

## **PRESENTERS**

### **David Bigio, Barrister, Auckland**

David has been a Barrister sole since May 2003. Prior to that he was a litigation partner in an Auckland firm for 8 years. David's areas of practice are commercial and civil litigation, real estate and property law, building and construction, trusts and administrative law. He provides advisory and advocacy services to a diverse range of commercial, institutional and private clients.

David has acted for the Real Estate Institute of NZ Inc for over 15 years in a variety of capacities, including the conduct of disciplinary proceedings before the Real Estate Agents Licensing Board and appeals of Board decisions to the High Court and Court of Appeal; as well as issues relating to the reform of the Real Estate Agents Act.

### **Rod Thomas, Barrister, Auckland**

Rod specialises in property litigation and problem solving. Since admission some 28 years ago, he has been a legal officer in the Land Registry, then for 12 years was a transactional property lawyer with Simpson Grierson. For the last 12 years he has been a barrister sole.

Rod has co-taught the law of vendor and purchaser at Auckland University. He is the author of the chapters on cross leases, unit titles and contracts for sale in *New Zealand Land Law*. He is co-author of the loose leaf publication *Brookers Land Law*. In 1999 he co-authored the standard REINZ/ADLS form of agreement (7th ed).

Most of Rod's practice is geared towards the High Court, but with appellate appearances. Rod was previously co-presenter of the NZLS Seminar *Cross Leases and Unit Titles – Problems and Solutions* (1994). Over the years, he has been a regular presenter at ADLS property-based seminars.

Rod Thomas gratefully acknowledges the assistance of Gabrielle Fortune and Anna Cornelius, both of Auckland, who proof read and commented on the materials. A significant portion of Rod's seminar material is derived from his chapters in *New Zealand Land Law* (2<sup>nd</sup> edition), to be published in late September 2009.

Rod Thomas wished to declare that since preparation of his written material for this seminar, he has been retained by ADLS Inc to advise on the new REINZ Agreement. However, his written and expressed views remain his own.

*The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*

# CONTENTS

INTRODUCTION .....	1
<b>1. SALE ISSUES IN A TOUGH REAL ESTATE MARKET .....</b>	<b>3</b>
BASIC FLAWS - THE FRONT PAGE .....	3
DESCRIPTION OF PROPERTY ON THE AGREEMENT .....	3
<i>Nature of estate being purchased</i> .....	3
<i>Encumbrances correctly and fully described</i> .....	4
<i>Nature of tenancies</i> .....	5
<i>Description of finance to complete</i> .....	5
ROLE OF REAL ESTATE AGENT IN PREPARATION OF AGREEMENT .....	6
BINDING TRUSTS TO THE SALE .....	6
DO ALL THE TERMS OF THE AGREEMENT NEED TO BE IN WRITING?.....	6
<i>Requirements of the Property Law Act</i> .....	6
<i>Effect on variations of contract</i> .....	7
<i>Judicial activity</i> .....	7
<i>Parole evidence rule/rectification</i> .....	7
<i>Collateral contract?</i> .....	8
<i>Court of Appeal correction</i> .....	8
DUE DILIGENCE AND OTHER STANDARD APPROVAL CLAUSES .....	8
<i>Reassurgance of condition precedent reasoning – High Court</i> .....	9
<i>Reassurgance of condition precedent reasoning – Court of Appeal</i> .....	10
TRUSTEE LIABILITY CLAUSE IN THE STANDARD FORM.....	10
ESTOPPEL AND WAIVER.....	11
<i>Seventh Edition addition to Standard Form Agreement</i> .....	11
<i>Judicial division</i> .....	11
ESTOPPEL OR WAIVER? .....	12
<b>2. “REGALWOOD – RETAINING FUNDS FOR A MISDESCRIPTION” .....</b>	<b>13</b>
<i>What is the issue?</i> .....	13
<i>Who should bear the risk?</i> .....	14
<i>Subsequent judicial activity</i> .....	15
<i>Fair Trading Act implications</i> .....	15
<i>Subsequent developments</i> .....	15
<i>Clause 6.5 added to Standard Form Agreement</i> .....	15
<i>Intended effect of cl 6.5</i> .....	16
<i>Regalwood</i> .....	16
<i>First instance judgment</i> .....	16
<i>Court of Appeal</i> .....	16
<i>Supreme Court</i> .....	17
SHOULD ANY CHANGES BE MADE TO THE STANDARD FORM AGREEMENT? .....	17
THE TREATMENT OF “INCORRECT DESCRIPTIONS” UNDER THE REINZ FORM .....	17
<i>Description of what?</i> .....	17
<i>REINZ Form gives contractual right to claim compensation</i> .....	18
<b>3. THE VALUE OF RETAINING A RIGHT OF REQUISITION?.....</b>	<b>19</b>
WHAT IS A RIGHT TO REQUISITION? .....	19
<i>Consequences of deeds system</i> .....	19
<i>A purchaser’s right to requisition at common law</i> .....	19
<i>Illustrations of right to requisition</i> .....	20
<i>No rights to requisition</i> .....	20
<i>Extensive rights</i> .....	20
VENDOR’S RIGHT TO TERMINATE .....	21
<i>The effect of the Torrens’ system on common law rights of a vendor to cancel</i> .....	21
REMOVAL OF THE REQUISITION CLAUSE FROM ANY STANDARD FORM AGREEMENT .....	21
REQUISITIONS UNDER THE NEW REINZ FORM.....	22

<i>Right to requisition remains</i> .....	22
<i>Effect of condition giving purchaser approval of title on a purchaser's right to requisition</i> .....	22
<i>How would the common law right to requisition remain?</i> .....	24
<i>Cross lease issues under the new REINZ Form</i> .....	24
PURCHASER'S RIGHT TO REQUISITION UNDER THE STANDARD FORM AGREEMENT.....	25
CONCLUSION.....	25
<b>4. "LEAKY HOMES" - EXISTING DAMAGE TO COMMON PROPERTY IN A UNIT TITLE DEVELOPMENT</b> .....	<b>27</b>
WHAT IS THE ISSUE? .....	27
EXISTING CASE LAW.....	28
<i>"Sunset Terraces"</i> .....	28
<i>"Byron Terraces"</i> .....	28
DISCUSSION .....	29
STATUS OF THE BODY CORPORATE .....	30
<i>Division of powers</i> .....	32
<i>Proprietors' rights, entitlements and obligations regarding units</i> .....	33
<i>Proprietor's right at common law to sue?</i> .....	34
<i>Issues of double recovery</i> .....	34
<i>Other jurisdictions</i> .....	35
<b>5. WHAT NEEDS TO BE ON A S 36 CERTIFICATE, AND WHAT DOES NOT</b> .....	<b>37</b>
PURCHASER HAS NO LIABILITY IF DEBT NOT DISCLOSED IN S 36 CERTIFICATE.....	37
DETAILS REQUIRED ON S 36 CERTIFICATE .....	38
REPRESENTATIONS TO PURCHASER BY BUILDING MANAGER .....	38
IS A S 36 CERTIFICATE REQUIRED ON SALE OF AN FDU? .....	38
<b>6. THE "BATTLE OF THE FORMS"</b> .....	<b>41</b>
WHICH FORM WORKS THE BEST IN A TOUGH MARKET; THE STANDARD FORM AGREEMENT OR THE NEW REINZ FORM?.....	41
<i>Standard Form Agreement</i> .....	41
<i>REINZ Form</i> .....	41
SHORTCOMINGS AND COMPARISONS IN THE FORMS.....	41
<i>Standard Form Agreement</i> .....	41
<i>REINZ Form</i> .....	42
ASPECTS OF THE REINZ FORM THAT FAVOUR THE PURCHASER .....	44
(a) <i>Operation of Condition 1, "Purchaser's approval of "title"</i> .....	44
(b) <i>Purchaser's right to requisition remains</i> .....	44
(c) <i>Proof of any tenancy</i> .....	45
(d) <i>"Building report"</i> .....	45
(e) <i>Extended vendor liability past settlement date</i> .....	45
(f) <i>Vendor requirement for deposit to be kept on termination</i> .....	46
(g) <i>No provision for a certificate of acceptance</i> .....	46
(h) <i>Degree of disclosure for Unit titles</i> .....	46
(i) <i>Seller Indemnity to Buyer</i> .....	46
(j) <i>Breadth of planning notice provisions</i> .....	46
(k) <i>Circular "default notice" provision for essential terms of the agreement</i> .....	47
(l) <i>Discharges of memoranda of encumbrance on settlement</i> .....	49
(m) <i>"Book" not made available to purchaser before agreement signed</i> .....	49
(n) <i>Standard Form Agreement</i> .....	49
(o) <i>Standard approvals in REINZ Form favouring purchaser</i> .....	50
(p) <i>Payment of purchaser's additional legal and other costs</i> .....	50
(q) <i>Withholding of estimated losses on settlement</i> .....	50
(r) <i>Who is the purchaser?</i> .....	50
(s) <i>Property remains at risk of the vendor until settlement</i> .....	50
ASPECTS OF THE REINZ FORM THAT FAVOUR THE VENDOR .....	51
(a) <i>Pegs</i> .....	51
(b) <i>Extension of settlement date</i> .....	51
(c) <i>Is a consent to a neighbour an " agreement?"</i> .....	51
(d) <i>Purchaser performance a condition precedent to vendor performance?</i> .....	51
(e) <i>Rights on re-sale</i> .....	51

(f) <i>Obligation to take title to a defective cross lease</i> .....	51
ISSUES FOR REAL ESTATE AGENTS UNDER THE REINZ FORM .....	52
<b>7. "THE AGENT DID IT" – LIABILITIES AND RESPONSIBILITIES .....</b>	<b>53</b>
DUTIES OF AN AGENT IN DRAFTING AN AGREEMENT – RECENT DEVELOPMENTS .....	53
<i>WRIGHTSON NMA LIMITED AUCKLAND v HUBBLE</i> .....	53
<i>Facts</i> .....	53
<i>Two allegations</i> .....	54
<i>Agent's duties</i> .....	54
<i>Claim for damages</i> .....	55
DISCUSSION .....	55
SUBSEQUENT DEVELOPMENTS - <i>JARDEN v LAWLOR</i> .....	56
<i>Facts</i> .....	56
<i>Agent liable</i> .....	56
<i>No contributory negligence</i> .....	57
<i>Foreseeability of losses</i> .....	57
<i>Costs award</i> .....	57
DISCUSSION ON AGENT LIABILITY FOR DRAFTING SALE AGREEMENT .....	57
<i>Monopoly consequences</i> .....	58
AGENTS TO VENDOR AND PURCHASER? .....	58
<i>Nature of any duty owed to the purchaser for drafting an agreement for purchaser</i> .....	58
<i>Discussion</i> .....	58
<i>Judicial analysis</i> .....	59
<i>Fiduciary principles</i> .....	60
SUMMARY - EXTENT OF AN AGENT'S LIABILITY FOR A BADLY DRAWN AGREEMENT .....	61
NATURE OF ANY ADDITIONAL DUTIES OWED BY AN AGENT TO EITHER PARTY POST EXECUTION OF THE	
AGREEMENT .....	63
<i>Agent's authority to receive notification on behalf of the vendor under the agreement</i> .....	63
<i>James v Campbell</i> .....	63
<i>Peach v Batten</i> .....	64
<i>Discussion</i> .....	64
<i>Agent acting for the purchaser in terminating the agreement</i> .....	65
SUMMARY OF POSITION REGARDING AGENT'S AUTHORITY POST DRAFTING AGREEMENTS FOR SALE .....	65
FAIR TRADING ACT ("FTA") .....	66
<i>Commerce Commission v Whitehead</i> .....	66
<i>Commerce Commission v Ireland</i> .....	70
<i>Commerce Commission vs Grenadier Real Estate</i> .....	71
CIVIL CASES .....	71
QUANTUM AVAILABLE UNDER S 43 OF THE FTA .....	74
CONDUIT DEFENCE .....	75
LIMS, LIABILITIES AND CONTRIBUTIONS .....	76
<i>Altimarloch Joint Venture Ltd v Moorhouse</i> .....	76
FIDUCIARY DUTIES OF REAL ESTATE AGENTS .....	79
<i>Stevens v Premium Real Estate Ltd</i> .....	79
<i>McNeill v Real Estate Institute of New Zealand Inc</i> .....	82
<i>Davis v Real Estate Institute of NZ Inc</i> .....	83
RECEIPT OF DISCOUNTS, COMMISSIONS, FEES BY AGENTS .....	84
SECRET COMMISSIONS ACT 1910 .....	85
DISCOUNTS RECEIVED BY THE AGENT .....	86
REFERRAL OF VENDOR TO A THIRD PARTY .....	87
REFERRAL OF PURCHASERS TO SERVICE PROVIDERS .....	87
DISCLOSURE .....	88
<b>8. "OPENING THE LID" – THE REAL ESTATE AGENTS ACT 2008 .....</b>	<b>89</b>
STRUCTURE OF INDUSTRY .....	89
REAL ESTATE PRACTITIONERS .....	90
NEW RULES REGARDING LISTING OF PROPERTIES .....	90
SALE AND PURCHASE AGREEMENTS .....	91
NEW COMPLAINTS AND DISCIPLINARY STRUCTURE .....	92
<b>APPENDIX 1 .....</b>	<b>95</b>

AGREEMENT FOR SALE AND PURCHASE OF REAL ESTATE .....	95
<b>APPENDIX 2</b> .....	<b>107</b>
REINZ AGREEMENT FOR BUYING AND SELLING REAL ESTATE.....	107
<b>APPENDIX 3</b> .....	<b>117</b>
REINZ BOOK OF STANDARD CLAUSES .....	117