or ‘stigmatised’ property. Such properties are not affected by a physical defect but are afflicted by a psychological taint caused by an unfortunate event which has occurred on the premises or in close proximity. Such a taint can affect the attitude of a prospective purchaser towards a property, even to the extent of a refusal to proceed because of the nature of the stigmatising event. Although the property industry, and no doubt a significant number of persons in the wider community, will appreciate the need for caution regarding the disclosure of factors which, in most cases, will have no lasting physical impact on the premises, it is clear that to many potential purchasers a property’s ‘past’ is a very material factor indeed.

In late 2004, there was a considerable amount of reporting in the media regarding the sale of a Sydney home in which a young man had murdered his parents and sister.¹ The property had been sold to unsuspecting purchasers who, upon discovering the property’s past, sought to withdraw from the transaction on religious grounds. At issue was why this information had not been disclosed to the prospective purchasers. There was significant public criticism of the real estate agent involved for not informing the purchasers and subsequent pressure on the agent to permit the transaction to be set aside. Eventually, the agent agreed to make an ex-gratia payment of \$80,000 to the purchasers, an amount equal to deposit paid. The Gonzales’ estate retained the deposit monies and the contract was rescinded. Despite this outcome, the Office of Fair Trading in New South Wales commenced proceedings against the agent for alleged contraventions of the Fair Trading Act 1987 (NSW) (hereafter, FTA) and the Property, Stock and Business Agents Act 2002 (NSW) alleging that the agents had engaged in misleading behaviour in promoting the property for sale.²

This article seeks to examine the disclosure obligations of vendors and

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1 The criminal proceedings, *R v Gonzales* [2004] NSWSC 822 (unreported, 17 September 2004, BC200406214) (hereafter, *Gonzales*).

2 The agents were fined \$20,000. J Garnaut, ‘Agents fined for failing to mention Gonzales murders’, *Sydney Morning Herald*, smh.com.au, 20 December 2004; AAP, ‘Estate agents fined over triple murder house’, *The Age*, theage.com.au, 20 December 2004. The agents appealed to the Administrative Decisions Tribunal: L Lamont, ‘Murder House agents fight ruling’, *Sydney Morning Herald*, smh.com.au, 10 August 2005. The appeal commenced on Monday, 6 February, 2006. ‘Agent appeals in murder house case’, www.news.nine.msn.com.au.

agents in Australia when marketing ‘psychologically impacted’³ or ‘stigmatised’⁴ properties. While the circumstances of the Sydney case may be extreme, sadly, they are not isolated to this one particular case.⁵ Properties may be regarded as stigmatised by some potential purchasers for a variety of circumstances involving the property prior to the present sale for reasons such as the death (by whatever cause)⁶ or illness of previous occupants.⁷ Interestingly, some stigmas find their origins in the metaphysical, through the alleged presence of ghosts or poltergeists.⁸ A stigma may also attach to a property because of activities in the present such as crime rates in the neighbourhood, the criminal history of past or present occupants, obstreperous neighbours⁹ or environmental concerns.¹⁰

Most potential purchasers of real estate would be justifiably concerned about purchasing stigmatised property. Many persons would choose not to purchase a property with a past. Others may choose to do so, however, may seek a significant discount off the market value of the property.¹¹ Even if the

3 D M Warner, ‘Caveat Spiritus: A Jurisprudential Reflection upon the Law of Haunted Houses and Ghosts’ (1993) *Valparaiso Uni L Rev* 207. Warner states at 208 that: ‘A home is “psychologically impacted” or “stigmatized” when it has a non-physical or non-material defect which “cause[s] . . . emotional or psychological discomfort to a buyer”. Such defects include: (1) “natural deaths, suicides, homicides, or . . . felon[ies]” which occurred on the property, (2) ghosts, and (3) an owner’s exposure to human immunodeficiency virus (HIV) or diagnosis of acquired immune deficiency syndrome (AIDS).’ For similar definitions, see R M Morgan, ‘The Expansion of the Duty of Disclosure in Real Estate Transactions; It’s not just for Sellers anymore’ (1994) *Fla BJ* 31 citing National Association of Realtors, *Study Guide: Stigmatized Property* and M Ben-Ezra and A Perlin, ‘Stigma Busters: A Primer on Selling Haunted Houses and Other Stigmatized property’ (2005) 19 *Probate and Property*, rppt@abanet.org.

4 Warner also refers to ‘karmic based real estate evaluation’: Warner, *ibid*, at 207. ‘Stigma is defined as “a mark or label indicating deviation from a norm”’. In the environmental context, stigma constitutes a mark or label that attaches to contaminated property, which results in a diminution in property value. See J Hierlmeier, ‘The Enigma of Stigma: A New Environmental Contamination Challenge Facing Canada’s Judiciary’ (2002) 11 *Dalhousie Jnl of Legal Studies* 179 at 180.

5 More recently, the home of Joe and Maria Korp (the ‘body in the boot’ case) was sold for significantly less than market value: ‘Legal hurdles block sale of Korp house’, theage.com.au, 15 August 2005; ‘Korp house sells for almost \$1 million’, theage.com.au, 29 October 2005. This tendency has been well documented in the United States, see, eg, Warner, above n 3, n 159. Recently, after other real estate consumers were affected by the purchase of stigmatized property, Neil Jenman, a real estate activist, mooted the creation of a ‘stigma register’, www.jenman.com.au/NewsAlerts1.php?id=70. The proposed register was the subject of media speculation, for example on Channel 7’s *Today Tonight*, <http://seven.com.au/todaytonight/story/?id=27084>.

6 *Reed v King* 193 Cal Rptr 130 (1983) where the failure to disclose the house in question had been the site of a multiple murder was held to be a misrepresentation. The contract was rescinded.

7 P C Murray, ‘Aids, Ghosts, Murder: Must real estate brokers and sellers disclose?’ (1992) 27 *Wake Forest L Rev* 689.

8 *Stamboy v Ackley* 572 NYS 2d 672 at 677 (App Div 1991).

9 T D Larson, ‘To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Brokers under Wisconsin’s “Megan’s Law”’ (1998) *Marquette L Rev* 1161.

10 T A Reuschel, ‘Caveat vendor: Sellers of Real Estate now need to be aware of Misrepresentations about the Condition of Property’ (1999) 64 *Mo L Rev* 661; Hierlmeier, above n 4, at 180.

11 ‘A buyer willing to assume headaches and other emotional discomfort in purchasing a residence will undoubtedly expect a discount for doing so’: *Alexander v McKnight* 9 Cal

stigma did not impact emotionally on the particular purchaser, he or she will realise that other persons may have reservations about purchasing such a property. Therefore, the pragmatic purchaser would be aware that, even if they were to negotiate a reduction in price to compensate for the stigma, a stigmatised property is likely to continue to be valued at less than comparable properties in the area and may be difficult to sell.

Vendor and agent disclosure in Australia — a brief introduction

Pursuant to the doctrine of caveat emptor, vendors were not, subject to limited exceptions, under any duty to inform a purchaser of defects in the subject property. The obligation to inspect the property and discover the defects therein was the sole responsibility of the purchaser who could not be heard to complain if defects were not revealed during the negotiation process. So long as a vendor did not positively misrepresent information as to a property's condition, the vendor could remain silent without fear of allegations of misrepresentation. Both at common law and in equity, mere silence regarding a material fact did not attract liability nor avoid a contract in the absence of any legal obligation to divulge.¹²

The doctrine was particularly appropriate under the classical model of contract theory where contracts were regarded always as arms length transactions between two equally resourced and informed parties.¹³ One of the attractions of caveat emptor was the belief that governments should adopt non-interventionist policies in the regulation of private contracts.¹⁴ Thus, caveat emptor promoted public policy in that it reduced the amount of litigation.¹⁵ As the vendor was under no duty to disclose, an aggrieved purchaser would not have any basis upon which to commence legal proceedings against the vendor.¹⁶

In the latter part of the twentieth century the shortcomings of the classical

Rptr 2d 453 (Cal Ct App 1992) at 456. Also in *Reed v Smith* 193 Cal Rptr 130 (1983), the court recognised that some people would not be concerned in a psychological sense by the previous history of the property. However, in such circumstances the court were of the view that such purchasers would none the less be discomforted by the prospect they have bought a house that may be difficult to sell.

12 For example, trustee and beneficiary, solicitor and client, relationships *uberrimae fidei*. Recall *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 488; ATPR (Digest) 46-010 at 53-047 per Bowen CJ; D Skapinker, 'The Imposition of a positive duty of disclosure under section 52 of the Trade Practices Act 1974 (Cth)' (1991) 4 *JCL* 75; L Griggs, 'Duty of disclosure by vendors in a conveyance – if caveat vendor, are we allowing the camel's nose of unrestrained irrationality admission to the tent' (1999) 7 *APLJ* 76.

13 '[If] there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held to be sacred and shall be enforced by the Courts of Justice': Sir George Jessel, *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

14 Tasmania Law Reform Institute, *Vendor Disclosure*, Final Report No 5, September 2004, p 7; Griggs, above n 12.

15 F Young Roberts, 'Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk' (2001) 34 *Conn L Rev* 1.

16 *Ibid*, at 4.

model were widely mooted,¹⁷ and many courts and legislatures demonstrated a preparedness to incorporate principles of equity and consumer protection into contract law. These developments saw an emergence of principles akin to fairness finding their way into the traditionally strict rules of contract law.¹⁸

The Trade Practices Act 1974 (Cth) (hereafter, TPA) has undermined classical contract law through the operation of s 52, and its equivalent provisions in the FTAs which prohibit misleading or deceptive conduct. Real estate transactions have not been immune from these developments. Pertinent to this article is the recognition by the courts that, in certain circumstances, non-disclosure can amount to misleading or deceptive conduct.¹⁹

While the courts have not gone so far as to impose a positive duty of disclosure, the utilisation of a 'reasonable expectation of disclosure' test in cases of non-disclosure involving s 52 and its equivalent provisions has seen an expansion of the circumstances where a party to a contract may be expected to disclose details to the other party.²⁰

The foundations of consumer protection law include the right to honesty, the right to fair agreements and the right to know.²¹ Clearly, it is therefore essential that consumers be well informed and have access to all pertinent information regarding the desired goods or services. This objective will be clearly undermined by the traditional asymmetry of knowledge between a vendor and a prospective purchaser. Therefore, in addition to the operation of the TPA and FTAs, some States²² and the ACT have introduced legislation imposing greater vendor disclosure obligations in transactions involving the sale of land. However, as will be discussed below, it appears that none of these provisions would extend to the issue of psychologically damaged property.²³

This article will examine the treatment of stigmatised properties and the impact of disclosure statutes in the United States, particularly in California. In an attempt to identify the disclosure obligations of vendors and agents in Australia in such circumstances, the article will also discuss the legal position under the common law, the TPA and various State and Territory fair trading

17 P S Atiyah, 'Contact and Fair Exchange' (1985) *Uni of Toronto L Jnl* 1 at 17.

18 See generally the discussion in N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th ed, Butterworths, Sydney, Chs 1 and 28.

19 *Demagogue Pty Ltd v Ramensky* (1993) 39 FCR 31; 110 ALR 608; ATPR 41-203.

20 *Ibid*; *Warner v Elders Rural Finance Pty Ltd* (1993) 41 FCR 399; 113 ALR 517; ATPR 41-238.

21 J Zeigel, 'The Future of Canadian Consumerism' (1973) 52 *Can Bar Rev* 191. Professor Zeigel lists a number of aims of consumer protection laws being; the right to safety, honesty, fair agreements, know, choose, privacy, the right to correct abuses, security of employment, peace of mind and to be heard. See too, J Goldring, L Maher, J McKeough and G Pearson, *Consumer Protection Law*, Federation Press, Australia, 1997, pp 2-3 and L Griggs, 'The Interrelationship of consumer values and institutions to the vendors duty of disclosure' (2005) 11 *APLJ* 116.

22 New South Wales, Victoria and South Australia. Tasmania is enacting similar legislation.

23 NSW: Conveyancing Act 1919 (NSW) s 52A, the documents are prescribed by the Conveyancing and Sale of Land Regulation 2005. Victoria: Sale of Land Act 1962 s 32(2).

South Australia: Land and Business (Sale and Conveyancing) Act 1994 (SA) ss 7-16, 35 Sch 1.

ACT: Civil Law (Sale of Residential Property) Act 2003 ss 9, 10, 11 and 18 and Sch 1.

For a full explanation of the impact of these provisions, see Vendor Disclosure, above n 14, at 13.

and real estate legislation. The article will also consider relevant provisions of the Real Estate Institute of Australia's (hereafter, REIA) recent publication, *Practice makes perfect — new guidelines for real estate agents on the Trade Practices Act*, which was prepared in collaboration with the Australian Competition and Consumer Commission (hereafter, ACCC) and the progress of the proposed reforms in New South Wales which have been mooted in response to the *Gonzales* case.²⁴

The article will conclude with a discussion of the desirability of extending the disclosure obligations in relation to non-physical features associated with a property and the difficulties of compensating a plaintiff in such circumstances.

Stigmatised property in the United States

Caveat emptor is the starting point for a discussion of vendor disclosure obligations in the United States. Clearly, the vendor or agent cannot engage in misrepresentation or active concealment of defects. However, unless a purchaser makes a direct enquiry of the vendor and/or agent, there will generally not be a sanction for failing to disclose issues affecting the property of which they were aware.²⁵ There are two relevant exceptions to this last statement. Several courts in the United States have recognised that there is an obligation to disclose information about factors which are not discoverable on normal inspection and which may *materially* affect a property through the existence of a latent defect or factors which may endanger the purchaser's health and safety.²⁶

Therefore, if a property is regarded as stigmatised, it becomes important to consider whether such stigma is a material, latent defect which should be disclosed to the purchaser. Legislatures in the United States had to confront the issue of stigmatised property in the 1980s and early 1990s after two landmark decisions, *Reed v King*²⁷ and *Stambovsky v Ackley*,²⁸ brought the issue of agent and seller disclosure in relation to non-physical defects in real property to the fore.

The decision in *Reed v King*²⁹ exhibits similarities to the issues in the *Gonzales* matter. Ms Reed purchased a property which had been the site of a multiple homicide 10 years before. Neither Mr King nor his real estate agents

24 J Garnaut, 'Gonzales house case prompts law review', *Sydney Morning Herald*, smh.com.au, 14 October 2004; Ms Reba Meagher, NSW Legislative Assembly *Hansard*, p 11551, 19 October 2004

25 S Ross Saxer, 'Am I my brother's keeper? Requiring landowner disclosure of the presence of sex offenders and other criminal activity' (2001) 80 *Neb L Rev* 522.

26 Ross Saxer, *ibid*, notes that in determining whether a defect is material; 'the focus is not on the defect itself but on the effect such a defect may have on the use and value of the property sold' therefore this would seem to equate to defects in the quality of title in Australia. Examples include landfill in close proximity to housing and damaged premises such as leaking roofs.

27 193 Cal Rptr 130 (1983).

28 572 NYS 2d 672 at 677 (App Div 1991).

29 193 Cal Rptr 130 (1983). Note the discussion of this case in Griggs, above n 12.

told Ms Reed about the murder.³⁰ The property was represented to be in good condition and fit for an 'elderly lady living alone'. Ms Reed purchased the property for \$76,000, but soon after the sale discovered that because of the stigma of past events, the property was only worth around \$65000. Ms Reed sought damages and rescission of the contract of sale.

After being unsuccessful at first instance, the court found in Ms Reed's favour on appeal. While the court was mindful of the problematic nature of stigmatised properties which were not physically defective, it concluded that the murders may have in fact had a quantifiable effect on the market value of the property because, even after 10 years, there was potential for so disturbing buyers that they may be unable to reside in a home where such events had occurred.³¹ The court also discussed whether the seller had a duty to disclose in such circumstances. In the view of the court, the buyer would not be likely to anticipate the possibility that a murder had occurred on the property and therefore there would not be an expectation that she should inquire into such issues.³²

Clearly, the judgment demonstrates awareness of the contentious nature of the case and the potential ramifications on certainty of contract with a finding in Ms Reed's favour.³³ The court was of the view that the property was encumbered with the stigma of previous tragic events which, if Ms Reed could demonstrate adversely affected the market value of her property, justified relief.³⁴

30 'Truth will come to light; murder cannot be hid long', Shakespeare, *Merchant of Venice*, Act II, Scene II per Associate Justice Blease, *Reed v King* 193 Cal Rptr 130 (1983) at 133.

31 *Ibid*, at 133 the court noted, with regard to the impact on the market value:

Reed alleges the fact of the murders has a quantifiable effect on the market value of the premises. We cannot say this allegation is inherently wrong and, in the pleading posture of the case, we assume it to be true. If information known or accessible only to the seller has a significant and measurable effect on the market value and, as is alleged here, the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information. Physical usefulness is not and never has been the sole criteria of valuation. Stamp collections and gold speculation would be insane activities if utilitarian considerations were the sole measure of value.

32 *Ibid*, at 133.

33 In relation to perceived reservations regarding the subject matter of the case, the court stated at 132-3:

The paramount argument against an affirmative conclusion is it permits the camel's nose of unrestrained irrationality admission to the tent. If such an 'irrational' consideration is permitted as a basis of rescission the stability of all conveyances will be seriously undermined. Any fact that might disquiet the enjoyment of some segment of the buying public may be seized upon by the disgruntled purchaser to void a bargain. In our view keeping this genie in the bottle is not as difficult a task as the arguments assume. We do not view a decision allowing Reed to survive a demurrer in these unusual circumstances as endorsing the materiality of facts predicating peripheral, insubstantial, or fancied harms.

34 193 Cal Rptr 130 (1983) at 133-4 the court noted:

Whether Reed will be able to prove her allegation the decade old multiple murder has a significant effect on the market value we cannot determine. If she is able to do so by competent evidence she is entitled to a favourable ruling on the issues of materiality and duty to disclose. Her demonstration of objective tangible harm would still the concern that permitting her to go forward will open the floodgates to rescission on subjective and idiosyncratic grounds.

In *Stambovsky v Ackley* a purchaser entered into a contract of sale for the purchase of a home in New York. Before settlement, the purchaser, Mr Stambovsky, discovered that the property was alleged to be inhabited by several ghosts. Mr Stambovsky sought rescission of the contract and a return of the deposit. At the time, the law of New York adhered strictly to the application of caveat emptor. Therefore, one would expect that, in these circumstances, there would be no obligation on the vendor to disclose the information about the existence of the ghosts (real or imagined).

Interestingly, again on appeal, the court found in favour of the purchaser.³⁵ It was noted that the purchaser was entitled to equitable relief because, as a resident of New York City, he could not be expected to have any familiarity with the folklore of the Village of Nyack, where the property was situated. Therefore, the purchaser could not readily learn that the home he contracted to purchase was haunted.³⁶ On the other hand, the court held that the vendor was prevented from denying the property's reputation as being 'haunted' because the vendor had sought significant amounts of publicity through newspaper and magazine stories. The vendor was therefore estopped from denying the existence of the ghosts and, as a matter of law, the property was haunted.³⁷ The court regarded its decision as a 'logical' extension of the principal that if a vendor makes a partial disclosure they are obligated to make full disclosure if the partial disclosure could result in the purchaser being misled.³⁸

Not surprisingly, these decisions caused quite a deal of consternation. However, these cases were certainly not the last word in relation to stigmatised property. It soon became obvious that, in addition to murders and ghosts, there was an abundance of factors which may, arguably, 'stigmatise' property, and possibly be regarded as 'material' issues which should be disclosed.³⁹ Deaths, through homicide, suicide or natural causes were mooted as material issues which should be disclosed during negotiations for the sale

35 Note the dissent of Smith J, 572 NYS 2d 672 (1991) at 677–8.

36 Ibid, at 676.

37 Articles describing the hauntings had appeared in *Readers Digest*, the local press on several occasions and was described in a walking tour of Nyack as 'a riverfront Victorian (with ghost)'. All this publicity, and other activities of the vendor, led the court to find that the vendors 'promotional efforts in publicising her close encounters with these spirits' fostered the reputation of the premises within the community.

38 The court noted 572 NYS 2d 672 (1991) at 675–6:

Where a condition which has been created by the seller materially impairs the value of the contract and is particularly within the knowledge of the seller or is unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity.

39 Issues which may be pertinent to potential purchasers 'could range from structural data to neighbourhood quality to violent deaths and paranormal experiences which occurred on the property': Murray, above n 7, at 689; R R Hartog, 'The Psychological Impact of Aids on real property and a real estate broker's duty to disclose' (1994) 36 *Ariz L Rev* 757; M E Wojcik, 'Aids and Funeral Homes: Common legal issues facing funeral directors' (1994) 27 *J Marshall L Rev* 411.

of property.⁴⁰ Properties where previous occupants had suffered from certain illnesses, primarily AIDS, were also alleged to be stigmatised.⁴¹

Materiality of information potentially extended beyond the individual property. For example, issues arose as to whether there should be disclosure of information regarding circumstances involving the neighbourhood itself, for example, whether a sex offender was living in the area, whether crime rates were high, whether particular crimes had been committed in the area or whether there was evidence of gang activity and/or drug abuse.⁴² These latter issues remain a contentious area and, it is suggested, will come under increasing scrutiny in Australia. Indeed, it is perhaps not the properties stigmatised by a past which will be of importance to many consumers. The issue of psychological stigmas attaching to properties because of prevailing conditions in the present, and the obligation, or otherwise, to reveal such matters, has the potential to become a contentious issue for the real estate industry.

How did the US legislatures deal with stigmatised property?

Thirty states and the District of Columbia have introduced legislation dealing with the obligations of vendors and agents marketing stigmatised property.⁴³ While the intention behind the legislation was generally to prevent psychological issues being regarded as material facts in real estate transactions, the legislation was not consistent in relation to the parties protected, the nature of matters which may psychologically impact upon properties and duties of disclosure to encourage potential purchasers to investigate certain matters themselves.⁴⁴ Two-thirds of the states have introduced enhanced statutory obligations to disclose in real estate

40 F Young Roberts, 'Disclosure Duties in Real Estate Sales and Attempts to Allocate the Risk' (2001) 34 *Conn L Rev* 1; Murray, above n 7.

41 *Kleinfield v McNally* NY Co Sup Ct, 15 July 1988, cited by Ben-Ezra and Perlin, above n 3, at 1; Murray, above n 7, at 690. This is despite the fact that it is impossible to contract AIDS merely from living in the same premises. See too Hartog, above n 39, at 759.

42 Murray, above n 7, at 690.

43 R B Brown, 'Buyers Beware: Statutes shield real estate brokers and sellers who do not disclose that properties are psychologically tainted' (1996) 49 *Okla L Rev* 625 at 628.

44 *Ibid*, at 628.

transactions.⁴⁵ Several of the disclosure statutes contain the statutory provisions for that particular state regulating the disclosure of stigmatised property.

In summary, three main strategies have been adopted in relation to statutes dealing with stigmatised property.

The first strategy — stigmatising events deemed immaterial

The first strategy prohibits stigmatising events from being regarded, as a matter of law, as material. Such statutes provide immunity from suit for non-disclosure of such information. Most statutes employing the first strategy identify specific conditions which are not to be regarded as material in a real estate transaction, typically death (of varying causes) and a previous resident suffering from HIV/AIDS.⁴⁶ The states differ in relation to the significance of the cause of death. For example, in some states the stigmatising event is limited to murder,⁴⁷ while others extend the reach to suicide and natural

45 The real estate disclosure statutes impose a duty on vendors to disclose a variety of factors to a prospective purchaser. In many cases, eg, in California, the reference to stigmatised properties is contained within the disclosure statute. See Alaska Stat §§ 34.70.010-.200; Cal Civ Code §§ 1102-1102.16 (West Supp 1997); 1995 Conn Legis Serv 311; Del Code Ann tit 6, §§ 2570-2578 (1993); Haw Rev Stat §§ 508D-1 to -20 (Supp 1995); Idaho Code §§ 55-2502 to -2518 (1994 & Supp 1997); 765 Ill Comp Stat Ann 77/1 to /99 (West Supp 1997); Ind Code Ann §§ 24-4.6-2-1 to -13; Iowa Code Ann §§ 558A.1-.8 (West Supp 1997); Ky Rev Stat Ann § 324.360; Me Rev Stat Ann tit 32, § 13273 (West Supp 1996); Md Code Ann, Real Prop § 10-702 (1996); Miss Code Ann §§ 89-1-501 to -525 (Supp 1997); Neb Rev Stat §§ 76-2, 120 (1996); Nev Rev Stat §§ 113.060-.150 (1995); N H Rev Stat Ann § 477:4-c (Supp 1996); N J Stat Ann §§ 46:3c-1 to -12 (West 1997); N C Gen Stat §§ 47E-1 to -10 (1995); Ohio Rev Code Ann § 5302.30; Okla Stat tit 60, §§ 832 to 839 (Supp 1997); Or Rev Stat §§ 105.456-.490 (1995); Pa Stat Ann tit 68, §§ 1021-1036; R I Gen Laws §§ 5-20.8-1 to -11 (1995); S D Codified Laws §§ 43-4-37 -44; Tenn Code Ann §§ 66-5-201 to -210 (Supp 1996); Tex Prop Code Ann §§ 5.008, 5.094-.095 (West 1997); Va Code Ann §§ 55-517 to -525; Wash Rev Code Ann §§ 64.06.010-.050 (West Supp 1997); Wis Stat Ann §§ 709.01-.08 (West Supp 1996).

Massachusetts has now enacted a stigmatised property law. This law was introduced on 11 August 1998, H 2099 An Act Relative to Disclosure of information in Real Estate Transactions. It is noteworthy that Massachusetts introduced broad new disclosure laws relating to real estate generally in 2005.

See generally, Brown, above n 43, at 628; R M Washburn, 'Residential Real Estate Condition Disclosure Legislation' (1995) 44 *DePaul L Rev* 381; E A Dalberth, 'Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards' (1992) 97 *Dick L Rev* 153; E S Schlicter, 'Stigma damages in Environmental Contamination Cases: A possible windfall for plaintiffs?' (1997) 34 *Houston L Rev* 1125.

46 M A Burger and L I Reyes Rosa, 'Your Money and Your Life! AIDS and Real Estate Disclosure Statutes' (1993) 5 *Hofstra Prop LJ* 349.

47 See Brown, above n 43, at 630.

causes.⁴⁸ Other potentially stigmatising events deemed immaterial may include other felonies and criminal activity in a neighbourhood.⁴⁹

The difficulty with this approach is that the states have not been consistent with the matters deemed immaterial. Colorado and the District of Columbia deem all psychological stigmas immaterial.⁵⁰ On the other hand, some states have attempted to painstakingly list all stigmas which will not be regarded as material.⁵¹ While some states refer specifically to HIV/AIDS, others refer to any illness not contractible through communal dwelling or to circumstances where it would contravene legislation, particularly the Fair Housing Act, to disclose information.⁵²

Where this strategy is used, it should also be noted that non-disclosure is protected even where direct questions regarding a listed stigma are asked.

A troubling issue is where the stigmatising event is not listed within the provisions. The issue then becomes whether the matter is, in fact, material. In such circumstances the matter will be left to be determined by the common law. It has been noted that given the move away from caveat emptor towards vendor disclosure in the United States since *Johnson v Davis*,⁵³ disclosure should be the appropriate course.⁵⁴

48 For example, New Hampshire refers to death only whereas many states specifically nominate, murder, suicide, accident and/or natural causes. Only five states, Nevada, Indiana, California (with limitations discussed below) North Carolina and South Carolina deem any death to be a stigma. Nevada and Texas exempt accidental deaths that occurred as a result of the condition of the property: Brown, above n 43, at 638.

49 For example, Indiana § 24-4.6-2.1-2(3) where a vendor is not required to disclose that the property was the site of:

- (A) A felony under IC 35;
- (B) Criminal gang (as defined in IC 35-45-9-1) activity;
- (C) The discharge of a firearm involving a law enforcement officer while engaged in the officer's official duties; or
- (D) The illegal manufacture or distribution of a controlled substance.

Brown notes that such issues are not merely psychological but can have a very real impact on the value of the property in the future: above n 43, at 635.

50 Colo Rev Stat Ann § 38-35.5-101(i) (West Supp 1996); D C Code Ann § 45-1936(f) (1996).

51 For example, Delaware Del Code Ann tit 24, § 2929 (Supp 1996). Variations are evident even within particular types of listed events. In Indiana, it is sufficient that an individual died on the property. Therefore, all forms of death — murder, suicide, accident and natural causes — are included. As discussed above, some other states refer only to homicide or suicide.

52 See R R Hartog, 'The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose' (1994) 36 *Ariz L Rev* 757 and the examples cited therein. The issue of AIDS will be discussed below.

53 480 So 2d 625 at 628 (Florida 1985). Although this case dealt with a physical defect, it seems accepted by commentators that it would extend to circumstances involving stigmatised property. In *Johnson*, the Florida Supreme Court noted:

The tendency of more recent cases has been to restrict rather than extend the doctrine of caveat emptor. The law appears to be working towards the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.

The court held that where a seller of a home knows of facts materially affecting the value of the property which are not readily observable and not known to the buyer, the seller is under a duty to disclose them to the buyer.

54 Ben-Ezra and Perlin, above n 3.

The second strategy — disclosure of certain non-physical matters

The second strategy involves a requirement for vendors (and in some cases their agents) to disclose certain non-physical matters. In some instances, a positive obligation to disclose information concerning a death on the property may be imposed, but is made subject to a time limitation. Therefore, in California and Hawaii, a death which occurred more than three years prior to the sale is non-material.⁵⁵ It seems that a vendor would be obliged to disclose details of a death on the property which had occurred within three years of the purchase.⁵⁶ South Dakota requires a vendor to disclose whether, in the 12 months prior to the provision of the disclosure statement to the purchaser, a homicide or any other felony against a person or the property was committed on the property.⁵⁷ A prospective purchaser has the right to terminate the contract on the basis of such disclosure.⁵⁸

The third strategy — obligation to disclose when specifically asked

The third strategy offers protection for non-disclosure however imposes positive obligations to respond truthfully when specifically asked about a particular stigmatising matter. Therefore, some states provide some opportunity for prospective purchasers to obtain disclosure regarding psychologically impacted properties. This takes the form of specific questions which can be asked of a vendor and/or agent regarding the property. For example, in Connecticut, a potential purchaser can inform the vendor or agent, in writing, that a psychological impact is relevant. The vendor can then choose to disclose or remain silent.⁵⁹ In other states, for example Delaware and Georgia, there is an obligation to answer truthfully when asked about stigma although in some cases if the query is in relation to disease the agent is under no obligation to disclose.⁶⁰ New York permits a prospective purchaser to make a written enquiry regarding stigmas which will impact on the decision to purchase.⁶¹ In some cases if a vendor will not respond, a broker must inform the prospective purchaser of this refusal.⁶²

The problem with this approach is that there is no obligation to disclose

⁵⁵ Cal Civ Code § 1710.2(a) (West Supp 1997).

⁵⁶ Cal Civ Code § 1710.2(a) (West Supp 1997). These requirements are also set out in the revised California Disclosure Statute operational 1 January 2006, Haw Rev Stat § 508D-8.

⁵⁷ Ben-Ezra and Perlin, above n 3, SD Codified Laws 43-4-44 (2004).

⁵⁸ SD Codified Laws 43-4-39.

⁵⁹ Conn Gen Stat §§ 20-329cc to -329ff. The provisions define certain occurrences to be stigmas and then declare them immaterial. However, the statute goes on to permit enquiry in relation to such events. The vendor and agent are then, if asked, under a duty to respond. The vendor can refuse to respond however it would seem that such behaviour would tend to war off a purchaser anyway.

⁶⁰ For example, Delaware Del Code Ann tit 24, § 2929 (Supp 1996) and Connecticut Conn Gen Stat Ann § 20-329cc (West Supp 1996).

⁶¹ Oklahoma 59 Okla Stat § 858-513 (1991).

⁶² Oklahoma 59 Okla Stat § 858-513 (1991). In California, the Civil Code § 1702 states: (1) Death or illness on the premises. As discussed above, the California Civil Code § 1710.2 deals with disclosures involving death or illness of a former occupant. No cause of action

unless specific questions are asked by the prospective purchaser. Therefore, a prospective purchaser is at a significant disadvantage as, due to their general lack of knowledge regarding a subject property, they would not know which questions are appropriate to ask. If the appropriate questions are not asked, the vendor is not under any obligation to divulge.⁶³

Application to agents and other persons involved in the sale

The legislation discussed, and the protections therein, apply to both brokers (agents) and vendors, some to just brokers and others to just vendors. There is little consistency in this regard. Clearly, the vendor is expected to have knowledge of the stigma associated with the property. However, there could be instances where a vendor did not pass on this information to a broker. Issues then arise as to the liability of the broker.⁶⁴

Stigmas impacting upon real property

Death on the premises

Evidence regarding the impact of a death on the premises on prospective purchasers is largely anecdotal. However, the issue has been the subject of empirical research by Dr Julia Kelso, a Canadian academic.⁶⁵ Dr Kelso surveyed real estate agents and prospective purchasers around St John's, an older area of New Foundland. This area was chosen because, due to the age and history of the town, it was likely that persons may have died, or at least been 'waked' in many homes. In earlier times, most people died at home rather than in a hospital. The agents surveyed also provided details of their experiences in marketing properties stigmatised by death.

Predictably, homes which were the site of murder or suicide were generally difficult to sell and often sold for a price lower than market value. Houses with a history often became notorious within communities and at times develop a folklore of their own. While clearly such stigmas do not affect all potential purchasers, a considerable number of recipients expressed unease at the

arises against an owner or the owner's broker/agent (or any cooperating broker/agent) when selling, leasing, or renting real property for failing to disclose to the buyer, lessee, or renter the following:

- the manner or occurrence of an occupant's death upon the real property if the death occurred more than 3 years prior to the transferee's offer to purchase, lease, or rent the property; or
- that an occupant of the property was afflicted with, or died from, Acquired Immune Deficiency Syndrome (AIDS).

Note this provision does not affect the disclosure of any other physical or mental condition or disease of an occupant or the physical condition of the property. If the buyer asks a direct question concerning deaths occurring on the real property, the statute will not protect the owner or broker(s)/agent(s) from misrepresentation.

⁶³ Note the provisions in New Hampshire and Nevada.

⁶⁴ For a discussion of this issue and references to statute refer to Brown, above n 43, at 625 onward.

⁶⁵ J Kelso, *Death and Real Estate; A study of the effect of death on home-purchasing decisions*, Memorial University of Newfoundland, 1999.

prospect of purchasing a home where someone had died, particularly not of natural causes. There was greater acceptance of the death of an older person, however the death of a younger person or a child often caused consternation. After a few years the stigma associated with the homes, except in especially notorious cases, appeared to dissipate.⁶⁶

Other commentators examining the situation in the United States have noted that homes where a death was particularly notorious retained the stigma for a considerable time and often became a liability, to the extent that in some cases demolition⁶⁷ or purchase by a local consortium to prevent further reduction in surrounding land values⁶⁸ appeared to be the only solution.⁶⁹

In Australia, it seems that significant sections of the community have similar views. In the wake of the *Gonzales*' matter, community reaction indicated many persons would have an aversion to purchasing a property where such a crime took place. This again appeared to be a factor in the lower selling price attained for the property formerly owned by Joe and Maria Korp.

Health related issues

At the height of the AIDS hysteria which was evident in the late 1980s and into the 1990s, some potential purchasers in the United States argued that it was material for the vendor to disclose the state of health of the vendor and/or any persons residing on the premises. There was considerable ambiguity at this time regarding disclosure obligations in real estate transactions where a previous owner or occupant of the property had contracted AIDS or was HIV positive. The Fair Housing Act prohibited discrimination in the sale, rental or financing of dwellings to persons regarded as handicapped. If those persons suffering from AIDS were regarded as being handicapped for the purposes of the Act, and disclosure of their condition would cause discrimination regarding the sale of the dwelling, there would be a violation of the Act. While it was found that unsolicited disclosure would offend the statute, the effect of disclosure when asked the question directly was problematic. Agents were advised not to respond to such questions.⁷⁰ As discussed above, the response in many of the states has been to declare that the fact a previous occupant had contracted AIDS or some other disease caused by common occupancy is not a material fact which must be revealed. Some states extend this exclusion to all diseases which cannot be contracted through communal dwelling. Some states, for example, Georgia and Louisiana, prohibit disclosure when to do so would result in unlawful discrimination. Michigan and Wisconsin refer specifically to the Fair Housing Act.

⁶⁶ Ibid, Ch 3.

⁶⁷ Ibid, Chs 3 and 6.

⁶⁸ For example, the houses where Charles Manson and his followers committed murders (although both houses had been on sold several times before the demolition and the scene of the 'Heaven's Gate' suicides).

⁶⁹ Sometimes, the stigma attached to a property where a controversial event had *not* occurred. For example, in the OJ Simpson case, predictably the home where Simpson's wife and friend were murdered decreased in value due to the stigma of the murders but OJ Simpson's home, where a crime had not been committed, also decreased in value.

⁷⁰ For an excellent discussion of this area generally and a comparative analysis of the US situation see, R B Brown, 'Buyers Beware: Statutes Shield Real Estate Brokers who do not Disclose that Properties are Psychologically Tainted' (1996) 49 *Okla L Rev* 625.

Stigma's operating in the present

Concerns regarding a death on a property or uninformed prejudice regarding illness may arguably be dismissed because these events are irrelevant to the present physical condition of the premises. However, some stigmas could potentially have a very real impact on persons who decide to purchase a property. For example, suburbs with high crime rates, drug dealing or the presence of a sex offender in the neighbourhood potentially impact on the purchasers, not just through psychological stigma and a possible diminution of value but also through exposing themselves or their families to potential danger. Similarly, neighbourhood environmental factors have long been a cause of concern.⁷¹ Some of these matters have been canvassed in the United States and may similarly be of concern in an Australian context.

As discussed, the United States has seen the common law evolve from caveat emptor in the sale of residential real estate. It appears disclosure obligations exceed those of the common law in Australia by compelling the disclosure of known material latent defects not known or not readily apparent to the purchaser.⁷² Two thirds of the states have enacted legislation which elaborates on the matters which must be disclosed to a purchaser by a vendor and/or agent. The most comprehensive is California where the common law requires the vendor to reveal all known facts materially affecting the value or desirability of the property. Statute complements but does not otherwise modify the common law situation in that state.⁷³

Under the California disclosure laws, duties to disclose are placed on vendors and agents. Agents are under an obligation to conduct a reasonably competent and diligent visual inspection of the premises the purpose of which is to disclose to the prospective buyer all material facts affecting the property's value, desirability and intended use. Each agent's inspection certification is contained in the TDS. In addition to this, the agents must disclose all material facts which affect the value, desirability and intended use of the property about which they have or should have notice or knowledge that may not be discernable from the required visual inspection.⁷⁴

Present potential danger to purchasers

Clearly, the focus of the stigmatised property statutes has been an attempt to avoid issues regarding death or illness on the property being regarded as material. However, the inclusion in some states of events pertaining to the present is an interesting development. Arguably, these stigmas may not be purely psychological. Properties stigmatised by prior events, for example deaths, are not physically impaired by the previous unfortunate events. However, this may not be the case where properties are presently tainted by a stigma which has the potential to encroach into the physical realm.

71 R Kwong, 'Fraud and the duty to disclose off-site land conditions: actual knowledge vs seller status' (1997) 24 *B C Envtl Aff L Rev* 897; S M Williams, 'When daylight reveals neighbourhood nightmares' (1996-1997) 12 *J Nat Resources & Envtl L* 1; D Binder, 'The Duty to disclose Geologic hazards in real estate transactions' (1998) 1 *Chap L Rev* 13.

72 *Lingsch v Savage* 213 Cal App 2d 729 (1963).

73 The legislation has been in place since 1985 and was the subject of significant amendments taking effect on 1 January 2006.

74 Cal Bus & Prof 10176(a), CAL Civil Code 2097 onward.

Therefore, should prospective purchasers be informed that the property itself, or those in the neighbourhood have been the subject of a violent crime, drug dealing or manufacture, gangs or other nefarious activities? In such circumstances there is arguably a risk to the personal safety, and certainly amenity, of the purchasers or their family. While it is clear that vendors and agents cannot make fraudulent misrepresentations regarding the safety of the premises or the neighbourhood, or untruthfully respond to direct questioning, whether such matters are a material defect requiring disclosure remains a clouded issue.⁷⁵

In *Van Camp v Bradford*,⁷⁶ the vendor and the real estate agent did not disclose that a rape had occurred on the property.⁷⁷ The victim was a former lessee's teenage daughter. The purchaser was a single mother with a teenage daughter. Ms Van Camp specifically asked about security bars that were on the basement windows. She was informed that they had been placed there after a burglary 16 years ago. The occurrence of the rape on the premises was not disclosed, nor was another rape which had occurred in the neighbourhood a month after the first. Two other rapes subsequently occurred in the neighbourhood.⁷⁸

The vendor and real estate agent contended that these matters were merely psychological. Therefore, as the defects were not of a physical nature there was no obligation to disclose the past crime or the prevalence of crime in the neighbourhood.⁷⁹

Interestingly, the court gave weight to the fact that both the vendor and the purchaser were single mothers with teenage daughters. As a result, the court was of the view that the vendor should have been aware that the purchaser was 'peculiarly disposed to attach importance to the subject of female-targeted crimes'.⁸⁰ The enquiry about the bars indicated that Ms Van Camp was

75 For an excellent discussion of these concerns, see generally L A Polonchak, 'Surprise! You have just moved next door to a sexual predator: The duty of residential sellers and real estate brokers to disclose the presence of sexual predators to prospective purchasers' (1997) 102 *Dick L Rev* 169.

76 623 NE 2d 731 (Ohio CP 1993).

77 For a case where the danger was in the past as the offender was incarcerated, see *Sanchez v Guerrero* 885 SW 2d 487 (Tex App 1994). This case involved a real estate agent who was found liable for fraudulent misrepresentation in relation to representations regarding the previous occupant of the property. The previous occupant was a serious sex offender who had molested children on the premises. The purchasers had specifically asked the agent prior to the purchase about the previous occupants and, although the agent knew of the identity and criminal history of the previous occupant, claimed not to know anything about him. Upon discovering the truth about the previous occupant, via a television news report, the purchaser tried to rescind the contract. The court was of the view that the information was material to the transaction as if the agent had disclosed the information, the purchasers would not have proceeded. The agent's response to the purchaser's specific enquiry was untrue and therefore the agent had committed a fraudulent misrepresentation pursuant to the Deceptive Trade Practices-Consumer Protection Act Tex Bus & Com Code Ann §§ 17.41-.63 (West 1987 & Supp 1997).

78 In addition, the purchaser and her daughter were harassed with threatening telephone calls and the house was burgled: Brown, above n 43, at 635-6; Ross-Saxer, above n 25, at 555-6; Polonchak, above n 75, at 191-2.

79 Ross-Saxer, above n 25, at 556; Polonchak, above n 75, at 192.

80 A M Weinberger, 'Let the buyer be well informed — doubting the demise of caveat emptor' (1996) 55 *Md L Rev* 387 at 410.

concerned about security. The provision of the information regarding burglary 16 years before, and not the recent rapes, particularly in the circumstances of the potential purchaser of which the vendor and agent were aware, resulted in a fraudulent misrepresentation. As a result, the court held that where vendors and agents engage in such misrepresentation, purchasers are 'relieved of their burden to protect their own interests under the doctrine of caveat emptor'.⁸¹

However, what are the duties of disclosure, if any, where the circumstances do not indicate the existence of a misrepresentation?

This issue became contentious in relation to the sale of real estate in the wake of the passing of 'Megan's Law' which was enacted in response to the death of 7-year-old Megan Kanka. Megan was murdered by a convicted sex offender who had moved into a neighbouring property. The local community had not been informed of the presence of this person or his criminal history. The outcry over this case resulted in the Clinton administration signing federal legislation into law which required state law enforcement authorities to inform and provide certain information to local communities regarding sex offenders living in the local area. Despite the controversial nature of the legislation, all states, the District of Columbia and the Federal Government have enacted various forms of the legislation.⁸² Again, the states have not adopted the law uniformly and there are significant differences regarding notification, limitations on information and disclosure obligations.⁸³ Generally, Megan's Law statutes require a level of disclosure regarding the presence of sex offenders in the local community. Pertinent to this article is whether the disclosure of information about the presence of a sex offender should be provided to a prospective purchaser *before* that purchaser settles and moves into the neighbourhood?

Clearly, if it was generally disclosed that a sex offender was living in the local area, this would be likely to discourage prospective purchasers and force down prices in the neighbourhood. More importantly, especially where a prospective purchaser has children, there are concerns about the safety of persons living in the area. For example, in Wisconsin, vendors and agents are under an obligation to disclose any material facts which are adverse to the purchaser.⁸⁴ It would seem appropriate that a risk to the safety of persons residing in a property would be regarded as material.⁸⁵

81 Polonchak, above n 75, at 187 discussing *Van Camp v Bradford*, above n 76, at 736.

82 See, generally, R Del Tufo, 'Megan's Law Symposium', University of Connecticut School of Law, 2 April 2003, *Connecticut Public Interest L Jnl*, Berkeley Electronic Press, at <http://lsr.nellco.org/uconn/cpilj/papers/1>.

83 The availability and content of information available to the community varies from state to state. Generally, sex offenders are assessed into low or high risk categories. In the case of a low risk offender, the Department of Corrections has a discretion as to whether to provide information regarding the offender to local authorities. If the risk is regarded as high the information must be sent to local officials. This information can be provided to the local community upon request, subject to a public interest test.

84 T D Larson, 'To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate brokers under Wisconsin's "Megan's Law"' (1998) 81 *Marq L Rev* 1161.

85 *Ibid*, at 1163. Larson states at 1177 that matters affecting a property 'off site', eg, environmental concerns, have been recognised in some cases as material matters. He concludes that therefore it would seem the 'off-site' risk posed by a sex offender should also be material.

There is concern that the legislation does not require the existence of a sex offender in the neighbourhood to be revealed to potential purchasers. In some states this loophole has been closed but not in the way one might expect. A number of states have been criticised for specifically stating in stigmatised property statutes that the residence of a sex offender in the neighbourhood is not a material issue.⁸⁶ Alaska and California have imposed a positive duty to disclose.⁸⁷

Crime

Predictably, most persons would be reluctant to move into an area with high crimes rates, gangs and/or drug use. As discussed, some states have stated that such matters are not material. In comparison, in California there must be disclosure of the existence of potential, known or suspected methamphetamine production.⁸⁸

Neighbours

In *Alexander v McKnight*,⁸⁹ it was found that the presence of hostile neighbours could depress the value of houses in the surrounding area. Therefore, the existence of such persons was a material defect which should have been revealed pursuant to the California Real Estate Disclosure Law. However, in *Strawn v Canuso*,⁹⁰ the court was of the view that there was no duty to disclose transient social conditions such as a neighbourhood's changing character or the deterioration of a local school system. The difficulty here is where does one draw the line between 'transient social conditions' and a matter which is material?⁹¹ Californian law requires a seller to disclose 'any neighbourhood noise problems or other nuisances'.⁹²

Environmental conditions

Stigma can be associated with properties which have been contaminated, or which are proximate to, contaminated land. Owners of such properties were concerned about the effect exposure to environmental contamination could

86 These states are Arizona, Idaho, Michigan, Nevada, North Carolina, and Oklahoma. See T A Van Wickler, 'The Real Estate Disclosure Act threatens Arizona's Children with becoming "Megan" Victims' (2000) 32 *Ariz St LJ* 367.

87 Pursuant to § 2079.10a of the California Civil Code, written leases or rental agreements for residential property and contracts for the sale of residential property must contain, in not less than eight point type, a prescribed notice relating to the locations of registered sex offenders.

88 After receiving notification from a law enforcement agency of potential, known or suspected contamination by a methamphetamine laboratory, the California Health and Safety statute § 25400.10 requires local health officers to make an assessment of an affected property. If there is contamination, an order which prohibits the property's use or occupation will be issued. Until such time as the owner of the property receives notice from the local health officer that the order does not require any further action, the owner must inform and provide a copy of the order to a prospective purchaser.

89 9 Cal Rptr 2d 453 (Cal Ct App 1992).

90 657 A 2d 420 (NJ 1995).

91 'Neighbours and attitudes come and go. One owner's loud neighbour may turn out to be the perfect party playmate for another', A Wallace, *Disclosure Standards are Steadily Evolving in Real Estate Sales*, Calif-Legal.com, www.calif-legal.com/Articles/mar_article.html.

92 Part C (11) of the TDS.

have on their health and also on the value and resale of their properties. It is undisputable that values can be affected by negative public perception regarding contaminated properties and those situated close by.⁹³ Often the psychological stigma may remain even after the property is cleaned up.⁹⁴ An owner affected by environmental damage and subsequent psychological stigma may claim against the polluter pursuant to federal and state statute and regulation and common law tort.⁹⁵ However, does the environmental stigma need to be disclosed to an incoming purchaser? In a landmark New Jersey case it was held that residential developers/sellers and real estate brokers have a duty to disclose the existence of off-site conditions which (1) are unknown to the buyers, (2) are known or should reasonably be known to the seller and the real estate broker, and (3) could reasonably be expected to materially affect the value or desirability of the property.⁹⁶ Therefore, developers were under an obligation to disclose the properties were built less than a mile away from landfill containing contaminated material. While cases of off-site contamination could be regarded in many cases as as 'psychological' as those associated with death, illness or crime rates, they have been accorded more credence in the courts.⁹⁷

Valuation

Leaving aside the psychological ramifications, the impact on the value of a stigmatised property, particularly in the period soon after the event, may be significant indeed.

In the United States several studies have been completed regarding the impact of high profile incidents on the value of homes where the incidents usually, but not exclusively, occurred.⁹⁸ The value of a stigmatised property will depend on the scope of the tragedy, the sales price of other tainted properties and the amount of media attention the incident received.⁹⁹ Some commentators suggest that there is approximately a 15–25% diminution in value for two to three years after the incident. Over time it appears that the discount evaporates but it takes 10–25 years for the stigma to go away entirely.¹⁰⁰

In *Reed*, the impact of the stigma on the market value of the property was sufficient for the court to rule in Mrs King's favour. While the impact of stigma can have a demonstrable effect on real estate values, it should be

93 T B Smallwood, 'A Primer on Stigma Damages, Environmental Litigation and Toxic Torts' (2005) 8(1) *Committee Newsletter, American Bar Association* 1.

94 Hierlmeier, above n 4.

95 Smallwood, above n 93, at 2.

96 Polonchak, above n 75, discussing *Strawn v Canuso* 657 A 2d 420 (NJ 1995).

97 Hierlmeier, above n 4; E S Fisk, 'Stigma Damages in Construction Defect Litigation: Feared by defendants, championed by plaintiffs, warded by (almost) no courts — What gives?' (2004–2005) 53 *Drake L Rev* 1029.

98 For example, the OJ Simpson example discussed above.

99 C Fleck, 'Stigma or Superstition? Appraisers weigh diminished values of tainted properties' (1997) *Realtor Magazine*, www.realtormag.com. See too J J Hockley and R T M Whittle, 'Valuation Evidence: the comparable sales approach when sales are not comparable' (2005) 11 *APLJ* 90.

100 Fleck, above n 99, citing Randall Bell, a property valuer who specialises in appraising stigmatised properties in California.

considered whether this alone is sufficient to make the existence of the stigma compensable. Warner notes that 'rational as it seems, economic reality is not society's standard for law'.¹⁰¹ If it was, certain other factors which society generally should regard as undesirable, for example, discrimination against persons on the basis of race or illness, may be in some respects justified.¹⁰² Therefore, rather than give recognition of the stigma of a past event, perhaps it is more desirable for the law to ignore the alleged diminution of the market value of the purchaser's property in favour of the 'greater good' of not recognising or bolstering superstition.

Also, it is quite illuminating to examine the impact a reduction in purchase price will sometimes have on a purchaser's qualms regarding a stigmatised property. As noted in *Alexander v McKnight*:

A buyer willing to assume headaches and other emotional discomfort in purchasing a residence will undoubtedly expect a discount for doing so.¹⁰³

In a newspaper article regarding the impact of stigma on properties in California a real estate agent was quoted as stating:

If the price is right, it doesn't matter what happened in the house . . . people will buy it. Some purchasers are amazed at the price cutting, some can't believe they are getting a break in price for something that happened in the past. It's not like they'll have to spend thousands replacing the plumbing.¹⁰⁴

In the wake of the *Gonzales* case, several persons indicated their intention to purchase the property if they could obtain a reduction in price.¹⁰⁵ As discussed, the home of Maria and Joe Korp was also sold at under market value.¹⁰⁶

Elsewhere

Canada has not experienced the same type of legislative activity as the United States. Although realtors are aware of the problems associated with disclosure of psychologically impacted properties, action has been limited to real estate organisations advising their members to fully disclose details of such events¹⁰⁷ and issuing information to real estate consumers to seek information regarding the property on certain matters which are of concern to them.¹⁰⁸ Similar views have been expressed in the United Kingdom.¹⁰⁹

101 Warner, above n 3, at 243-4.

102 Ibid, at 244.

103 9 Cal Rptr 2d 453 (Cal Ct App 1992) at 456.

104 J Glionna, 'A Haunting Story', *LA Times*, 31 March 1991, p A26. This article is discussed in Warner, above n 3, at nn 54 and 159.

105 The home was sold to the first purchasers for \$800,000. It eventually sold at auction for \$720,000.

106 While for the purchasers in *Gonzales* there is no doubt that the stigma had a real and personal impact upon their beliefs, recognition generally of the materiality of stigma could easily become a cynical bargaining chip to obtain a lower purchase price.

107 *Nova Scotia Realtors Bulletin*, *Alberta Realtors Association Newsletter*.

108 See, www.reca.ab.ca/consumer_information/protect_your_interests/stigmatized_properties.htm.

109 Professor Mark Pawlowski, Solicitors Journal regarding the introduction of a 'Sellers information Pack' in the United Kingdom.

Vendor and agent disclosure in Australia

Vendor disclosure in Australia is regulated predominantly by the States and Territories. When considering issues regarding vendor disclosure three areas need to be considered being: the common law, State and Commonwealth consumer protection legislation (the FTAs, the TPA and miscellaneous real estate legislation) and the standard contract for the sale of land in each State or Territory.

Agent disclosure is regulated by the common law, consumer protection legislation and industry specific real estate legislation. The conduct of agents is also influenced by the Codes of Conduct adopted by real estate industry organisations in each State and Territory.

Caveat emptor¹¹⁰ is clearly the starting point of any discussion in this area, however, as was the case in the United States, significant limitations have been placed on the operation of the doctrine. At common law, mere silence will generally not amount to a representation,¹¹¹ however a vendor cannot indulge in fraudulent conduct, for example, concealing defects¹¹² or make misleading statements regarding the property, through half truths¹¹³ or as a result of a change in circumstances.¹¹⁴

Misrepresentation through a half truth was, of course, the situation in *Van Camp*. Mrs Van Camp asked a question regarding the bars on the basement window. The response was that there had been a break in 16 years ago. Clearly the question was with regard to the security of the premises. Mentioning the previous break-in but failing to mention the recent assaults was an actionable half truth. It is submitted that the result would be the same in an Australian context.

Defects in title

A vendor must disclose a latent¹¹⁵ defect in title to land¹¹⁶ and if he or she fails to do so the purchaser may rescind the contract. However, the vendor is under

110 *Dormer v Solo Investments Pty Ltd* [1974] 1 NSWLR 428 at 432; *Tsekos v Finance Corporation of Australia Ltd* [1982] 2 NSWLR 347; (1983) Q ConvR ¶54-084.

111 *W Scott Fell & Co Ltd v Lloyd* (1906) 4 CLR 572.

112 *Anderson v Daniels* (1983) NSW ConvR ¶55-144.

113 *Dimmock v Hallett* (1866) LR 2 Ch App 21.

114 *English v Denham Vale Properties Ltd* [1978] 1 WLR 93; [1978] 1 All ER 382. However, Cheshire and Fifoot note that silence can constitute a misrepresentation in three circumstances. These circumstances are where silence distorts a positive representation, where the contract is one of utmost good faith or where a fiduciary relationship exists between the parties: para 11.18 The vendor must also honour any express term or warranty in the contract of sale relating to the condition of the property: CCH, *Queensland Conveyancing Law and Practice*, CCH Australia, 2005, at [9-220].

115 Latent defects are those which the purchaser could not by exercise of ordinary care discover upon a physical inspection of the property': S A Christensen, W M Dixon, W D Duncan and S E Jones, *Land Contracts in Queensland*, The Federation Press, 2004.

116 The central tenant of title to land is that the subject property is free from any encumbrance, lien, right, title or interest which would render the property unmarketable . . . In summary, what is required is that there be no restriction in the widest sense of the word on title': Griggs, above n 12, p 78.

no obligation to disclose a patent¹¹⁷ defect in title.¹¹⁸ Similarly, there is no duty on a vendor to disclose either a patent or a latent defect in the quality¹¹⁹ of the subject matter of the sale¹²⁰ even if this defect is material to the property's present value¹²¹ and the failure to disclose has impacted upon the purchaser's ability to make an informed assessment of the property's value.¹²² The failure to such defects in relation to the quality of title will not permit rescission but will be of relevance in an application by the vendor for specific performance or an application from the purchaser for the return of the deposit.¹²³

If psychological stigmas were to be regarded as impacting upon the land it seems they would impact upon the quality of the title. The most objective gauge of the impact of the stigma would be a valuation indicating a reduction in the value of the property, as against other comparable properties, as a result of the stigma. Therefore, although a purchaser could not rescind the contract, it could be alleged that there has been a material impact on the present value of the property and therefore the purchaser may resist an action for specific performance and/or seek the return of the deposit.

Alternatively, psychological evidence could be heard as to the impact of the stigma on the purchasers, for example, as Buddhists the purchasers in the *Gonzales* case could not live in a property where a murder had been committed. This latter approach is controversial as it would mean that courts would give credence to a factor impacting personally on an individual rather than the property itself or its value.

The impact of legislation

These general principles are impacted upon by the operation of the TPA¹²⁴ and FTA and the disclosure requirements imposed by New South Wales, Victoria,

117 A patent defect is one which a purchaser would be likely to discover upon a physical inspection of the property': Christensen et al, above n 115, at 221.

118 *Becker v Partridge* [1966] 2 QB 155.

119 Matters affecting the quality or value of the property: CCH, *Queensland Conveyancing Law and Practice*, CCH Australia, 2005, at [9-220]; *McInness v Edwards* [1986] VR 161.

120 For an overview of this area, see S Christensen and S Lumb, 'Can non-disclosure of a defect in the quality of title entitle a purchaser to rescind?' (1993) *QLSJ* 311.

121 Above n 119, at [9-220].

122 *Ibid*, at [9-220].

123 *Ibid*, at [9220]. See, eg, s 69 PLA(Qld).

124 Other provisions of the TPA may arguably be applicable but in the author's view will not be significant in a discussion of stigmatised property. Section 53A targets false representations and other misleading or offensive conduct in relation to land. Section 53A(1) again refers to the necessity for a trade and commerce element thus limiting the section's potential impact where non-corporate vendors are involved. Also, it would appear its operation is limited as the section refers to representations rather than conduct. Therefore, the section would appear to require positive representations rather than deal with conduct, ie, non-disclosure. Therefore, this section may be of limited use in a case involving stigmatised property. Part IVA of the TPA deals with unconscionable conduct. Section 51AA deals with unconscionable conduct generally, s 51AB unconscionable conduct in consumer transactions and s 51AC unconscionable conduct in small business transactions. It is difficult to see any of these sections applying to a case involving stigmatised property. Section 51AA prohibits a corporation from engaging in conduct which is unconscionable according to the unwritten law. Decided cases have revealed that a narrow view of unconscionability is the appropriate standard to be applied: *ACCC v GC Berbatis* (2003) 197 ALR 153.

South Australia, the Australian Capital Territory and soon, Tasmania. As will be discussed below, the disclosure statutes would not seem to extend to cover stigmatised property.

Section 52 of the TPA prohibits corporations in trade or commerce from engaging in conduct which is misleading or deceptive or likely to mislead or deceive. This provision is mirrored in the FTAs except that the reference to 'corporation' is replaced by a reference to 'person'. Section 4(2) defines 'engaging in conduct' for the purposes of the Act and refers to the doing or refusing to do any act.¹²⁵ A reference to refusing to do an act includes a reference to refraining (otherwise than inadvertently). This includes positive acts and also the failure to speak, silence.¹²⁶

Problems arise with the potential liability of vendors who are not corporations.¹²⁷ While this problem is addressed by the FTAs, the trade or commerce limitation will limit the application of both s 52 and the FTA equivalents in circumstances where the sale of land is between private vendors and purchasers. The majority of residential sales are by private vendors who are not in the business of buying and selling houses and are unlikely to be regarded as engaging in conduct 'in trade or commerce' for the purpose of the TPA or the FTAs.¹²⁸ On the other hand, real estate agents, being actively involved in a commercial enterprise, would, if the circumstances arose, be subject to liability under the TPA and/or the FTAs.¹²⁹

In circumstances where the 'in trade or commerce' element is established, the next step is to examine whether the agent, or vendor if applicable, has engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

The issue of whether a failure to disclose will amount to misleading or deceptive conduct has an interesting history. Initially, the courts were of the view that s 52 required disclosure where the common law would have recognised a duty to disclose.¹³⁰ Subsequent decisions established that the focus should be on a consideration of the silence amongst all the other circumstances of the case. In *Demagogue Pty Ltd v Ramensky*,¹³¹ Gummow J noted that:

¹²⁵ Section 4(2)(a).

¹²⁶ Section 4(2)(c).

¹²⁷ *O'Brien v Smolonogov* (1983) 53 ALR 107; *Argy v Blunts & Lane Cove Real Estate* (1990) 26 FCR 112; 94 ALR 719.

¹²⁸ *O'Brien v Smolonogov* (1983) 53 ALR 107; *Franich v Swannell* (1993) 10 WAR 459, cf *Gentry Bros Pty Ltd v Wilson Brown and Associates* (1996) ATPR ¶41-460.

¹²⁹ *Argy v Blunts & Lane Cove Real Estate* (1990) 26 FCR 112; 94 ALR 719.

¹³⁰ *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546; 79 ALR 83.

¹³¹ (1993) 39 FCR 31 at 32; ATPR 41-203 at 40,851. Chief Justice Black agreed with Gummow J stating;

Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or likely to mislead or deceive. To speak of 'mere silence' or of a duty of disclosure can divert attention from that primary question.

with regard to the natural meaning of s 52, the question is whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive.¹³²

The Full Federal Court adopted a test of reasonable expectation of disclosure. In summary, the test requires a court to determine whether, after all the circumstances of the case, including the silence, had been considered, would there have been a reasonable expectation that the matter under consideration would be disclosed? .¹³³

Questions soon arose however as to whether an *inadvertent* silence would always defeat an allegation of misleading or deceptive conduct. Two lines of authority developed. On one view, silence must be deliberate.¹³⁴ The other view postulates that if one is to look at all the circumstances to determine whether the conduct was misleading, the deliberateness or otherwise of the failure to speak is merely another factor to consider.¹³⁵

In the recent case of *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd*,¹³⁶ Hoeben J reviewed the authorities and discussed the issue of deliberate and inadvertent silence in the context of s 52. The issue in this case was whether the BAL was liable under s 52 for failing to disclose the existence of contamination of the land on which a school was constructed. The representatives who had undertaken the negotiations were not aware of the contamination and therefore did not reveal the problem. Although those particular representatives did not know, persons within the organisation did know of the contamination. This failure, occurring in a context of full disclosure where other potential pitfalls regarding the site were disclosed, rendered the failure to disclose, although inadvertent to those representatives, to be misleading. His Honour favoured the adoption of the second view stating:

132 See too the comments in *Grubic v Commonwealth Bank of Australia Ltd* (1993) ATPR(Digest) 46-111; *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164; 117 ALR 629.

133 In *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR 46-054, French J had made mention of such a test in determining whether silence constitutes misleading or deceptive conduct for the purposes of s 52. His Honour noted at 53,195;

The cases in which silence may be so categorised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined. However, unless the circumstances are such as to give rise to a reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does exist.

The reasonable expectation of disclosure test has been adopted as the appropriate test to apply in determining whether remaining silent will, in all the circumstances, amount to misleading or deceptive conduct: *Fraser v NRMA Holdings Ltd* (1994) 52 FCR 1; 124 ALR 548; ATPR 41-346, and on appeal (1995) 55 FCR 452; 127 ALR 543; ATPR 41-374; *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399; 113 ALR 517; ATPR 41-238.

134 *Edgar v Farrow Mortgage Services Pty Ltd (in Liq)* (1992) ATPR(Digest) 46-096 per Einfeld J; *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* (1999) 155 ALR 714; ATPR 41-694.

135 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2002) 104 FCR 564; ATPR 41-794; *Fraser v NRMA Holdings Ltd* (1995) ATPR 41-374 and note the comments of C Lockhart in *The Law of Misleading or Deceptive Conduct*, 2nd ed, Butterworths, Australia, 2003, para 5.2–5.3.

136 (2005) ATPR(Digest) 46-263 (NSW SC) per Hoeben J; 215 ALR 625.

it is suggested that the better view is that the 'expanded meaning given by [the definition] to "conduct" should not distract attention from the fundamental issue' where breach by non-disclosure is in issue, namely, 'whether in the particular circumstances the silence constitutes or is part of misleading or deceptive conduct'. In accordance with that approach, the impugned actor's intention or knowledge will be a relevant, but not decisive consideration in the determination of whether a contravention by non-disclosure has occurred.¹³⁷

Hoeben J also discussed the issue of 'mere' silence and agreed with the comments of Merkel J in *Johnson Tiles Pty Ltd v Esso Australia Ltd*¹³⁸ who noted that the requirement for conduct to be deliberately engaged in only applies where 'silence alone' is relied upon as constituting the misleading or deceptive conduct.

Therefore, it would appear that in the course of negotiations for the sale of a property, circumstances where features of the property are discussed, and particularly where questions are asked regarding security features, the safety of the neighbourhood etc, a reasonable expectation could arise that issues of psychological stigma may be revealed.

The ACCC has underlined the importance of silence in determining misleading or deceptive conduct in its recent joint publication with the REIA.¹³⁹

Finally, consideration should be made of the statutes regulating real estate agents conduct. To use New South Wales as an example, the Property Stock and Business Agents Act 2002 (PSBA) regulates misleading conduct by agents.¹⁴⁰

Section 52 prohibits a licensee or registered person from making any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a material fact (whether intended or not), which induces any other person to enter into any contract or arrangement. Such conduct is an offence against the Act. However, it is a sufficient defence to a prosecution for an offence under this section if the defendant proves that the defendant did not know, and had no reasonable cause to suspect, that the statement, representation or promise was false, misleading or deceptive. Section 53 regulates damages for misrepresentation or concealment.¹⁴¹

Therefore, it is useful to apply a fact scenario involving stigmatised property to the Australian situation. In *Van Camp*, which has already been discussed under misrepresentation, clearly issues of half truth would arise. The vendor was in possession of knowledge relating to the property. Mrs Van Camp asked about the bars on the window. The vendor did not reveal the recent assaults. Would this failure to disclose also offend the TPA or FTA?

137 Ibid, at ATPR 52,519–52,520.

138 (1999) ATPR 41-696 at 42,888.

139 Real Estate Agents and the Trade Practices Act, 2002, Canberra, p 2; ACCC, *Practice makes perfect — new guidelines for real estate agents on the Trade Practices Act*, above n 24.

140 Refer generally also to the Estate Agents Act 1980 (Vic), Property Agents and Motor Dealers Act 2000 (Qld) and Land Agents Act 1994 (SA).

141 The provision states that no term or provision of any agreement for the sale and purchase of land or any interest in land operates to prevent the purchaser from claiming or being awarded damages or any other relief in respect of any misrepresentation or concealment in connection with the sale and purchase of the land or interest.

Leaving aside the problem of a vendor who would not satisfy the 'in trade or commerce' requirement, the circumstances involved the purchase of a house, a woman with a young daughter, a question which indicated a concern for safety, a statement involving the prior break-in but a failure to reveal the recent assaults. In such a circumstance would it be misleading not to reveal the recent rapes? Would Mrs Van Camp have a reasonable expectation that these issues would be disclosed? Looking at all the circumstances, they would seem to give rise to such an expectation. This scenario would also seem to satisfy the provisions of the state real estate legislation. Like in the *Bankstown Airport* case, there seemed to be an atmosphere of full disclosure regarding the safety issues, therefore, in such circumstances all the information relevant to the situation should have been revealed.

Reed v King did not involve a half truth. There was a representation that the property was suitable for an elderly lady living alone. However, this may not necessarily be untrue or, indeed, misleading. There was no present danger to the property as the offender was no longer a threat. In the circumstances of the sale of a house would there be a reasonable expectation that the information about the previous crime be revealed? This crime has no physical threat to the property at this time. Similar comments can be made regarding the *Gonzales* case. The crime had occurred but there was no lingering physical danger to the purchasers. Their religious beliefs would not have been obvious to the real estate agent and it is unlikely that any matters were raised in their discussion which would have revealed their religion. In such circumstances there would appear to be no reasonable expectation that a past incident should be revealed.

Together with references to misleading conduct, s 52 of the PSSA refers to 'concealment of a material fact'. Is a murder on the premises a material fact? Material would seem to refer to a matter presently affecting the *property*, not a past event and not the individual sensibilities, no matter how strongly felt, of a purchaser. However, in *Gonzales*, it was held that a material fact had been concealed in such circumstances.

Now a hypothetical scenario. A family moves from interstate and looks to purchase a home. They inspect a property advertised 'perfect for families' which seemed suitable for their needs. The real estate agent informs them of local schools, transport, shopping facilities, playgrounds, proximity to beaches etc. The agent does not disclose that a convicted sex offender lives across the street.

Arguably, a half truth could be established because the agent was telling the prospective purchasers about matters relevant to a family with children, ie, parks, playgrounds, schools. The issue would be clearer if the purchaser had asked the question, 'is this a safe area' or 'is this a safe area for children'? However, arguably, if the agent utilises these 'child-friendly' features to promote the house, surely then the seamier side should be revealed? On this view, there would seem to be a reasonable expectation of disclosure in all the circumstances. Again issues would arise as to whether these characteristics could amount to a 'material' fact. However, what about the impact of defamation and privacy laws? In Australia there is no equivalent to Megan's law. On the contrary, law enforcement authorities generally refuse to reveal the whereabouts of such persons after their release from prison for fear of, especially in the case of offenders against children, vigilante style activities.

An agent could be in a very precarious position indeed if he or she was to reveal such information, if they were even aware of it in the first place.

Disclosure statutes

To date, four States and Territories have adopted streamlined disclosure statutes which clearly stipulate matters which must be disclosed by the vendor in the conveyancing process. Tasmania is soon to follow suit. The provisions refer to physical matters and would not seem to extend to matters of psychological stigma. For example, in New South Wales,¹⁴² a vendor is said to warrant that, as at the date of the contract and except as disclosed in the contract 'the land is not subject to any adverse affectation . . . '.

Clearly, the term 'adverse affectation' could logically extend to an issue involving psychological trauma however the definition of this term precludes this conclusion. Part 3 of Sch 3 lists facts which will amount to adverse affectation for the purposes of the Act and they are again limited to physical factors.¹⁴³

In the wake of the *Gonzales* case, it was announced that new legislation would be introduced to require the disclosure of material facts which 'may impact upon a buyers decision to buy the property'.¹⁴⁴ While perhaps California may be a guide, it should be noted that those States which have adopted disclosure legislation have decided against the wider scope of the Californian statute. While as yet there is no indication of how the statute will be drafted, such requirements could result in an obligation to disclose a burdensome amount of material potentially extending to a variety of physical and psychological factors. Clearly, as the legislation was triggered by the failure to reveal a death and the psychological impact this had on the purchasers due to their religious beliefs, disclosure of such stigma is clearly contemplated by the legislation.

Is stigma compensable?

As discussed, at common law, rescission for an undisclosed psychological stigma is unlikely in Australia. Therefore, what remedies could be available to an aggrieved purchaser? In the *Gonzales* case, the purchaser's were permitted

142 Conveyancing (Sale of Land) Regulations 2005.

143 Conveyancing (Sale of Land) Regulations 2005. Examples include a proposal for re-alignment, widening or siting, or alteration of the level of a road or railway by the Roads and Traffic Authority, Rail Corporation New South Wales, Transport Infrastructure Development Corporation or Rail Infrastructure Corporation, a proposal by or on behalf of the Minister for Education and Training to acquire the whole or any part of the land, a proposal of TransGrid or an energy distributor (within the meaning of the Energy Services Corporations Act 1995) to acquire any right or interest in the whole or any part of the land, an interim heritage order, listing on the State Heritage Register or other order or notice under the Heritage Act 1977 and a proposal to acquire any right or interest in the whole or any part of the land by reason of the Pipelines Act 1967.

144 Ms Reba Meagher, NSW Legislative Assembly, *Hansard*, 19 October 2004, p 11551; Media Release — NSW Department of Fair Trading, 19 October 2004; FindLaw Australia, 'Gonzales murder leads to new disclosure laws', 23 October 2004. However, note the comments in Law Society of New South Wales, *Property Law E-Newsletter*, Issue 4 regarding these proposed reforms.

to avoid the contract due to the public outcry. The agents were convicted of misleading conduct under the State real estate legislation and fined. However, what would the situation be if the purchasers had proceeded with the purchase?

It appears the purchaser's would have obtained a property with a diminished market value due to the unpleasant events which took place on the premises and the likelihood that, given the intense media scrutiny, the stigma would remain for a considerable period of time. An action would be possible under the TPA or FTA against the agent and, depending on the circumstances, the vendor. Damages are available under s 82 of the TPA and the FTA equivalents. Section 82(1) states that a person suffering loss or damage by the conduct of another person that was done in contravention of inter alia Pt V of the Act may recover the amount of that loss or damage by action against that person or against any person involved in the contravention. However, s 82(1) is subject to limitations pursuant to s 82(1B). Pursuant to s 82(1B), where a person makes a claim in relation to inter alia economic loss¹⁴⁵ caused by the conduct of another person in contravention of s 52 the damages which may be recovered may be, in certain listed circumstances, reduced to the extent to which the court thinks it is just and equitable to do so. These instances include circumstances where the claimant has failed to take reasonable care and the defendant did not intentionally or fraudulently cause the loss of damage. Apportionable claims are available under Pt VIA.

Pursuant to s 82, damages are predominantly calculated using the tortious standard. However, questions will arise as to what the purchasers are to be compensated for and how would a measure of damages be calculated?

The impact of a psychological stigma may be difficult to calculate. The most obvious method would be through a calculation of the diminution of market value.¹⁴⁶ This gives rise to questions as to whether the diminution is in the present (ie, the purchase price, less the amount of the 'true' market value, taking into account the stigma) or whether the purchasers may wish to sell in 2, 5 or 10 years time? Arguably, nothing has been lost unless the purchasers want to resell. But who is to say the stigma will still significantly impact on the property after the elapse of time? Also, calculating the scale of the diminution in value is fraught with danger. While no doubt expert witnesses from the real estate industry and elsewhere may debate their estimations of any alleged diminution in value, it will be difficult to predict with any certainty what amount of damages should be awarded. Such estimates are likely to be based on the market value of the property taking into account the limitations on the marketability of the property due to public awareness of the stigma and resultant deterrence of purchasers.

Also, damages would not compensate persons who felt they were under threat from a continuing stigma or who through religious conviction could not bring themselves to reside in the property.

To date, the best indication of the impact of stigma damages is examining the impact of environmental stigma which has been the subject of a

¹⁴⁵ Presumably the reduced market value of the property because of the stigma.

¹⁴⁶ Although recall *Chaplin v Hicks* [1911] 2 KB 786 at 792 'the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages'.

considerable amount of discussion in Canada and the United States.¹⁴⁷ Like psychological stigma, environmental stigma can involve matters on site and off site. To explain, the property itself could be affected by a past environmental accident (a chemical spill directly affecting the property) or a stigmatising event (a murder on the premises). The property may also be affected by an off site event which has or may have the potential to encroach onto the premises (the chemical spill took place off site or a serial sex offender lives in the neighbourhood). In the case of environmental damages, in many instances the property can be cleaned up and poses no future risk to persons on or near the property. Nevertheless, it is recognised that in the public perception there may be suspicion regarding the property and a reluctance to occupy the premises, particularly for residential purposes.¹⁴⁸ Similarly, it could be argued that where a property has been the scene of, for example, a murder, in most cases there is no risk to an incoming purchaser of that property. However, it cannot be denied that some purchasers would be deterred from purchasing the property and the stigma remains. In both cases there may not be a scientific or rational explanation for the reluctance but it is nevertheless a factor impacting upon potential purchasers¹⁴⁹ and thus will impact upon the person who has actually purchased the property.

However, it should be noted that there are considerable differences between psychological stigma and environmental damages, although there can be a psychological aspect to the latter. Firstly, in environmental matters, when the incident occurs the polluters are the obvious culprit and are the likely candidate for the owner of an affected property to pursue. Also, in the case of an ascertainable contamination there is some certainty regarding the costs of, for example, cleaning up the site. While it is recognised that there are concerns regarding the calculation of damages for the psychological impact of environmental contamination, it is suggested here that the problems associated with other types of stigma will be even more difficult to predict. Significant too is that, with regard to the subsequent sale of an environmentally stigmatised property in the United States, the existence of environmental matters adversely affecting the land are regarded as material issues which should be revealed during the negotiation process.¹⁵⁰

In a case involving psychological stigma, apart from the fact that the perpetrator of the event is likely to have died themselves, be in jail, or not be resourced enough to pursue, the purchaser of such a property would proceed at first instance against the person who directly dealt with them in the purchase, the agent, and/or vendor. The estimate of damages for a psychological stigma would be far less precise as in the case of contamination and clean up costs. Given that there could be some scientific basis for a

147 Hierlmeier, above n 4; Fisk, above n 100.

148 Kelso, above n 65.

149 In relation to stigma, whether the public's perception is reasonable is irrelevant because both rational and irrational beliefs affect property values: Hierlmeier, above n 4.

150 S M Williams, 'When daylight reveals neighborhood nightmares: The duty of builders and developers to disclose off-site environmental conditions', (1996-1997) 12 *J Nat Resources & Envtl L* 1; R Kwong, 'Fraud and the Duty to Disclose off-site land conditions', (1997) 24 *B C Envtl Aff L Rev* 897; T A Reuschel, 'Caveat vendor: sellers of real estate now need to beware of misrepresentations about the condition of property', (1999) 64 *Mo L Rev* 661.

prediction as to whether the property would become or would remain physically affected by the contamination, future estimates of market value would seem have some basis in fact. However, psychological stigma involving past crimes cannot be resolved or 'cleansed' completely. In an environmental context, although a stigma may remain, experts can sate with some degree of certainty that the property is safe or what it will cost to make it so. This will reassure most persons and, even where they are still uneasy, there could not be a claim for compensation. However, in a case of past crime, arguably the danger has passed but stigma may continue, entirely driven by public perceptions and attitudes, arguably with some assistance from 'the amplification effect'.¹⁵¹ In the case of a sex offender in a neighbourhood, how could such a stigma be quantified?

Therefore, if s 82 was to operate, could a purchaser be compensated for the economic loss suffered by the conduct of the vendor (if applicable) or agent in failing to reveal a psychological stigma? It would appear the damages could be estimated, however, what is the potential impact of the exclusions in s 82(1B)? Section 82(1B)(b)(i) refers to the failure of the claimant to take reasonable care. Therefore, would this provision place an onus on a prospective purchaser to make enquiries into possible stigmas affecting the property? If so, how far should such a purchaser pursue matters which may or may not stigmatise the property? Would asking questions of an agent suffice or would there be an onus to conduct independent enquiries? Also, pursuant to s 82(1B)(c) the defendant's lack of intention¹⁵² to cause the loss and the lack of fraudulent conduct¹⁵³ on the part of the defendant could reduce a damages award.

Section 87 provides a variety of remedies. Under this provision it would appear that rescission may be available.

Public policy

Is stigma an appropriate matter for the courts to regard as material? One of the arguments against such recognition is that to recognise such stigma is to encourage superstition. In *Caveat Spiritus — A Jurisprudential Reflection upon the Law of Haunted Houses and Ghosts*, Daniel Warner writes in support of the stigma statutes in the United States and argues that judicial recognition of 'karmic' factors is bad law which damages society.¹⁵⁴ Warner posits that the law should promote 'the kind of mindset that encourages independent, well-adjusted citizens'¹⁵⁵ and that 'conduct should be controlled on some rational basis that reflects and promotes societal values'.¹⁵⁶ Such goals will be undermined if issues such as a property's troubled past are regarded as material facts in a real estate transaction.¹⁵⁷ While acknowledging the desirability of the decline of caveat emptor in relation to the disclosure of

¹⁵¹ Hierlmeier, above n 4.

¹⁵² Para (i).

¹⁵³ Para (ii).

¹⁵⁴ Warner, above n 3, at 207.

¹⁵⁵ *Ibid*, at 208.

¹⁵⁶ *Ibid*, at 208.

¹⁵⁷ 'Social welfare is decidedly not promoted by law that indulge belief in ghosts and in real estate tainted by bad karma': *ibid*, at 214.

physically defective real estate onto unsuspecting buyers who cannot protect themselves, Warner bemoans the possibility that purely non-physical attributes and the irrational beliefs of a purchaser should be regarded as material, impact upon market price and thus dictate law.¹⁵⁸

It should be noted that Warner focuses on the issue of death on the premises in comparison to the (undisputed) desirability of legislation prohibiting disclosure of factors such as race or illness in the negotiation process. His thesis focuses on the desirability of laws being motivated by common sense and rationality rather than superstition. Few would argue with this view, however, while clearly relevant to cases such as *Gonzales* where there would appear to be no lingering threat to the property, such comments have less application to the problem of properties where the psychological stigma may have the potential to encroach on the physical realm. There is a potential for conflict here. On the one hand, laws should be based on rationality. Therefore, it should not be sufficient to argue that a fact is material because it may have an adverse impact on the market value of the property. However, should the position be different where what may be regarded as a 'mere' psychological stigma has the potential to extend to a real physical danger to potential purchasers?

However, if we take the viewpoint of a real estate consumer, it is in the public interest for prospective purchasers to be aware of all matters which impact upon a property. Clearly, through the introduction of the disclosure legislation discussed above, vendors and agents are compelled to disclose of a variety of matters pertaining to the property. Many of these matters involve not only the present condition of the property but matters which may impact upon the property, and its value, in the future. Therefore, it would seem to be a logical step to require a vendor, or their agent, to disclose issues of psychological damage to the property.

Conclusions

The issue of psychologically stigmatised property is contentious and more complicated than it seems at first glance. While consideration of this issue in Australia remains in its infancy, it is possible to make some conclusions and provide some general recommendations.

1. Unless there has been fraud, misrepresentation, half truth or change in circumstances, at common law a vendor or real estate agent is under no obligation to disclose a psychological stigma affecting property.
2. A psychological stigma would be regarded, at best, as a latent defect in the quality of title.
3. If stigma is to be recognised as a material factor, it will be a significant leap from the status quo. To date, all authority regarding defects in the quality of title refers to physical matters impacting upon the land itself rather than psychological factors. It is very different to equate a road widening, a flood plain or an unapproved extension with a personal belief or prejudice. What may be extremely

¹⁵⁸ Ibid, at 240.

worrisome in a psychological sense to one person may be of little or no concern to another. On the other hand, few persons would doubt that significant physical defects would tend to disconcert most, if not all, purchasers.

4. It seems the TPA and FTA would require, in some cases at least, that certain stigmas should be disclosed. Actions under the TPA or FTA will be limited in relation to private vendors where those vendors are not regarded as being in trade or commerce. Real estate agents and commercial vendors may be liable under the TPA and FTA where the failure to disclose the stigma is regarded as, in all the circumstances, misleading. Therefore, it would need to be established that there would be a reasonable expectation in those circumstances that the particular stigma be revealed. In circumstances where there is 'mere' silence, it would appear the silence must be deliberate, however, it is debatable how often this could be in the case of a real estate sale. In circumstances where the silence is a factor amongst other positive and negative conduct, it does not appear to matter that, for example, the agent remaining silent was doing so because of a lack of knowledge on their part, so long as the organisation whom the person was representing was aware of this fact and the circumstances required disclosure.
5. State real estate legislation regulating the conduct of agents appears to be applicable in circumstances involving the failure to disclose the stigma being held to be misleading.
6. State disclosure statutes do not appear to cover psychological stigma.
7. Regarding remedies, as a psychological stigma would not be regarded as a defect in title a purchaser would be unable to rescind the contract at common law. However, if the defect was regarded as a material defect in the quality of title the purchaser may be able to resist an order for specific performance or succeed in an action to recover the deposit.

Section 87 of the TPA may also provide an opportunity for a purchaser to obtain rescission. In relation to compensation for a failure to reveal a stigma, s 82(1) of the TPA permits recovery from the person who failed to disclose or any other person involved in the contravention. However, as psychological stigma appears to result in economic loss, the amount recovered may be reduced if the purchaser has failed to take reasonable care and the person who engaged in the conduct did so unintentionally and without fraud. As discussed, it is uncertain what would suffice for 'reasonable care' in a case involving stigmatised property.

Assessment of damages would presumably be on the basis of the reduction in market value due to the stigma.

Real estate legislation may offer another avenue for recourse but the only available remedy is a fine.

7. Regarding the role of the agent, the agent is in a precarious position in relation to psychologically stigmatised property. Vendors, even if they are aware of the stigmatising event, may not attract liability and therefore the agent will bear the brunt of the purchaser's

dissatisfaction. A problematic matter is the liability of an agent in circumstances of the vendor remaining silent. For example, a vendor may not tell the agent of the existence of the stigma and then the agent cannot tell the purchaser because the agent does not know? In California, agents have resorted to requiring vendors to complete and sign extremely detailed disclosure statements regarding the property before listing to protect themselves against legal action.

Also, it may be impossible to anticipate all the events which may be material to the psyche of a purchaser. To require this standard of disclosure of agents has been described as 'unwarranted and not in the best interests of the public'.¹⁵⁹ On the other hand, prospective purchasers go to real estate agents because there is a perception, encouraged of course by the agents themselves, that they know neighbourhoods and have the expertise to recommend areas they believe to be good values.¹⁶⁰

What can we do?

Presumably, most properties will not be affected by stigma and those which are will tend to lose the stigma as time goes by. It would appear that commercial premises would be affected far less than residential premises. Indeed, in some cases the notoriety of the stigma may encourage business. However, the issue is clearly of some concern so how can this problem best be overcome? Is more legislation really the answer?

In the writers view there are four alternatives.

The first is full and complete disclosure by the vendor and agent of any psychological stigma affecting the premises. Vendors and agents are better equipped to acquire knowledge about the premises. In most cases there will be nothing to reveal regarding a property. Where there is a psychological stigma associated with the premises, disclosure of the stigma may not deter purchasers at all.¹⁶¹ Disclosure of the existence of a stigma may, in many cases, be proactive as the impression of honesty makes for a better working relationship.

On the other hand, it may not be reasonable for vendors, and particularly agents, to bear the onus of inquiring into the history of the premises or the quality of a neighbourhood. Unless the event leading to the stigma had a high profile and/or was of a relatively recent occurrence, it may be difficult for an agent to know about it at all.¹⁶² Also, widely different subjective factors impact on the decisions of individual purchasers. The significance of stigma is determined by characteristics as diverse as age, gender, ethnicity, religion, values and individual sensitivities and prejudices.

¹⁵⁹ Murray, above n 7, at 690.

¹⁶⁰ K Barrett Carter, 'State Justices to Decide if Developer Should Have Told Buyers of Landfill', *Star-Ledger*, Newark NJ, 5 January 1995, p 20.

¹⁶¹ Indeed, in Dr Kelso's research a significant number of persons interviewed were not unduly concerned with non-contentious deaths (eg, old age). It has been recently noted in the context of the *Gonzales* appeal, that deceased estates were often sought after: 'Agent appeals in murder house case', www.news.nine.msn.com.au. The appeal commenced in the NSW Administrative Decisions Tribunal on 6 February 2006.

¹⁶² For example, some people will not talk of a suicide which occurred in their family.

It would be impossible to consider, let alone disclose, a diversity of matters which may possibly impact psychologically on an individual purchaser, deaths, neighbourhood quality, paranormal experiences and noisy neighbours to name a few. If a matter so personal is significant enough to affect the perception of the person who purchases a property, a vendor or agent could be forgiven for expecting the onus of raising the issue on the purchaser.

Thirdly, a compromise could be reached. Agents could be required to raise the issue of psychological stigma to potential purchasers and inform them that if such matters are of concern to them they should make their own enquiries. Also, there should be a clear and obvious notification on any disclosure statement that the matters dealt with on the disclosure form do not extend to psychological impacts. Examples could be given of the nature of a psychological impact. Therefore, the onus would be passed to the buyer to make their own enquiries. The diverse matters which could lead to psychological stigma are many and would be difficult to anticipate. This would spare agents or vendors preempting an investigation of factors which may be entirely irrelevant to a particular property or to the sensibilities of most potential purchasers. Once examples of psychological stigma are given to the buyer, they may be prompted to ask appropriate questions about issues pertinent to them.¹⁶³ Naturally, as in some states in the United States, if a direct question is asked of a vendor or agent it must be answered truthfully.

Fourth, there is the possibility of legislation. As yet little is known about the content of the proposed legislation promised in response to the *Gonzales* matter. However, in the writer's view, this should be approached with extreme caution. Broadly stated disclosure obligations, such as a requirement to disclose material facts which 'may impact upon a buyers decision to buy the property',¹⁶⁴ run the risk of including within its ambit a myriad of factors which could result in a sale being set aside because of a buyer's unusual sensitivities and prejudices. It would be impossible for a vendor or agent to anticipate every matter which should be disclosed to prospective purchasers. Unless in some way confined, contracts could be rendered uncertain, or the market value of a property significantly diminished, on psychological rather than physical grounds.

As a final point, this article will conclude with an issue which, although mentioned, is beyond the scope of this article to fully explore. This is whether, in our approach to psychological stigma, it would be advisable to draw a line between stigmas resulting from events in the past and those where properties are affected by matters in the present? Where a psychological stigma is such that there is a real possibility that it could encroach and affect prospective purchasers physically, through for example, drugs or crime, particularly towards children, should there be a heightened duty to disclose? Although such a prospect has attracted the scorn of some commentators, in this writer's

163 There appears no reason why a purchaser who has concerns regarding a particular stigma, eg. crime in the neighbourhood, could not make enquiries of the police.

164 Ms Reba Meagher, NSW Legislative Assembly, *Hansard*, 19 October 2004, p 11551; Media Release — NSW Department of Fair Trading, 19 October 2004; FindLaw Australia, 'Gonzales murder leads to new disclosure laws', 23 October 2004. However, note the comments in Law Society of New South Wales, *Property Law E-Newsletter*, Issue 4 regarding these proposed reforms.

view it is a troubling conundrum for property law if what is left of the caveat emptor doctrine is utilised as a defence for a failure to warn.