AUCKLAND DISTRICT LAW SOCIETY INC

INDEPENDENT VOICE OF LAW

THE ADLSI **PROPERTY DISPUTES COMMITTEE** RULINGS MANUAL

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It should be noted that the rulings of the Property Disputes Committee are binding only on parties who have submitted a dispute to the Committee. The rulings are accordingly:

- Based on the statements of fact as agreed between the Parties;
- Intended to provide answers based on practice and "equity and good conscience" rather than on any exhaustive analysis of the Law;
- Intended as a guide to practice.

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For an updated copy of this manual please visit,
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A copy of a decision in full is available upon request. This applies only to rulings made since 2008.

To contact the ADLS Property Disputes Committee to resolve a dispute or enquire about resolving a dispute please contact,

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1.1 Apportionments - Rates - Discount
Where the rates are discounted should the discounted amount or the full amount be used for the basis of the apportionment?

Ruling:
If a person obtains a discount by early payment and thereby incurs the disadvantage of not having the benefit of the funds, then the full amount should be apportioned.
March 1993

1.2 Apportionments - Rates - Subdivision
What is the most appropriate method for determining rates apportionment in a new subdivision?

Ruling:
1. A common basis for apportioning rates is on an area basis as this method has the advantage of simplicity and certainty.
2. In some situations it may be not appropriate to apportion rates on an area basis because either the value of the property as a whole may have been affected by an attribute which is specific to a particular part of the property e.g. a beach frontage, or topographical features or simply by vast differential in size. In such cases the apportionment should take into account all factors and perhaps an alternative method should be adopted such as an apportionment based on value or sale price.
3. As there is a trend towards fixed charges by councils in rates, the fixed charge portion should be divided equally among the number of allotments resulting regardless of differing sizes or valuations of those allotments.
December 1996

1.3 Apportionments - Sale of Business - Prepaid advertising
In the sale of a motel business, are the advertising in Jason's Guides and AA Guide, which are prepaid, 'apportionable outgoings' in terms of general condition clause 3.5 of the *Agreement for Sale and Purchase of a Business (Second Edition 1995)*.

Ruling:
The prepaid advertising in the Jason's Guide and the AA Guide is not apportionable. When a purchaser purchases a business, he carries out some form of 'due diligence' no matter how informal. In doing so he has the opportunity to look at the accounts and take accounting advice; and he is entitled to look at any contracts to which the business is committed – he would be foolish not to. In doing so, he then learns exactly what has and has not been prepaid and when he agrees on a purchase price, he is paying for that which he has seen including those prepaid contracts. The vendor can negotiate to build reimbursement for the prepayment into the purchase price if he wishes/can. This is a matter of contract and the purchaser should not have to pay again for something they have already paid for.
September 2004

Subclause 3.5 of the Agreement for Sale and Purchase of a Business Second Edition July 1995
All outgoings and incomings excluding insurance premiums shall be apportioned as at the close of business on the possession date. The vendor shall be responsible for outgoings up until the close of business on that date, and shall be entitled to receive all trading profits up until the close of business on that date.

This subclause is no longer present in the current form and "outgoings" are dealt with in clause 1.1 (11) "Outgoings" includes any payments made or to be made by the vendor on or before the settlement date in respect of the lease or of goods or services supplied to the vendor in connection with the business (including but not limited to prepayment of advertising, telephone listings, trade listings), where those goods or services have not been supplied (in whole or in part) by the settlement date or where the vendor has not obtained the full benefit of such services by the settlement date

1.4 Apportionments – Capital Payment
Where the vendor chose to pay for a capital [sewage] work by a lump sum payment and then sold the property, can the vendor apportion the payment on settlement and if so, how?

Ruling:
The vendor made the lump sum payment to the Council by contract with the Council. The vendor did not disclose to the purchaser during the course of the negotiations that this payment may be requested and therefore the vendor cannot claim a share of the payment from the purchaser. That being the case the question of how much the share would be does not need to be determined.
June 1991

2.1 Cross leases - Flat not wholly depicted on plan - Changed survey practice - Title requisition
Where a cross leased flat was defined on the Flats Plan by a diagram of the ground floor of the flat only, and did not depict the (greater) dimensions of the first floor of the flat, did this give a purchaser the right to requisition for a defect in title?
Note: It was accepted that this depiction of the flat accorded with survey practice at the time of issue of the title, but not at the time of the ruling.

Ruling:
If the Flats Plan complied with survey practice current at the time of issue of the title, the lease and title did not become defective subsequently following a change in survey practice. As long as the Flats Plan identified the dwelling adequately, the grant of the lease incorporated the whole of the dwelling as it existed at the time that the plan was prepared, notwithstanding that the plan did not depict the dwelling with precision. The purchaser, therefore, did not have grounds for requisition in respect of title.
February 1997

2.2 Cross lease - Residue Section - Meaning of 'vacant residential lot' - Subclause 5.1 - Pegging
Is a residue cross lease section a 'vacant residential lot' and therefore required to be pegged at settlement date pursuant to clause 5.1 of the *Agreement for Sale and Purchase of Real Estate (Fourth Edition)?*

Ruling:
The 'property' is an undivided one-half share in a lot. It is the cross lease which defines the restrictive use area. Therefore, the residue title is not a 'vacant residential lot' and the vendor is not required to peg it.
March 1993

Seventh Edition (2) July 1999 (inserted for reader's reference)
Subclause 5.1
The vendor shall not be bound to point out the boundaries of the property save that on the sale of a vacant residential lot which is not limited as to parcels the vendor shall ensure that the property is pegged at the possession date.

Ninth Edition 2012(2) (inserted for readers reference)
Subclause 5.1
The vendor shall not be bound to point out the boundaries of the property except that on the sale of a vacant residential lot which is not limited as to parcels the vendor shall ensure that all boundary markers required by the Cadastral Survey Act 2002 and any related rules and regulations to identify the boundaries of the property are present in their correct positions at the settlement date.

2.3 Cross lease - Staged development - Council requirements for upgrading
In a staged cross lease development the last owner to build was faced with Council requirements that necessitated an up-grading of the access areas (which were common property). That owner tried to cast liability on other owners relying on clauses in the cross lease relating to maintaining of the property to a high standard.

Ruling:
1. No clause in the cross lease covered the situation.

2. The holder of the Council consent has the obligation to comply with all consent conditions albeit that these involved up-grading of common property.
July 1995

2.4 Title and Cross-lease – Signing Correct

Can a solicitor who certified a cross-lease correct decline to rectify at his/her expense an error which had now become apparent?

Ruling:

Signing [the cross-lease] correct neither expressed nor implied a warranty that the document was flawless in all respects.
August 1987

2.5 Cross Lease property - outgoings - maintenance reserve fund

Where, on the sale of a cross lease flat, a maintenance reserve fund held on behalf of all five flat owners amounted to $4,400, was the purchaser required to give the vendor a credit on settlement for the vendor's portion of the maintenance reserve fund?

Ruling:

1. The maintenance reserve fund was not an apportionable outgoing.
2. Although the parties had endeavoured to adapt the panel headed 'Unit Title Contributions' in the *Agreement for Sale and Purchase of Real Estate (Sixth Edition May 1995)* as if the cross lease title for the flat were a unit title, they had omitted to complete the section headed 'Vendors portion of any maintenance fund: $…….' or to insert any special condition to deal with the maintenance reserve fund. Accordingly, as the maintenance reserve fund was not an apportionable outgoing, there was no obligation on the purchaser to give the vendor a credit for the vendor's portion of the maintenance reserve fund on settlement.
August 1998

Users Note: There is no longer a Unit Titles Contribution panel in the current form of the Agreement and clause 8 of the Ninth Edition 2012 (2) should be examined.

3.1 Deposit - Interest for late payment

Where a purchaser does not pay the deposit to the agent as stakeholder immediately upon execution of the agreement, is the vendor entitled to demand late payment interest?

Ruling:

1. Where a purchaser does not pay the deposit to the agent as stakeholder immediately upon execution of the agreement, the vendor is entitled to demand late payment interest in terms of clause 3.3 of the general conditions of the Auckland District Law Society/Real Estate Institute form of *Agreement for Sale and Purchase of Real Estate (Sixth Edition (2) May 1995)?*

This was so even though the agreement was not unconditional and the vendor would not therefore have received the benefit of interest on the deposit even if paid on due date.
2. Estoppel. If the agent had expressly waived a right to interest by accepting the deposit late then interest would not be payable on the deposit during the period of that waiver.
August 1996

Sixth Edition (2) May 1995 (inserted for reader's reference)

Clause 3.3 - *Agreement for Sale and Purchase of Real Estate (Sixth Edition (2)*
If from any cause whatever save the default of the vendor any portion of the purchase price is not paid upon the due date for payment the purchaser shall pay to the vendor interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment; but nevertheless this stipulation is without prejudice to any of the vendor's rights or remedies including any right to claim for additional expenses and damages. For the purposes of this subclause a payment made on a day other than a working day or after the termination of a working day shall be deemed to be made on the next following working day and interest shall be computed accordingly.

3.2 Deposit - Vendor's solicitor's obligation to refund

Where the vendor's solicitor had received the balance deposit moneys after deduction of the land agent's commission and the purchaser had subsequently cancelled the agreement as a result of the vendor's failure

to settle the sale, was the vendor's solicitor obliged to refund the balance deposit moneys to the purchaser or was the vendor's solicitor entitled to exercise a lien over the moneys in order to meet the solicitor's fees?

Ruling:
When the vendor's solicitor received the balance deposit moneys they were the vendor's property. It followed that the vendor's solicitor was not obliged to refund the moneys to the purchaser on the purchaser's subsequent cancellation of the contract. It further followed that if a lien had arisen over the moneys in favour of the vendor's solicitor for fees incurred by the vendor, the vendor's solicitor was entitled to exercise that lien.
August 1994

3.3 Collection Commission
Should a purchaser's solicitor wishing to deduct collection commission arrange this with the vendor's solicitor at the time of agreeing to funds being placed on deposit?

Ruling:
Yes. Otherwise the purchaser's solicitor is not entitled to deduct commission when accounting to the vendor.
October 1987 - *Note:* Please read subclauses 3.14 and 7.4 of the *Agreement for Sale and Purchase of Real Estate (Ninth Edition(2)2012)*.

3.4 Deposit - Paid in respect of two Agreements - Apportionment
If the vendor's solicitor notifies appropriation of a deposit payment between two agreements by issuing settlement statements recording the appropriation, can the vendor's solicitor subsequently change the appropriation and re-apportion the payment?

Ruling:
1. If the purchaser had notified an apportionment of the deposit between the two contracts when making payment then that apportionment would be binding on the vendor (refer chapter on 'Contract' in Butterworth's *Laws of New Zealand* paragraphs 307-308).
2. In the absence of apportionment by the purchaser, once the vendor's solicitor has communicated appropriation of the deposit between two contracts, it is not open to the vendor unilaterally to alter that appropriation.
3. In terms of those particular contracts, the vendor's solicitors are holding deposit monies as stakeholder until the possession date and the consent of both parties would be required for the stakeholder to alter the basis on which the funds were held.
April 1998

4.1 Fax settlement - Late settlement interest - Confirmation of settlement
Where a vendor specifies terms for fax settlement and the purchaser fails to adhere to them, despite settling by fax within the allotted time period, will the purchaser be liable for interest for late settlement?

Ruling:
1. The vendor's requirements for fax settlement were clear. The purchaser had to confirm to the vendor by 3.45 p.m. on the settlement date that the funds had been lodged with the vendor. Failure to do so would result in settlement being deemed not to have occurred until the following working day.
2. If the purchaser wished to settle by fax then the purchaser was required to comply absolutely with the vendor's requirements. Failure to do so constituted acceptance of the ascribed penalty and it was payable.
Note: If the purchaser does not accept the terms of fax settlement then they must say so before settling. At that time the parties can enter into an alternative agreement or settlement will have to be carried out face to face.
October 1996
Note – Readers should now refer to section 6 of the PLS Property Transactions and E-Dealing Guidelines 2012 available online (http://www.propertylawyers.org.nz/__data/assets/pdf_file/0004/56065/Property-Transactions-and-E-Dealing-Guidelines-July-2012.pdf)

4.2 Fax settlement - Time limit implied in fax settlement requirements
1. Where no time is specified in a vendor's stated settlement procedure what time is to be implied?

2. Has settlement been effected in terms of the vendor's settlement procedure for facsimile settlement where the funds had been deposited in the trust account before 5.00pm but confirmation did not arrive later after 5.00pm?

Ruling:
1. As no time was specified in the vendor's stated settlement procedure, the procedure could therefore be complied with by the purchaser's solicitor at any time within the working day (i.e. by 5.00pm).
2. The confirmation of the deposit did not arrive until after 5.00pm and therefore settlement had not been effected in terms of the vendor's settlement procedure.
3. Late settlement interest was properly payable by the purchaser.
December 1995
Note – Readers should now refer to sub-clause 3.11 of the ADLS Agreement for Sale and Purchase Ninth Edition (2) 2012 where it stipulates 4.00pm as being the prescribed time for settlement and if "settlement takes place between 4.00pm and 5.00pm on the settlement date… one day' interest " is payable.

5.1 Fixtures and chattels - Burglar alarm
Was a burglar alarm wired into a house a fixture or a chattel? Its removal had left a hole which the vendor had covered with a plate.

Ruling:
1. The burglar alarm was permanently affixed by being wired into the house.
2. The alarm was intended to be a permanent fixture.
3. The alarm was a fixture and was to remain with the property.
November 1994
Note: Where the alarm is the property of the alarm company there can be no such intention, and where the purchaser wants to retain it s/he will be obliged to take over the contract.

5.2 Fixtures and chattels - Flag pole
Was a flag pole erected on a lawn of a property purchased at auction a chattel or a fixture?

Ruling:
1. On inspection, the flag pole was held to be a very prominent feature of the property.
2. Although the pole was removable, it was fixed to the ground by concrete footings for the pole itself and for the large stays that were necessary to support the pole.
3. Having regard to factors such as, the purpose for which the flag pole was placed on the property (to enhance the property), the degree of annexure (high), its situation and prominence, the flag pole was a fixture.
November 1995
5.3 Fixtures and chattels – Paving stones
Are paving stones a fixture or a chattel?

Ruling:
A fixture. Should they ever be considered a chattel this would leave the way open on the sale of a property to uplift cobble stones, front drives etc.
February 1986

6.1 Leases - Agreement for terms 'no more onerous' than nominated form
Was the inclusion of additional clauses relating to the *Building Act* in a lease, where the nominated form did not normally contain such clauses, contrary to the agreement to lease which stated that 'the lease covenants to be no more onerous than those contained in the [nominated form]'?

Ruling:
As the effect of the amendments was to impose obligations for payment on the tenant that were more onerous than the nominated form of lease, the amendments should be excluded from the lease.
August 1993

6.2 Leases - Assignment - Liability for landlord's costs
Ruling:

In the absence of a specific provision in a lease for payment of the legal costs incurred by the landlord in consenting to an assignment of the lease, it was reasonable to impose, as a condition of consent, a requirement that the costs be paid.
November 1992
Note - Readers should bear in mind the effect of the Property Law Act 2007 and the Deed of Lease Sixth Edition(4) 2012.
Costs: Subclause 6.1
Each party will pay their own costs of the negotiation and preparation of this lease and any variation, or deed recording a rent review or renewal. The Tenant shall pay the Landlord's reasonable costs incurred in considering any request by the Tenant for the Landlord's consent to any matter contemplated by this lease, and the Landlord's legal costs (as between lawyer and client) of and incidental to the enforcement of the Landlord's rights remedies and powers under this lease.

6.3 Leases - Guarantee by shareholder of Subtenant Company
Where an agreement to sublease did not provide for a guarantee by the shareholder in the subtenant company, but the agreement deemed the terms of the head lease to be incorporated into the sublease and the head lease contained provision for a shareholder guarantee, was that provision in the head lease deemed to be included in the sublease agreement also?

Ruling:
A guarantee of a lease (even if included within the lease document) does not constitute part of the lease contract. A requirement to provide a guarantee by a shareholder of the tenant is, therefore, not included among the lease terms which are deemed to be incorporated in the sublease.
April 1997
Note: See *Polperro Corporation v Munro* (unreported) Master Faire 30/11/00, Auckland High Court CP187im00

6.4 Leases - Repairs and maintenance clause - Painting
Does the requirement to keep buildings in good tidy substantial repair, order and condition include repainting?

Ruling:
A requirement to keep buildings 'in good tidy substantial repair, order and condition' includes repainting, when warranted.
March 1997
Note: This is now specifically covered in the current version of the Auckland District Law Society Lease.

6.5 Lease – Apportionment of Rent on a Sale of a Property on day of possession
Who gets the rental of a property on the day of possession?

Ruling:
The vendor gets the benefit of apportioning of rent to the end of the date of possession.
March 1989

6.6 Lease – Apportionment of Rent on what basis on a Sale of a Property
Should rental be apportioned on an annual basis or a calendar monthly basis?

Ruling:
The rental should be apportioned on a daily basis based on the annual rental.
March 1989

6.7 Sale of Commercial Business – Apportionment of Rental – GST
Where the purchaser's solicitor requested that the rent be apportioned on a GST exclusive basis as the settlement was in the middle of the month; the vendor had already paid the monthly rental in full including GST and had claimed the value of the GST paid in his own return.

Ruling:
The purchaser's solicitor had adopted the correct principle, in that the vendor would obtain a GST credit for the full month's rental paid. In principle therefore the vendor should account to the purchaser for that part of the GST credit attaching to the rental paid by the purchaser. This is probably best dealt with on the basis that rental is apportioned on a GST exclusive basis. This principle is not of course limited only to rental but to all items which are apportioned and which contain a GST element eg. rates.

April 1991

6.8 Leases – Assignment – Witnessing of Signature
Where in an assignment of lease the landlord signed the consent, but did not have it witnessed; the assignment was sent back to the landlord but was not returned.

Ruling:
The landlord had consented to the Assignment of Lease although the consent had not been witnessed. The witnessing of the landlord's signature was not crucial to the agreement.
December 1992

6.9 Leases – Assignment of Lease – Payment of Lessor's Solicitors Fees
In an Assignment of Lease, who is liable for payment of the landlord's solicitor's fees relating to obtaining the landlord's consent to assignment?

Ruling:
Fee is payable by the lessee, subject to anything to the contrary in the lease.
March 1990
Note – Readers should note the provisions of the Deed of Lease Sixth Edition (4)2012 and the Deed of Assignment of Lease Fifth Edition (2) 2012.

6.10 Lease – Liability for Costs of a New Lease
The dispute related to the interpretation of a clause in a business agreement, which was conditional on the purchaser being granted a new lease, which was to be approved by his solicitor. Who should meet the costs?

Ruling:
On the strict wording, the purchasers should meet the costs as the clause specifically referred to the grant of the new lease to the purchaser. Also, the purchaser's solicitor had the opportunity of approving the lease and had the right to request deletion of the charging clause, but did not.
September 1987
Note – Readers should note the wording of the Deed of Lease Sixth Edition (4) 2012 and the effect of subclause 6.1 shown above.

6.11 Costs – Renewal of Lease
Is the cost of preparing a renewal of lease 'a cost incidental to the preparation and completion' of the original lease?

Ruling:
Without a specific provision in the original lease, there is no obligation on the lessee to pay the costs on the renewal.
October 1987

6.12 Costs – Variation of Lease – Rent Review
Who is liable under a lease for the costs and disbursements payable on a variation of lease evidencing a rent review?

Ruling:
The lessor is unable to require payment of the costs on a deed of variation unless the lease specifically gives the lessor the right to do so. A general reference is not sufficient. The empowering clause has to refer specifically to the documentation envisaged and the lessor's right to charge the lessee for the legal costs and disbursements for that document.
March 1987

6.13 Rent Holiday
Is a rent holiday a suspension of actual rent or a suspension of rent and outgoing payments?

Ruling:
A rent holiday is a holiday of rent only. The outgoings issue is a separate one, reiterated by the separate clauses in agreements relating to them.
April 1992

6.14 Leases – 'Usual Conditions'
Is the vendor lessee, being a private company, required to provide guarantees by it directors and/or shareholders in the resulting lease, in order to discharge the vendor/lessee's obligations under the agreement?

Ruling:
No personal guarantee by directors is required unless it is part of the original contract or negotiation.
August 1989

6.15 Lease – 'Usual Clauses'
Would the following clauses be considered a 'usual' lease clause?

Rulings:
1. A clause entitling the lessor to charge an additional rental where the lessor is required to make improvements is a provision customarily included in commercial leases.
Note – Readers should note that the Improvements Rent provision was removed from the Deed of Lease Sixth Edition (4) 2012.

2. A clause requiring the lessee to pay not only the insurance premia but also valuation fees and other expenses payable in respect of those insurances is a provision customarily included in commercial leases.
April 1992
Note – Readers should note 18.(11) of the first schedule of Deed of Lease Sixth Edition 2012 (4)

6.16 Variation of Lease –Witnessing of Landlord's Signature
In a Variation of Lease incorporated into a Deed of Assignment, the lessor's consent had not been witnessed. Did this affect its validity?

Ruling:
If the consent was to incorporate consent to the various variations to the lease, then the consent to the Variation, as a Deed, had not been correctly executed. It is the duty of the lessor's solicitor to ensure the Deed is validly executed.
February 1989

6.17 Lease – Payment of costs regarding amendments – Site Meeting
Is the lessee liable to pay for the lessor's solicitor's attendance at a site meeting in respect of negotiating amendments to a lease? Are these costs 'incidental to the preparation of' the lease?

Ruling:
No. The lessor's solicitor is entitled to seek costs for the initial preparation of the lease and also for the amendment to the lease following the site meeting, but not legal costs for attending the meeting.
February 1986

6.18 Lease – Setting of New Rental
Where a new rental has been set, at a time not corresponding with a renewal date:
1. Should the tenant be liable for payment of a Deed evidencing agreement on such a rental (when the lease is silent)? and
2. Is there any need for a document evidencing the setting of a new rental?

Ruling:
1. Where the lease is silent on reference to a Deed of Review of Rental there is no obligation on the tenant to pay the same.
2. If there was no requirement under the lease for such a document then there is no need for one. As a matter of practice it is desirable for leases envisaging rental reviews at times different to renewal of term for particular provision to be included in the lease allowing for deeds recording the rental review at the cost of the tenant.
January 1986

6.19 Assignment of Lease – Landlord's Consent – Costs charged including perusal of finance documents

Where in an assignment of lease, the Landlord was asked for consent to the assignment, and also for consent to a mortgage of lease and a deed of acknowledgment of title to chattels. The sale did not proceed and the Landlord's solicitors rendered a bill of costs.

Ruling:
The financing issue arose simultaneously with the request for assignment. Therefore the method of financing by the proposed purchaser would need to have been considered by the Landlord when determining whether or not to consent to the assignment including consideration of the documentation. Therefore the costs charged were in respect of matters which are part of the Landlord's ove rall consideration of the assignment.
May 1991

6.20 Leases – Costs of Rental Negotiations
What right does the lessor have to charge the lessee for the cost of rent negotiations on a renewal of lease?

Ruling:
The Lessor's right to charge the Lessee is confined to the renewal of the lease and does not extend to rent negotiations. If the lessor is to make a claim from the lessee the right to claim must be specifically stated in the lease.
August 1988

6.21 Leases – Recovery of Outgoings
Where the First Schedule of a lease included a percentage for the proportion of outgoings payable by the tenant and where the landlord subsequently notified the tenant that the percentage would be varied, the tenant objected and argued that the stated percentage must remain for the duration of the lease.

Ruling:
The landlord is able to vary the percentage of outgoings payable to reflect a fair recovery from all tenants. Clause 3.2 of the ADLSI Deed of Lease applies.

7.1 Mortgages – Review of Interest Clause
The relevant part of the mortgage interest review clause read:
'The mortgagor may on or after the 1st day of June 1984 and at three yearly intervals thereafter increase the rates of interest…' The last review of interest was made in October 1984 and the mortgagee wished to make another review in June 1987.

Ruling:
The mortgagee is not entitled to make a review in June 1987. The words 'or after' enabled the mortgagee to make a review after 1 June 1984 which indeed happened in October 1984. The mortgagee is then entitled to make reviews at three yearly intervals thereafter; the next review could not be before October 1987.
December 1987

7.2 Usual Clauses – Penalty Interest
Is a penalty interest clause a normal and usual term included in a vendor second mortgage?

Ruling:
Yes. However, there is no normal or usual rate. The actual rate to be inserted cannot be implied, but has to be agreed between the parties. Further, because the penalty interest clause is a penalty, it must be construed against the person seeking to enforce it.
August 1991

7.3 Mortgages – Costs of a Mortgagee Sale
Who is liable for the costs leading to a mortgagee sale?

Ruling:
The mortgagor is liable for all reasonable costs leading to a mortgagee sale. The costs of course are for proper costs; whether the costs incurred are reasonable or not (e.g. delays caused by nominee company contributory mortgage situation) should be referred to the Costs Committee to decide.
March 1990

7.4 Mortgages – Liability for Interest
When does mortgage interest liability stop?

Ruling:
Interest is payable on a mortgage until it is repaid. In a case where the mortgagor's request to discharge is given with little time that the mortgagee to perform (2 or so days) interest is payable up until the time that the mortgagee is ready to deliver discharged documents. If the mortgagor wishes to stop interest running they must lodge the mortgage settlement funds with the mortgagee or its solicitor, from which date interest ceases to run.
May 1988

7.5 Mortgage – Mortgagor in Default – Liability for 'Foreseeable Losses'
Where a mortgagor disputed a mortgagee's claim for additional costs incurred as a result of the mortgagor's default.

Ruling:
The amount to be paid by a mortgagor to redeem his mortgage is that stipulated pursuant to the provisions of the mortgage, and amounts in addition to the principal sum and interest pursuant to [clause 12] of the mortgage. A claim for damages, foreseeable or otherwise, does not fall within the provisions of [clause 12] and cannot, therefore, be claimed as an amount due by the mortgagor. The remedy available to the mortgagee is stipulated by the mortgage contract, namely the payment of interest at the penalty rate.
October 1990
Note: Numbering of relevant clauses will be different in different forms of mortgage.

7.6 Mortgage – Mortgagor in Default – Injunction restraining mortgagee from pursuing power of sale
Where a mortgagor in default, having obtained an interim injunction restraining the mortgagee pursuing its power of sale on condition that the mortgagor pay [inter alia] *'the legal costs … pertaining to the exercise of the mortgagee's powers under the mortgage including the costs of the defendant pertaining to those proceedings in the sum of $250…'* Was that mortgagor liable for the mortgagee's costs of $480.00 relating to injunction proceedings?

Ruling:
If the issue related to the mortgage alone the terms of clause 12 [of the Auckland District Law Society mortgage form (current at the time of ruling)] permitted the mortgagee to recover these costs. However the Court has made a ruling as to costs and expenses which takes priority over the mortgage document and if there is any doubt as the meaning of the Order, the matter should be resubmitted to the Court for its interpretation.
December 1985

7.7 Mortgage - Review of interest rate - Back dated
A mortgage contained the following clause:
'The mortgagee shall have the right to review the rate of interest on or after the 17th day of May 1987' The mortgagee gave notice of an increase in the interest rate on 5 October 1987 and purported to back-date it to 17 May 1987. The back-dating was contested at the time but the matter was not pursued until the mortgage was repaid in 1992.

Ruling:
The terms of the mortgage did not specifically provide that the increase in the interest rate could be back-dated (c.f. lease provisions). Therefore, the interest rate increase was only effective from the date of the notice of increase.
August 1993

7.8 Mortgages – Penalty Interest Clause
In a mortgage, the advance was to be for 3 months interest-free until repayment of the principal. [November 1987] A penalty rate was included. In a default in payment of the principal, is penalty interest payable from the interest commencement date? [August 1987]

Ruling:
Assuming the mortgage was for a three-month term, that penalty interest is intended to apply from the due date for repayment of the principal.
December 1987

7.9 Mortgage of Lease – Power of Attorney

Where the mortgagee purported to insert a power of attorney giving unlimited power to it.

Ruling:
The clause inserted in the mortgage of lease is too wide to be considered reasonable and usual. To merit that, it should be limited to protecting the security afforded to the mortgagee by the leasehold estate, and no further.
April 1986

7.10 Mortgage Agreement – Insertion of Penalty Interest Clause
Where, in an Agreement for Sale & Purchase, there was a provision for a mortgage of shares, was the vendor entitled to provide a penalty rate of interest in that mortgage?

Ruling:
Since the Agreement did not provide for a penalty interest rate to be inserted, it cannot now be inserted.
February 1990

8.1 Possession - Machinery used on property by vendor on settlement date - Vendors obligation to give vacant possession
Was a vendor yielding vacant possession of a property on settlement date (as the vendor was obliged to do) when some machinery had been left on the property which required a forklift to remove?

Ruling:
Vacant possession is the right to actual unimpeded physical enjoyment. If there is an impediment it must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property. (*Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 ALL E.R.284).
December 1995

8.2 Possession – What Constitutes Vacant possession?
There will not be vacant possession if there is a physical impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the relevant property: see Professor McMorland, Sale of Land etc (the emphasis is ours). Whether there is such an impediment is a matter of fact and degree. In this matter the Committee considered that a 1.0935 metre encroachment of a carport from an adjoining property onto the subject property of some 797m2 did not constitute such a physical impediment. Other influencing factors which led the Committee to this conclusion were that the encroachment was on a walkway not known to either the vendor or purchasers to form part of the property when the sale agreement was signed, the adjoining owner's agreement to remove the encroachment, and no relevant trespass (infrequent use by the adjoining owner) to prevent the giving of vacant possession.

8.3 Possession Date - Relationship to Settlement Date - Deferral Pursuant to General Conditions - Provisions for issue of new Title
Does a definition of possession date as: *'… or 7 days after issue of new Title …'* override the provisions in clause 3.7 general conditions ('settlement date shall be deferred to the seventh working day following the date on which the vendor has advised the purchaser in writing that a search copy is obtainable …')?

Ruling:
1. The definition did not override clause 3.7.
2. The effect of the definition of 'possession date' on the front of the agreement and clause 3.7 was simply to allow the possession date and settlement date to diverge.
3. The purchaser was not late in settling the purchase after the possession date but before the date derived from clause 3.7.
April 1998

Ninth Edition(2) 2012(inserted for reader's reference)
Subclause 3.7
New Title Provision
1.1 (1) Where -
(a) the transfer of the property is to be registered against a new title yet to be issued; and
(b) a search copy, as defined in section 172A of the Land Transfer Act 1952, of that title is not obtainable by the tenth working day prior to the settlement date –

(c) then, unless the purchaser elects that settlement shall still take place on the agreed settlement date, the settlement date shall be deferred to the tenth working day following the later of the date on which:
(d) the vendor has given the purchaser notice that a search copy is obtainable; or
(e) the requisitions procedure under clause 5.0 is complete.

(2) Subclause 3.17(1) shall not apply where it is necessary to register the transfer of the property to enable a plan to deposit and title to the property to issue.

9.1 Requisitions - Fencing of Swimming Pools Act 1987

A council requisition required an owner to complete fencing of a spa pool. The requisition was addressed to the previous owner and the vendor maintained it had no knowledge of it. This was not disputed. The purchaser argued the vendor was obliged to comply with the provisions of the *Fencing of Swimming Pools Act 1987*.

Ruling:

In terms of the contract, there was no obligation on the vendor to comply with a requisition of which it had no knowledge. There was no general provision in the contract whereby the vendor was obliged to comply with the provisions of all statutes as they related to the property, nor could such a condition be implied.

August 1993

10.1 Residential Tenancy – Bond

Where there was a sale of several tenanted properties with one tenant in arrears is the purchaser entitled to take the benefit of the bond held by Tenancy Services?

Ruling:

Where there was a sale of several tenanted properties with one tenant in arrears, the purchaser was entitled to take the benefit of any existing bond held by Tenancy Services because the tenancy continued in existence.

April 1992

11.1 Settlement - No code compliance certificate - Potential conflict between special conditions and general conditions - Does 'date' mean within a working day?

Where an agreement for sale and purchase for a development under construction required settlement on practical completion or 5th working day after date the vendor had notified the purchaser that title was available and a code compliance certificate was not available, the purchaser withheld settlement on the basis that another special condition was the usual 'builders' clause requiring completion of development in accordance with proper requirements of the local authority.

Ruling:

1. The purchaser was not entitled to withhold settlement.
2. Settlement date as specified in the agreement envisaged settlement at a time when the code compliance certificate probably would not probably be available.
3. Even without the specially contracted for settlement date, it was unlikely that the purchaser would be entitled to withhold settlement. Clause 6.1(8) of the *Agreement for Sale and Purchase (Sixth Edition (2) May 1995*) is a warranty only. The purchaser's remedy lay in damages.
4. The 'builders' special condition was of no assistance to the purchaser unless the purchaser was able to point to specific breaches of the clause. Mere non-issue of the code compliance certificate did not in itself point to breach of the clause.
5. Notification of issue of the title was given after 5 p.m. Ruled that 'date' in the special condition must be interpreted by reference to the 'working day' preceding it. Notification had therefore not been given until the next following working day.

11.2 Settlement - Vacant possession - Market rental

Where a vendor was unable to give vacant possession, were the additional expenses of hire of a removal vehicle (as the offer of a free vehicle was no longer available) and two days loss of wages claimable by the purchaser in addition to the fair market rental?

Ruling:

1. The purchaser could receive expenses incurred and damages but only insofar as they were in excess of the fair market rental. The purchaser could not receive both market rental and full expenses.

2. The wages were foreseeable but, in terms of the distance travelled, only reasonable to the extent of one day. The loss of the free use of the truck in the weekend was reasonably foreseeable and consequently the vehicle hire was claimable.
3. The excess of these over the market rental for the period involved was claimable in addition to that market rental.
November 1994
Note: Additional costs are now claimable under clause 3.13(6) of the Ninth Edition 2012 (2).

11.3 Settlement - Vendor in default - Possession before settlement - Quantum of rental pursuant to clause 3.4(3)(b) - Meaning of 'financial disadvantage'
Where the purchaser delays uplifting mortgage moneys because settlement has been delayed through the vendor's default but the mortgagee charges a holding fee, can the purchaser offset such holding fee against the rental payable to the vendor where the purchaser elects to go into possession prior to settlement and the quantum of rental is agreed?

Ruling:
1. The vendor was unable to settle on the settlement date due to delays in completing the dwelling, obtaining a cross lease title and obtaining a code compliance certificate. The parties agreed that the purchaser enter into early possession on an agreed rental. The purchaser stopped paying rental (after moving into possession) for a period of ten weeks during which time the purchaser had to pay an equivalent sum to the mortgagee as interest on mortgage moneys not drawn down.
2. The agreed rental w as accepted by the parties pursuant to clause 3.4(a) of the agreement.
3. Clause 3.4(3)(b) of the *Agreement for Sale and Purchase of Real Estate (Sixth Edition (2) May 1995)* exists to give relief in exactly this type of situation. Accordingly the set-off was allowed.
October 1996

Sixth Edition (2) May 1995 (inserted for reader's reference)
Clause 3.4(3)(b)
In respect of any period when delay in settlement is caused by the default of the vendor, rental payable under this paragraph (3) shall be reduced to the extent necessary to ensure that the purchaser, by paying rental, will not be financially disadvantaged by taking possession, by comparison with the position applicable if possession had not been taken prior to settlement.
Note – There is no equivalent clause in the Ninth Edition (2) 2012.

11.4 Settlement – Tender of Transfer
What is a reasonable time (as set out in clause 3.5 of the *Agreement for Sale and Purchase of Real Estate Third Edition*) for a transfer to be tendered to the vendor or his solicitor prior to settlement?

Ruling:
A week prior to settlement (ie. five clear working days) is reasonable in normal circumstances.
July 1988

Note – Readers should refer to subclauses 3.6 to 3.10 of the Ninth Edition 2012 and section 6 of the PLS Property Transactions and E-Dealing Guidelines.

11.5 Settlement – Vendor's Default – Liability Under Clause 3.4(1)
Where the settlement was delayed by the vendor's default, and when it subsequently took place, the purchaser considered that interest was payable by the vendor.

Ruling:
Clause 3.4(1) of the *Agreement for Sale and Purchase of Real Estate (Third Edition)* provides that where the vendor does not offer possession then the vendor shall pay to the purchaser a fair rental for the property and shall also compensate the purchaser for expenses and damages suffered by the purchaser. In this case the vendor did not offer possession to the purchaser and is liable to the purchaser pursuant to clause 3.4(1).
March 1991

Third Edition 1987 (inserted for reader's reference)
Clause 3.4(1)&(2)

(1) Subject to paragraph (2) of this subclause, if from any cause whatever save the default of the purchaser the vendor does not offer to give possession (and where the agreement calls for it, vacant possession) on the possession date the vendor shall pay to the purchaser a fair rental for the property from the possession date until possession is given and the vendor shall also compensate the purchaser for any expenses incurred and damages suffered by the purchaser (including the purchaser's reasonable costs of temporary accommodation for persons and for chattels) resulting from the failure of the vendor to give possession on the possession date to the extent that such expenses and damages are greater than the fair rental for the property.
(2) As a condition of giving possession prior to settlement the vendor may require the purchaser to provide reasonable evidence of the purchaser's readiness, willingness and ability to perform the purchaser's obligations and, where the purchaser does not upon request by the vendor provide such evidence, the vendor shall not be required to pay or give credit for any amount under paragraph (1) of this subclause.

Note: This ruling is still correct in principle, but the position is addressed clause 3 of the Agreement for Sale and Purchase of Real Estate Ninth Edition (2)

11.6 Settlement – Bringing Settlement Forward – Penalty Interest for Failure to Settle on New Date
Where the parties agreed to bring settlement forward, but the purchaser was unable to settle on the new date, was the purchaser liable for penalty interest?

Ruling:
Yes
December 1989

11.7 Settlement by Fax – Funds Deposited in Wrong Account
Is the purchaser liable for interest charged by the Bank for overdrawing trust account, for depositing settlement moneys in wrong account (where purchaser had not used deposit slip provided)?

Ruling:
The solicitors acting for the vendor established the terms for settlement and provided a deposit slip to be used by the purchaser's solicitors when making settlement. The deposit slip was not used, and the funds were deposited into the wrong account. Therefore is it the purchaser's solicitors responsibility to pay the interest which was subsequently incurred.
October 1988

11.8 Settlement – Penalty Interest
Where a vendor gave purchasers an extension of the finance date, but the settlement date was not altered, and vendor is subsequently unable to settle on that date, is the vendor liable for penalty interest?

Ruling:
Yes, the vendor should pay penalty interest to the purchaser for not providing possession on the due date. The Committee noted it was not prudent on the part of the vendor's solicitor to extend finance dates without similarly extending the settlement date.
December 1988

11.9 Settlement – Penalty Interest – Settlement Moneys Late
If a vendor provides an undertaking to obtain code compliance certificates but cannot obtain them by the time of settlement, resulting in settlement being deferred by agreement, is the vendor liable to penalty interest on the newly agreed date?

Ruling
No. This is not a situation where the usual penalty provisions (clause 3.10 of the agreement) were invoked as deferment of settlement and purchase date was by express agreement between the parties. Nor is this a situation where there was a breach of a condition (clause 6.2 of the agreement) invoking penalty provisions (clause 8.7 of the agreement) as the purchaser could not point to any actual loss or damage. At any rate, breach of a condition does not grant the purchaser a remedy of deferring settlement (clause 6.5 of the agreement).

11.10 Settlements – Retention

Where a Purchaser took possession of an unfinished property, $2,000 was retained by the purchaser's solicitors against completion. Vendor's solicitors had not agreed on settlement on that basis. Is the vendor entitled to penalty interest:
1. From time of possession until partial settlement?
2. From settlement to date of payment of $2,000?

Ruling:
1. Settlement should have occurred on date of possession. A unilateral fax of an amount less than set out in the settlement statement does not constitute a settlement. Penalty interest is due on the full settlement price until the partial settlement occurred.
2. Following partial settlement $2,000 was never agreed upon as a held amount and is therefore overdue. Penalty interest is payable until it is received.
April 1990

11.11 Late Settlement – Sale & Purchase of a Business –Penalty Interest
How many days penalty interest are payable in a situation where settlement took place on Tuesday instead of Friday, with the vendor trading until Sunday?

Ruling:
As the vendor had the benefit of trading until Sunday it could not also benefit from penalty for late settlement prior to Sunday. Possession therefore passing on Sunday, 1 day's penalty is payable.
February 1988

11.13 Settlement – Reasonable time to prepare the E-dealing
What is a reasonable time for a purchaser's lawyer to prepare the e-dealing prior to settlement?

Ruling:
Setting up the e-dealing on the settlement date is not a reasonable time prior to settlement and is a breach of clause 3.6 of the Agreement for Sale and Purchase Ninth Edition 2012 (2).

11.14 Settlement – Failure to communicate the pre-validation of the e-dealing
If the vendor's lawyer has not specifically stated in correspondence to the purchaser's lawyer that they have pre-validated the e-dealing then does that mean that they are not ready, willing and able to settle?

Ruling:
No, it depends on the circumstances and other evidence of their position.

12.1 Solicitor's undertakings
1. May a solicitor be released from an undertaking in circumstances where the undertaking cannot be complied with but where there is every indication that no loss will flow from the failure?
2. Which party is entitled to funds retained by the purchaser pending satisfaction of the undertaking?

Ruling:
1. The undertaking was clear but could not be complied with. A potential liability to the purchaser would always remain. Accordingly, it was not appropriate to discharge the vendor's solicitors from their undertaking.
2. As the undertaking could not ever be complied with, the moneys held should be retained by the purchaser.
October 1996

12.2 Solicitor's undertakings – Implied
Can a solicitors undertaking be implied by the terms of an agreement despite not giving it expressly?

Ruling:
Where an agreement provided for a fund to be held by the solicitor for one party on the basis that the fund was to be paid out to another party upon completion of work and the solicitor who accepted the fund from the other party's solicitor was aware of the terms of that agreement, then the solicitor to whom the fund was paid was bound to observe the terms for holding that fund as set out in the agreement, notwithstanding that the solicitor had not expressly given an undertaking to do so.
February 1997

12.3 Undertakings by Employees
Is a practitioner entitled to ask for and rely on an undertaking given by another practitioner's employee?

Ruling:
1. When a practitioner, whether a partner or a staff solicitor, specifically entrusts a file to a staff member there is an implied assumption that that employee is entitled to give undertakings and take whatever steps may be necessary to facilitate settlement. Undertakings given by secretaries in these circumstances must be observed as scrupulously as those given by practitioners.
2. Practitioners entrusting files to employees should consider whether it is advisable to instruct their staff not to give undertakings or to commit the client without reference back to their principal.
April 1992

12.4 Undertakings – Promise to Pay
Where, a solicitor acting for a purchaser (in possession) wrote to the vendor's solicitor (inter alia) ' … we hold funds here sufficient to bring all rental payments up to date and will pay the same to you immediately the lease has been executed by all parties'. The purchaser subsequently refused to sign the lease. Was the above an undertaking and could it be relied upon?

Ruling:
Yes; but as no new lease was ever executed, the purchaser's solicitors are not bound by that undertaking.
August 1986

12.5 Undertakings – Inability to Fulfil
A solicitor cannot give an undertaking which the solicitor is unable to fulfil. An unconditional undertaking to refinance a loan is one example. Normally a 'best endeavours' undertaking to arrange finance within a time agreed upon is the best that can be given, but only when the solicitor has a real expectation that the finance can be arranged.
October 1987

12.6 Undertakings – Silence
Where a solicitor was told by telephone that a file was being forwarded to them 'against the usual undertaking to protect [the forwarding solicitor] for costs and disbursements', and the solicitor remained silent.

Ruling:
The solicitor has an obligation for the other party's costs and disbursements. There was an opportunity to refute an obligation to the usual practice but the solicitor remained silent. A follow-up letter had been clear in its terms and the file should have been returned if they were not prepared to accept the obligation.
July 1986

12.7 Solicitors Certificate – Sole Practitioner
In the absences, planned and unplanned, of a sole practitioner, who may sign a solicitor's certificate?

Ruling:
A solicitor's certificate should not be issued by any person other than the solicitor concerned. Where a solicitor's certificate cannot be issued through illness or absence or where on account of some other cause the practitioner is unable to personally attend to the issue of the certificate in his name, he or she should give due consideration to utilising his or her power of attorney and wherever possible plan for absences.
March 1990

13.1 Certificates – Solicitors Obligation to Forward
What is the position on law firms forwarding to its client RWT Certificates? Is there an obligation to do so? Who pays for the administration and postage charges?

Ruling:
There is an obligation on practitioners to forward certificates to their clients. New Zealand Law Society has previously ruled that RWT funds whilst being retained by practitioners pending payment to the Revenue can be retained on term deposit to the benefit of the practitioner to defray such administration and costs and disbursements.
December 1992

14.1 Warranties - Vendor's Breach - Purchaser withholding settlement until warranty satisfied

Was a purchaser entitled to withhold settlement when the vendor could not provide a code compliance certificate on settlement as warranted in the agreement?

Ruling:

In this case (relatively minor matters outstanding and vendor prepared to permit retention of funds) the breach of warranty was not of a sufficient magnitude as to entitle the purchaser to withhold settlement and therefore late settlement interest was properly payable by the purchaser.

August 1995

Note – Readers should refer to clause 6.5 of the Agreement for Sale and Purchase of Real Estate Ninth Edition (2) 2012

14.2 Warranties – Vendor's Drainage work requirement - Building Act 1991

Where, after the signature of an agreement for sale and purchase, the local authority wrote to the vendor requiring certain drainage work to be carried out to the property, did the vendor's warranties oblige the vendor to satisfy the requirement?

Ruling:

1. The *Building Act 1991* did not apply to the dwelling as it was in existence before the Act came into force, nor was the dwelling dangerous within the meaning of section 64 of the Act.
2. The vendor's warranty under clause 6.1(9) of the contract did not extend to require the vendor to satisfy the local authority's requirement because there was no obligation imposed on the vendor under the Building Act 1991 at the time of signature of the contract.
3. A notice must be given before an obligation is imposed and in this case the local authority's letter did not amount to a notice.

July 1994

Note – Readers should refer to clauses 6.2(6) and 6.2(8) of the Agreement for Sale and Purchase of Real Estate Ninth Edition (2) 2012

15.1 Unit Title - Section 36 Certificate

To what extent is a purchaser entitled to decline to settle the purchase of a unit title property on the basis that a certificate purportedly supplied pursuant to s 36 contains qualified statements rather than absolute statements of fact in relation to the items sought to be certified.

Ruling:

The requirements of s 36 of the *Unit Titles Act* are for absolute statements of fact in relation to the matters being certified. A purported certificate that contains qualified statements only, or that fails directly to answer the issues raised by s 36, is insufficient such that clause 7.1(2) (*Agreement for Sale and Purchase Sixth Edition (2) May 1995*) applied and settlement may be deferred to the fifth working day following the date on which a sufficient certificate is provided.

September 1999

Sixth Edition (2) May 1995 (inserted for reader's reference)

Clause 7.1(2)

If the property includes a stratum estate under the Unit Titles Act 1972 ('the Act'), the vendor warrants and undertakes that: Not less than five working days before the settlement date the vendor will provide:

a) A copy of all insurance policies or certificates effected by the body corporate under the provisions of section 15 of the Act, and

b) A certificate from the body corporate under section 36 of the Act. Any periodic outgoings shown in that certificate (not being amounts referred in paragraph (d) of section 36) shall be apportioned, and the purchaser shall give credit for the vendor's portion of any fund held by the body corporate which is disclosed on the front page of this agreement.

Note – The Ninth Edition (2) 2012 provides for unit title and all relevant disclosure statements under clause 8.

15.2 Unit Title Sale - Non-Standard Insurance Provisions

In a sale of a stratum estate under the *Unit Titles Act 1972*, in which non-standard form conditions are agreed; and:

1. Include the following: *'The vendor will provide on settlement a certificate from the Body Corporate*

under s 36 of [the Unit Titles Act]'.
2. But do not include any reference to s 15 of the Act relating to insurance. And where the building certificate provided contains the assertion: *'That the buildings and other improvements are insured individually'.* Is the purchaser entitled to delay/refuse settlement on the basis of s 15 of the Act, requiring the body corporate to have 'Body Corporate insurance' has not been complied with.

Ruling:
The purchaser is not entitled to delay or refuse settlement. Section 36 does not mention insurance and the reference to insurances in the certificate in this case was unnecessary. In all respects, the certificate provided the information required under s 36, and accordingly the vendor had provided all that the agreement required them to provide. There being in the agreement no reference to s 15, there was no basis upon which the purchaser could require compliance by the Body Corporate as a pre-requisite of settlement. Practitioners acting for the purchaser in such circumstances are advised to advise their client to arrange their own insurance under s 39 and should note in particular the provisions of s 39(1)(b). Further, there was something of an assumption in this case that the agreement contained a requirement to certify as to insurance (similar to the requirements of the ADLS/REINZ standard form agreement) and practitioners are advised to peruse such 'one-off' agreements with extra care.

Note- the Unit Titles Act 2010 has now replaced the Unit Titles Act 1972 and subclause 8.2(2) of the Ninth Edition (2) 2012 deals with insurance provisions.

(2) Not less than five working days before the settlement date the vendor will provide:

(a) a certificate of insurance for all insurances effected by the body corporate under the provisions of section 135 of the Act; and

(b) a pre-settlement disclosure statement from the vendor, certified correct by the body corporate, under section 147 of the Act. Any periodic contributions to the operating account shown in that pre-settlement disclosure statement shall be apportioned. There shall be no apportionment of contributions to any long-term maintenance fund, contingency fund or capital improvement fund.

15.3 Unit Title Sale – Purchaser cancellation under s 151 Unit Titles Act 2010
Can a purchaser cancel an agreement for sale and purchase under section 151 of the Unit Titles Act 2010 in circumstances where the vendor provides the section 147 pre-settlement disclosure statement within the 10 day notice period referred to in section 151(2)?

Ruling:
The purchaser is entitled to cancel the agreement. Although section 151(2) of the Unit Titles Act 2010 may be considered a draconian clause in terms of a remedy for non-compliance by the vendor with section 147 (2) of the Unit Titles Act the wording of the section is clear. If the vendor does not provide the pre-settlement disclosure statement within the prescribed time the purchaser is able to cancel. The ten day period relates only to when cancellation is effective and although it may give time for negotiation between the parties there is nothing in the section which gives the vendor a right to remedy the breach.
June 2013

15.4 Unit Title Sale – Special Maintenance Levy
Whether the vendor or purchaser should pay a special maintenance levy which was struck before the Agreement for Sale and Purchase was entered into but which was not due for payment until after the settlement date.

Ruling:
The special maintenance levy was disclosed in the pre contract disclosure statement and the pre settlement disclosure statement and it is not classifiable as a periodic payment. Therefore, the levy is not apportionable and falls to be paid by the owner of the unit at the time payment is due, in this case by the purchaser.
October 2014
Note – Readers should refer to clause 8.2 of the Agreement for Sale and Purchase of Real Estate Ninth Edition (2) 2012 and section 124 of the Unit Titles Act 2010.

16.1 Legal Fees – Acting Without Instructions
Where a firm was instructed by a man to act for himself and his sister to refinance a mortgage on his sister's property. The sister contemporaneously sold her property through another solicitor and denied liability for the firm's fees as she had not instructed them.

Ruling:
The firm did not take instructions from the sister, and as they were never instructed by her they cannot take fees for work done on her behalf. Any funds held by them should be forwarded to her own solicitor together with any interest earned.
February 1990

16.2 Legal Fees – Deduction
Where a solicitor was holding funds until he received documentation to complete a matrimonial property transaction. When the documents were received, the solicitor deducted his client's legal fees from the funds, paid the balance over, and registered the documentation.

Ruling:
1. Documents were forwarded to solicitor in effect on trust, not to act until moneys were paid over. If the solicitor was not prepared to hold the documents on that basis, he should have returned them.
2. The solicitor, in registering the documentation without paying the full settlement moneys, was in breach of his duties. Any lien on moneys held for his costs does not apply where a trust has been imposed.
3. Registration of the document was in breach of the trust on which he held the document.
April 1992

16.3 Legal Fees – Enquiries On Behalf of Client
Ruling:
Solicitors asked on behalf of a client for information concerning a matter which they have handled are entitled to charge for their time to the extent that they would be if the client asked them direct.
July 1987

16.4 Leases – Liability for Fees
Where there is nothing in writing between the parties, is a tenant liable to pay fees to the landlord's solicitor for preparation of a monthly tenancy agreement?

Ruling:
Unless the liability is stated in the tenancy agreement the tenant is not liable to pay the fees.
November 1989
Note – Readers should refer to clause 6.1 of the Deed of Lease Sixth Edition (4) 2012

16.5 Solicitors Refusal to Settle – Fees
Is it proper practice for a solicitor to refuse to settle a conveyancing contract until their fees have been paid?

Ruling:
A solicitor's duty to complete settlement by due date depends on the terms agreed with the client when the client instructed the solicitor to act. If the instructions were that the solicitor's fee would be payable before settlement and an account has been rendered, the solicitor is entitled to postpone settlement until payment is received. If the instructions did not cover the question of when the fee would be payable, or the solicitor and client agreed that the fee would become payable after the settlement date, the solicitor's duty is to settle on time. A solicitor is not absolved from the duty merely on his or her assumption as to the time legal fees are due.
February 1991
Note – The Rules of Conduct and Client Care should be adhered to particularly rule 4 - Duty to complete retainer.
4.2A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless—
(a) the lawyer is discharged from the engagement by the client; or
(b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or
(c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.
4.2.1Good cause includes—
(a) instructions that require the lawyer to breach any professional obligation:
(b) the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time:
(c) the client misleading or deceiving the lawyer in a material respect:
(d) the client failing to provide instructions to the lawyer in a sufficiently timely way:

(e) except in litigation matters, the adoption by the client against the advice of the lawyer of a course of action that the lawyer believes is highly imprudent and may be inconsistent with the lawyer's fundamental obligations.
4.2.2None of the matters set out in rule 4.1.1 is good cause to terminate a retainer.
4.2.3A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—
(a) had due regard to his or her fiduciary duties to the client concerned; and
(b) given the client reasonable notice to enable the client to make alternative arrangements for representation.
4.2.4A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

16.6 Caveat – Caveator's ability to collect debt collection fees
1.Whether the Respondent's legal fees of and incidental to registering a caveat over the Claimant's property negotiating and procuring the lapse of the caveat, and on-going negotiations and correspondence are payable pursuant to an agreement to guarantee and indemnify given by the Claimant.
2. Whether debt collection agency fees of $615.58 calculated at 5.5% of the debt would be found to be payable by a Court in accordance with the Terms and Conditions of Trade and the Guarantee and Indemnity, in addition to the full solicitor/client indemnity costs also claimed by the Respondent;
3. Whether interest since judgment is payable at the rate provided for in the Terms and Conditions of Trade or the prescribed rate in section 65A District Court's Rules 1947.

Ruling:
The lodging of the caveat by the Defendant was part of the overall enforcement process and as such all costs of and incidental to the lodging and removal of that caveat are payable. The costs charged by the debt enforcement agency are payable by the Claimant. The Respondent is only entitled to interest at the statutory rate specified in section 65(A) of the District Courts Act 1947, not the contract rate.
May 2013

17.1 Misdescription – purchaser's entitlement to compensation
Where a property described in an Agreement for Sale and Purchase of Real Estate (Sixth Edition (2) May 1995) as having an area of 3.4670 hectares on a scheme plan of subdivision was subsequently reduced to 2.6528 hectares by the vesting of an esplanade reserve, did the diminution in area amount to a misdescription of the property entitling the purchaser to compensation under clause 5.4 of the agreement?

Ruling:
1. The reduction in size of the property was not minor. On the contrary it was sufficiently substantial as to amount to a misdescription of the property entitling the purchaser to compensation.
2. A clause in the agreement under which the purchaser acknowledged that the property was sold 'subject to any easement or restriction which any local or government authority may require as a condition of plan approval or to obtain the deposit of the plan' did not relieve the vendor from liability to compensate the purchaser for the misdescription because the vesting of land as an esplanade reserve was not an 'easement or restriction' within the meaning of the agreement for sale and purchase.
August 1998
Note – Readers should refer to clause 5.4 of the Agreement for Sale and Purchase of Real Estate Ninth Edition (2) 2012