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Property Disputes Committee

RULINGS MANUAL

The Law Association
OF NEW ZEALAND

Disclaimer

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The rulings are historical determinations and should be read as correct at the date each ruling was made. References to legislation, case law, standard form agreements, clause numbers and secondary sources (including textbooks and other commentaries) were made by reference to the law, practice, forms and sources applicable at the relevant time, unless the relevant ruling or note expressly states otherwise. Those matters may have changed since that date.

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Standard form agreements and clause numbers

This Manual includes references to ADLS, ADLS/REINZ, The Law Association of New Zealand-REINZ and LegalForms by TLANZ. Unless a note expressly states that it has been updated to a later form, references to forms and clause numbers should be read by reference to the edition identified in the relevant ruling or note, or the edition current at the time that ruling or note was prepared. The Committee has retained historical ADLS references where the relevant ruling or note refers to an ADLS form. Practitioners should not assume that a historical clause reference is unchanged in the current LegalForms by TLANZ. Before advising or relying on any ruling or note for a current transaction, practitioners should check the current form, clause numbering and current law.

As at the date of publication of this Manual, the key current forms relevant to this Manual include The Law Association of New Zealand/REINZ Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (4), released 21 April 2026; The Law Association of New Zealand Deed of Lease Seventh Edition 2024; The Law Association of New Zealand Agreement to Lease Sixth Edition 2024; and The Law Association of New Zealand Term Loan Agreement (non-regulated), released 5 April 2023.

For further updates to this Manual, please visit: https://thelawassociation.nz/committee/property-disputes/

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The Law Association OF NEW ZEALAND

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1. Apportionments

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, but the basis of apportionment should be specified in the settlement statement and undertakings provided.
2. In some situations it may be inappropriate 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, or a number of sections where only one has a house on it. 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. However, this can only be done by agreement or by special conditions to the sale and purchase agreement.
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 – 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?

June 1991

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.

> ***Note:*** *the recent form of the ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) clause 3.5 states at the end "There shall be no apportionment of contributions to any long-term maintenance fund, contingency fund or capital improvement fund."*

1.4 Apportionments – unit title levies

In this dispute, the vendor was selling a unit title, and a Body Corporate levy was struck (payable in monthly instalments) before the sale agreement was entered into but was due after the settlement date. The issue was whether the vendor or purchaser was liable to pay for the Body Corporate monthly instalments due after the settlement date when the agreement was otherwise silent.

June 2018

RULING:

Relying on the specific wording of clauses 21 and 22 of the Agreement and on interpretation of the sale agreement as a whole, the Committee determined that the purchaser was liable to pay for the Body Corporate monthly instalments due after the settlement date.

2. Cross-Leases

2.1 Cross-lease – 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 the 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

> ***Note:*** *Seventh Edition (2) July 1999 (inserted for the 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."*
>
> ***Note:*** *Ninth Edition 2012 (2) (inserted for the reader's 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."*
>
> ***Note:*** *Subclause 6.1 of the ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) also sets out the aboves.*

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 upgrading 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 upgrading of common property.

July 1995

2.4 Cross-lease – 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 – 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 incorrectly 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 'Vendor's 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

Note: *There is no longer a Unit Titles Contribution Panel in the current form of the ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3).*

3. Deposit

3.1 Deposit – interest for late payment

Is a purchaser liable to pay penalty interest pursuant to clause 3.12 of the Ninth Edition 2012 (3) Agreement for Sale and Purchase of Real Estate? Do the provisions of clause 2.2 preclude the vendor from claiming penalty interest unless the vendor first serves a deposit notice?

An agreement was entered into to buy a property on 11 July 2016, with the 10% deposit of $278,000.00 being payable immediately on execution. The interest for late settlement was 12%. The agreement became unconditional on 1 August 2016, with the purchaser paying a reduced deposit of $263,000.00 which the purchaser paid to the real estate agent on 2 August. A settlement statement issued on 15 August claimed interest for late payment of the deposit of $2,010.74 – this was held in a stakeholder account until the Committee could consider the issue.

RULING:

1. The purchaser is liable to pay penalty interest to the vendor – as the purpose of paying a deposit is as part payment of the purchase price and also security for future performance of the agreement by the purchaser. Payment of the deposit is immediate and is subject to no other conditions;
2. Clause 3.12 is applicable to this case;
3. Clause 2.2 does not preclude the vendor from claiming penalty interest, as clause 2.2 is relevant to a vendor's right to cancel for non-payment of the deposit; and
4. The purchaser is liable to pay interest to the vendor to the extent demanded by the vendor.

27 June 2017

3.2 Deposit – paid in respect of two agreements – apportionment

If the vendor's solicitor notifies appropriation of one deposit payment between two separate agreements by issuing settlement statements recording the appropriation, can the vendor's solicitor subsequently change the appropriation and reapportion 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. Fax settlement

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 pm 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.

[Date unknown]

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.*

5. Fixtures and chattels

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 – flagpole

Was a flagpole erected on a lawn of a property purchased at auction a chattel or a fixture?

RULING:

4. On inspection, the flagpole was held to be a very prominent feature of the property.
5. 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.
6. Having regard to factors such as the purpose for which the flagpole was placed on the property (to enhance the property), the degree of annexure (high), its situation and prominence, the flagpole 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

Note: Refer to paragraph 8.06 of *Sale of Land* ("McMorland") Fourth Edition page 279 for a discussion of what may or may not be fixtures and also to footnote 133 of page 280 where McMorland refers to rulings 5.2 and 5.3 as examples of things that can become fixtures.

6. Leases

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

Who should pay for the landlord's costs for the landlord's consent to an assignment of lease?

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 landlord's costs be paid by the tenant.

November 1992

> ***Note:*** *This is now specifically covered in the The Law Association Deed of Lease Seventh Edition 2024 Clause 6.1 where it states: Each party must pay their own costs of the negotiation and preparation of the Lease and any deed recording a new rent review or renewal. The Tenant must pay the Landlord's reasonable costs incurred in considering any requests by the Tenant for the Landlord's consent to any matter contemplated by the Lease. Each party must pay the other party's reasonable legal costs (as between lawyer and client) of and incidental to the enforcement of the other party's rights and remedies and powers under the 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 guarantee provision from the head lease deemed to be included in the sublease agreement?

RULING:

A guarantee of a lease (even if included within the lease document) did not constitute part of the lease contract. A requirement to provide a guarantee by a shareholder of the tenant could not be deemed to be incorporated into the sublease as it was not part of the head lease terms.

April 1997

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 recent version of the ADLS Deed of Lease. For instance, the ADLS Deed of Lease 2012 (5) clause 8.1(c) Painting states:*
> *"Paint and decorate those parts of the interior of the premises which have previously been painted and decorated as at the commencement date of this lease (or where the lease is renewed the commencement date of the initial term of this lease) when they reasonably require repainting and redecoration to a specification as approved by the Landlord such approval not to be unreasonably withheld."*

6.5 Leases – outgoings

Under a 6th Edition 2012 (4) Deed of Lease, was the tenant liable to pay as part of "outgoings", fire system works, and costs for painting of the exterior of the building and the repair of broken underground pipes, dealt with by the Body Corporate by replacing the pipes with a new, more sophisticated system that went over the roof of the building, rather than underground, with this deemed to be a more efficient manner of dealing with the repairs?

RULING:

The Committee determined that the painting of the premises was an outgoing for which the tenant was liable for the costs under clause 18(7) of the First Schedule of the Lease, with this being separate from the obligation under clause 8.1(c) of the Lease to paint and decorate those parts of the interior of the premises. The Committee further determined that the fire system works related to a Building Service, for which the landlord was responsible under clause 18(7) of the First Schedule of the Lease.

2 July 2021

> ***Note:*** *This was under the ADLS Deed of Lease Sixth Edition 2012 (4).*

6.6 Leases – renewals

Parties signed a commercial lease (6th Edition 2012 (4) Deed of Lease) which included both market and CPI rent review. The issue was whether the "last rent review date" referred to in definition D of clause 2.5 of the 6th Edition 2012 (4) Deed of Lease means the last CPI rent review date or any rent review date (market review or CPI review). The tenant's position was that the definition was linked to the last CPI rent review date. The landlord's position was that the definition was any rent review date, whether market review or CPI review.

RULING:

The Committee determined that the definition was intended to reference the last rent review, whether a market review or a CPI review, noting that the words were not qualified in the same way that the definitions in A, B and C of clause 2.5 were expressly qualified.

19 June 2025

> ***Note:*** *This was under the ADLS Deed of Lease Sixth Edition 2012 (4).*

6.7 Leases – 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 rental for the date of possession.

March 1989

> ***Note:*** *This is now specifically covered in the recent version of the ADLS Agreement for Sale and Purchase Eleventh Edition 2022 (3) clause 3.3 states:*
> *"Outgoings and incomings in respect of the settlement date are the responsibility of and belong to the vendor."*

6.8 Leases – 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

6.9 Leases – sale of commercial business – apportionment of rental – GST

Where the vendor has pre-paid monthly rent in advance including GST, when apportioning rent under a sale and purchase of a business with settlement in the middle of the month, should the rent be GST inclusive or exclusive?

RULING:

Under a sale and purchase of a business that is zero-rated for going concern, rent and any other apportionments should be GST exclusive.

April 1991

6.10 Leases – assignment – witnessing of signature

In an assignment of lease where the landlord signed the consent, but did not have it witnessed, has the landlord consented to the assignment?

RULING:

The landlord had consented to the assignment of lease although the consent had not been witnessed, and the landlord would be estopped from arguing otherwise. However, the document is technically incomplete and would need to be properly executed with a witness.

December 1992

6.11 Leases – liability for costs of a new lease

Who should pay the landlord's costs for a new lease which was required as a condition for sale and purchase of a business, to be approved by the purchaser's solicitor?

RULING:

The purchaser should meet the costs as this particular clause specifically referred to the grant of the new lease to the purchaser which was for the benefit of the purchaser. Also, the purchaser's solicitor approved the lease without requesting the deletion or variation of the default cost provision, making the purchaser liable so the purchaser should pay.

September 1987

6.12 Leases – 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

> ***Note:*** *Refer to Ruling 6.2 above, this is now specifically covered in the recent ADLS Deed of Lease Sixth Edition 2012 (5) which would make each party liable for their own costs for a renewal of lease.*

6.13 Leases – 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 must 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

> ***Note:*** *Refer to Ruling 6.2 above, this is covered in the recent version of the ADLS Deed of Lease Sixth Edition 2012 (5).*

6.14 Leases – 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

__Note:__ Covid-19 rent abatement clauses need to specifically refer to an abatement in rent and outgoings, otherwise the default provision will be that the abatement applies to rent only.

6.15 Leases – 'usual conditions'

Is the vendor lessee, being a private company, required to provide guarantees by its 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

6.16 Leases – 'usual clauses'

Would the following clauses be considered 'usual' lease clauses?

RULING:

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:__ The reader should note that the Improvements Rent provision was removed from the ADLS Deed of Lease Sixth Edition (5) 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.

   __Note:__ The reader should note 18(5) of the first schedule of the ADLS Deed of Lease Sixth Edition 2012 (5).

April 1992

6.17 Leases – 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 Leases – setting of new rental

Where there is no requirement for a deed of rent review in the deed of lease, is the tenant obliged to sign one and pay for the landlord's costs?

RULING:

No, where there is no requirement for a deed of rent review in the deed of lease, the tenant would not be obliged to sign or pay for the landlord's costs.

January 1986

__Note:__ See Ruling 6.2 above, clarification to the landlord's cost is now specifically covered in the recent version of the ADLS Deed of Lease Sixth Edition 2012 (5).

6.19 Leases – assignment of lease – landlord's consent – costs charged including perusal of finance documents

In an assignment of lease, the landlord was asked for consent to the proposed assignment, and also for consent to a mortgage of lease and a deed of acknowledgment of title to chattels. The sale did not proceed but is the tenant still liable for the landlord's cost?

RULING:

The landlord's cost arose with the request for assignment. Therefore, the method of financing by the proposed purchaser was 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 overall consideration of the assignment and should be paid by the tenant.

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. Any right to lessor's costs must be specifically stated in the lease.

August 1988

> ***Note:*** *See Ruling 6.2 above, clarification to the landlord's cost is now specifically covered in the recent version of the ADLS Deed of Lease Sixth Edition 2012 (5).*

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. Is the landlord bound to keep the percentage the same as the amount specified on 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 TLANZ Deed of Lease applies.

[Date unknown]

6.22 Leases – gross rental dispute

In a commercial lease where the guarantor guaranteed the "gross rental" under the lease, did this include the tenant's share of the outgoings?

RULING:

Relying on case law, and definition in *Black's Law Dictionary*, the Committee found that "gross rental" included the tenant's share of outgoings.

27 January 2017

7. Mortgages

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 Mortgages – 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 must be agreed between the Parties.

August 1991

> ***Note:*** *efer to clause 3(c) of the ADLS Term Loan Agreement (non-regulated) (release date 5 April 2023) if the loan has been recorded using the same. It is usual practice to specify the form of the agreement and key terms of a mortgage when agreeing to grant a mortgage.*

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

> ***Note:*** *There is no longer a Costs Committee in the ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3).*

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 allows for a little time for 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 Mortgages – 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 Mortgages – 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 to 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 – backdated

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 backdate it to 17 May 1987. The backdating 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 backdated (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. Possession

8.1 Possession – machinery used on property by vendor on settlement date – vendor's 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 ER 284). Leaving machinery on the property is a breach of vacant possession.

December 1995

> ***Note:*** *The reader should refer to McMorland paragraph 8.04 for a discussion of the topic of what constitutes vacant possession.*

8.2 Possession – possession date and settlement date

Does an agreement to vary the possession date under an agreement override the default definition of settlement date?

RULING:

No, unless the Parties specifically varied the settlement date as well as the possession date, an amendment to vary the possession date only (which is often provided earlier by agreement) does not necessarily amend the default settlement date under the agreement.

April 1998

> ***Note:*** *The reader should further be aware that prior versions of the ADLS Agreement for Sale and Purchase of Real Estate contained a separate section for possession date and settlement date which is now no longer the case. Care previously was needed when amending one date (possession date or settlement date) without the other as the ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) clause 3.3 states that "Possession shall be given and taken on the settlement date" and clause 1.1(37) states "settlement date" means the date specified as such in this agreement.".*

9. Requisitions

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

> ***Note:*** *This ruling was rare and determined this way because it was accepted the vendor had no knowledge of the requisition, and if the purchaser had obtained a LIM report, then there would have been a different outcome.*

10. Residential tenancy

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. However, this would be subject to the vendor/landlord signing a change in landlord form and lodging this with Tenancy Services.

April 1992

11. Settlement

11.1 Settlement – no code compliance certificate – potential conflict between special conditions and general conditions – does 'date' mean within a working day?

An agreement for sale and purchase for a development under construction required settlement on practical completion or the 5th working day after the date the vendor had notified the purchaser that title was available. If a code compliance certificate was not available after the 5th working day from title, was the purchaser entitled to delay settlement until the issuance of code compliance certificate? The purchaser tried to withhold 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 be available.
3. Even without the specially contracted settlement date, it was unlikely that the purchaser would be entitled to withhold settlement. Under the then-current provision of cl 6.1(8) of the Agreement for Sale and Purchase (Sixth Edition (2) May 1995), the provision operates only as a warranty. 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 5:00pm. It was 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.

July 2020

11.2 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

11.3 Settlement – 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, it is the purchaser's solicitors' responsibility to pay the interest which was subsequently incurred.

October 1988

11.4 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

11.5 Settlements – retention

Where a purchaser took possession of an unfinished property, $2,000 was unliterally 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 in full should have occurred on date of possession. A unilateral deduction 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

> ***Note:*** *ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) clause 10 now sets out the requirement for claims for compensation.*

11.6 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 in normal circumstance is not a reasonable time prior to settlement and is a breach of cl 3.6 of the Agreement for Sale and Purchase Ninth Edition 2012 (2).

December 2015

> ***Note:*** *ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) clause 3.6 similarly deals with this.*

11.7 Settlement – commercial onseller

This case arose as a dispute between a vendor and purchasers under a standard form Sale and Purchase Agreement (version not specified). Title for the unit sold issued on 7 July 2021, with settlement under the Agreement scheduled for 7 working days later. As part of the development, the vendor was obliged to construct a retaining wall on the boundary of Lots 1 and 2. Building consent had been issued for the retaining wall. The retaining wall had been constructed and inspected by Council, but its Code Compliance Certificate ("CCC") had not yet issued. The purchasers argued that they were not obligated to settle until a CCC had issued for the retaining wall, in terms of the vendor being a commercial onseller and the retaining wall being part of a household unit in terms of GST cl 3.14. The question was whether settlement was contingent on CCC issuing for the Retaining Wall and whether the vendor was a commercial onseller.

RULING:

The Committee determined that the Retaining Wall did not fall within the definition of household unit as used by cl 3.14 and as defined by the provisions of the Building Act 2004, as the Retaining Wall was not itself a part of a building capable of being occupied, nor was it exclusive to one household, being built as it was on the boundary of two separate Lots. So, settlement was not conditional on CCC issuing for the Retaining Wall.

30 August 2021

11.8 Settlement – default

This case arose as a dispute between a vendor and purchasers under the ADLS/REINZ Tenth Edition 2019 (2) for the sale of bare land scheduled for settlement on 24 January 2022, where the vendor defaulted on settlement as a result of being unable to provide clear title. The vendor contacted the purchaser on the afternoon of settlement to advise it was not able to settle and was unsure when it would be. On 25 January 2022, the purchaser served a Settlement Notice. On the afternoon of 26 January 2022, at 3:13 pm, the vendor advised it was now ready, willing and able to settle, but due to the lateness of the advice, the purchaser was unable to settle that day but did settle the following day. The issue was whether the vendor had provided reasonable notice and whether the purchaser was liable to pay penalties.

RULING:

The Committee determined that the vendor had not given notice within a reasonable time of its ability to settle, in terms of clause 3.7 of the Agreement, and was not therefore entitled to hold the purchaser in default and seek penalty interest.

March 2022

11.9 Settlement – costs of delay

1. Can a vendor be ready, willing and able to settle if the vendor advises the purchaser that possession would not be provided on the settlement date unless the purchase price is paid in full despite its claim for compensation?
2. Is the purchaser liable to pay the late settlement interest accrued over the period Friday 18 May 2018 to the next working day 21 May 2018 when it failed to settle?
3. Is the purchaser liable to pay the additional insurance costs and moving costs incurred by the vendor's directors/shareholders personally in respect of the on-purchase costs they incurred (not the vendor company)?
4. Is the purchaser liable to pay the additional legal costs of the vendor incurred by the late settlement?
5. Is the purchaser liable to pay the late settlement interest incurred by the vendor's directors/shareholders personally, and the additional legal costs incurred by the vendor's directors/shareholders personally?
6. Who should be liable for costs as the "successful party"?

RULING:

1. The vendor was ready, willing and able to settle on the agreed date of 18 May 2018 and in the circumstances, the last-minute settlement provisions only applied to the prior settlement date of 15 May 2018. Therefore, the purchaser settling at 4:47 pm on 18 May 2018 was a late settlement.
2. Due to the determination in issue 1, the vendor was entitled to late penalty interest from 18 May 2018 to Monday 21 May 2018.
3. The vendor sought to recover costs of insurance and moving costs incurred by the vendor's directors/shareholders personally as a result of the purchaser's failure to settle on the settlement date, but there is no privity of contract for the vendor's directors/shareholders to personally claim these costs against the purchaser, so the purchaser should not be liable to pay the costs.
4. The purchaser is liable to pay the vendor's additional legal costs for additional attendance occasioned by the late settlement.
5. For the same reasons in issue 3 above, the purchaser is not liable to pay for the additional legal costs incurred by the vendor's directors/shareholders personally.
6. The vendor is the "successful party" having succeeded in 3 out of the 5 issues submitted, so the purchaser should pay the vendor's legal costs in this application.

September 2018

***Note:** The claim for compensation was raised late after the stipulated settlement date and on the date of the agreed new settlement date of 18 May 2018, and this was prior to the revised clause 10 for claims for compensation.*

11.10 Settlement – Covid-19 delays

Was the purchaser obliged to complete settlement on 31 March 2020, which was during the Covid-19 Level 4 lockdown, or was the settlement date automatically deferred to the expiry of the lockdown?

RULING:

Whilst the Committee had sympathy for the purchaser, contractually, the vendor was able to offer vacant possession to the purchaser, and the property was available for the purchaser for physical possession on the settlement date and therefore the purchaser was obliged to complete settlement on 31 March 2020.

July 2020

***Note:** This determination was made on an agreement form that did not include the standard Covid-19 clause.*

11.11 Settlement – delays – additional costs

Are additional legal costs incurred by the vendor resulting directly from delays by the purchaser in completing settlement on the settlement date recoverable from the purchaser?

The purchaser failed to settle four properties, and in addition to penalty interest the vendor sought to recover legal costs of $600 plus GST under clause 3.12(1).

RULING:

1. The additional legal costs incurred by the vendor as a direct result of the purchaser's failure to settle is recoverable from the purchaser.
2. Clause 3.12(1) does not preclude claims for additional expenses and damages where the vendor also charges penalty interest.
3. In accordance with the Court of Appeal decision in *Rochis Ltd v Chambers [2007] NZCA 479*, the vendor is not precluded from recovering additional legal fees.

The claim for costs does not amount to a double claim, as payment of interest only compensates the vendor for loss of money.

April 2017

11.12 Settlement – variation terms

Further to an agreement for sale and purchase of property, what variations were agreed between the Parties?

RULING:

Further to an agreement for sale and purchase, the Parties' lawyers exchanged emails discussing and proposing various things, but none of the emails resulted in a clear offer and acceptance or meeting of the minds – the only variation clearly agreed was a $2,000 price reduction so that was the only enforceable variation.

June 2018

12. Undertakings

12.1 Solicitor's undertakings

1. May a solicitor be released from an undertaking in circumstances where the undertaking cannot be complied with?
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. The undertaking was provided for the benefit of the purchaser. Accordingly, it was not appropriate to discharge the vendor's solicitors from their undertaking.
2. As the undertaking could never be complied with, the moneys held should be retained by the purchaser.

October 1996

12.2 Undertakings – 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

__Note:__ While practitioners are entitled to rely on such an undertaking, they are not obliged to accept and can require a partner/director to sign.

12.3 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

12.4 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 the solicitor was not prepared to accept the obligation.

July 1986

12.5 Solicitor's 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 or her 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. Certificates

13.1 Certificates – solicitor's obligation to forward

What is the position on law firms forwarding to their 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. The New Zealand Law Society has previously ruled that RWT funds, whilst being retained by practitioners pending payment to Inland Revenue, can be retained on term deposit to the benefit of the practitioner to defray such administration and costs and disbursements.

December 1992

14. Warranties

14.1 Warranties – vendor warranties

What are the vendor's obligations to the purchaser under clause 7.2(8) of the agreement for sale and purchase with respect to a notice or demand received by the vendor after the date of the agreement?

RULING:

On a plain reading and interpretation of clause 7.2(8), a vendor's obligation is to deliver any notice or demand to the purchaser unless the vendor has paid or complied with such notice or demand.

By forwarding the external letter to the purchaser, the vendor satisfied its obligations under clause 7.2(8) of the agreement for sale and purchase. No further liability arose for the vendor.

September 2019

14.2 Warranties – vendor warranties

Is the purchaser able to claim compensation based on alleged vendor breach of warranties and in relation to title defect? Whether the chattels must be delivered in reasonable working order, even if the chattels are not in working order when the agreement is signed? The dispute related to sensor lights not working, waste disposal not working and garden pipe deck – Parties agreed to settle on the day with $10,950.00 retention pending the ruling.

RULING:

1. The Committee finds that no compensation is payable by the vendor in relation to the title defect.
2. Compensation is payable by the vendors in relation to the breach of warranty, but the Committee has not been given enough information to be able to determine how much should be paid. It would however seem reasonable that the waste disposal unit be replaced with a new unit as it is generally not economic to repair such things. No evidence was provided in relation to the cost of remedying the other breaches of warranty.
3. The Committee finds that chattels are to be in reasonable working order at settlement date even if they are not in working order at the time the agreement was signed.

The Committee finds that the vendor was not obliged to give vacant possession until the purchaser settled in full, as such the purchaser had to pay penalty interest for failing to settle on time.

September 2016

15. Unit Titles

15.1 Unit Titles – s 36 certificate (now s 147 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 1972 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) (ADLS Agreement for Sale and Purchase of Real Estate 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

Note: *The ADLS Agreement for Sale and Purchase of Real Estate Sixth Edition (2) May 1995 (inserted for the 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 s 15 of the Act, and
b) A certificate from the body corporate under s 36 of the Act. Any periodic outgoings shown in that certificate (not being amounts referred in paragraph (d) of s 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 ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) provides for unit title and all relevant disclosure statements under clause 8 and this is also covered by the requirements of s 146 of the Unit Titles Act 2010.*

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:

1. It includes the following: 'The vendor will provide on settlement a certificate from the Body Corporate under s 36 of [the Unit Titles Act]';
2. However, it did not include any reference to s 15 of the Act relating to insurance. Whereas the building certificate provided did contain the following assertion: 'That the buildings and other improvements are insured individually'.

Is the purchaser entitled to delay or refuse settlement on the basis that 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.

April 1998

Note: *The Unit Titles Act 2010 has now replaced the Unit Titles Act 1972 and subclause 8.3(3) of the ADLS Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) deals with insurance provisions:*
"If the property is a unit title, not less than five working days before the settlement date the vendor will provide:
(1) a certificate of insurance for all insurances effected by the body corporate under the provisions of s 135 of the Act; and
(2) a pre-settlement disclosure statement from the vendor, certified correct by the body corporate, under s 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 – 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 8.3 and 8.4 of the Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (3) and s 124 of the Unit Titles Act 2010.*

16. Fees

16.1 Fees – 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 and the sister contemporaneously sold her property through another solicitor and denied liability for the firm's fees as she had not instructed them, was the sister liable for the solicitor's fees?

RULING:

No, the firm was never instructed by the sister and therefore cannot take any instructions or charge her any fees.

February 1990

> ***Note:*** *This ruling is historic and pre-dates the Lawyers and Conveyancers Act 2006.*

16.2 Fees – solicitor's refusal to settle

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 a due date depends on the terms of engagement 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 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 should be adhered to, particularly Rule 4.2 (Duty to complete retainer):*
> *"4.2 A 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*
> *(a) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or*
> *(b) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.*

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4.2.1 Good 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.

4.2.2 None of the matters set out in rule 4.1.1 is good cause to terminate a retainer.

4.2.3 A 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.

4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

16.3 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 ongoing negotiations and correspondence are payable pursuant to an agreement to guarantee and indemnity 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 s 65A District Courts Act 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 s 65(A) of the District Courts Act 1947, not the contract rate.

May 2013

Note: *Parties would now need to consider the interest due under the Interest on Money Claims Act 2016.*

17. Misdescription

17.1 Misdescription – purchaser's entitlement to compensation

Where a property described in the ADLS 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: *The reader should be aware that this ruling was determined under clause 5.4 of the ADLS Agreement for Sale and Purchase of Real Estate Sixth Edition (2) May 1995. In the current form, The Law Association of New Zealand/REINZ Agreement for Sale and Purchase of Real Estate Eleventh Edition 2022 (4), the relevant provisions are now contained in clause 10, Claims for compensation..*

18. Interim amount for stakeholder

18.1 Interim amount for stakeholder

What was a reasonable sum for the interim amount to be held by the stakeholder until the amount of the claim is determined, given the circumstances of this purchaser and vendor where the vendor is proposing $20,000 and the purchaser is requiring $130,000?

RULING:

Having considered the views of the Parties, their submissions, and the other materials put before the Committee, the reasonable sum to be held by a stakeholder was determined to be $100,000 in these specific circumstances.

July 2020

19. Purchase price

19.1 Purchase price dispute

Parties to an agreement agreed on a purchase price of $1,325,000, then engaged in negotiations where the purchaser firstly requested a price reduction of $15,000 for the LIM issue and $5,000 for the building issues, the vendor then offered the same discounts on the basis the agreement was declared unconditional, but no response was provided. Subsequent correspondence led to the purchaser proposing a variation inserting a new condition requiring the vendor to use their best endeavours to rectify the LIM issues, amendment to the settlement date and an amendment to the deposit arrangements without referring to the price discount. The vendor believed the purchase price was unchanged, while the purchaser argued the $5,000 reduction for the building issues should be provided. The Parties settled with $5,000 of the purchase price retained on trust pending the Committee's determination. The issue for the Committee was, what is the correct purchase price under the agreement, $1,325,000 or $1,320,000?

RULING:

Failing an offer and acceptance of the price reductions by the purchaser, and then the vendor, there was no agreed price reduction. The subsequent variation did not include a price reduction so the purchase price was as per the agreement being $1,325,000 and the $5,000 retention should be released to the vendor.

September 2020

20. Retirement Village Contracts

20.1 Retirement village contract interpretation dispute

The issue was whether the retirement village operator could contractually charge a departing resident two global fees (of $3,000 & $1,000) for respective labour/supervision and administration costs as part of "refurbishment costs" that were carried out by the retirement village operator employee and not an external contractor.

RULING:

The Committee found that the retirement village operator could not contractually charge these costs as the licence under which the resident had occupied the unit provided an obligation to pay a share of general outgoings incorporating "all reasonable costs (including wages …….) management, control, and administration" and if the resident was required to pay the disputed charges on vacating the unit, the resident would be paying for the same services twice.

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This Manual is the product of a collaborative effort between Committee members and The Law Association and is intended to make the Committee's rulings more readily available to the profession.

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