

NZ Certificate in Real Estate (Salesperson) (Level 4)

MODULE 2 – UNIT STANDARD 23135 (V6)

**Demonstrate knowledge of the law of contract.
and the law of agency in a real estate context
(Level 4, Credits 5)**

Learner Guide



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THE LAW OF CONTRACT

Modern contract law was developed in the 19th century. It was based on the notion of 'striking a bargain', which means to agree the terms of a deal. These terms identify what the parties to an agreement will give or receive, and anything that they must do to fulfil the agreement.

A general meaning of contract

In general terms, under contract law, contracts can be written or verbal.

Under contract law, a contract (verbal or written) is a **legally binding** agreement between two or more parties. In common law, there are **six elements** of contract which must be met in order for a contract to be legally enforceable. These elements are discussed a little further on.

CONTRACTS IN REAL ESTATE

The following contracts are central to real estate transactions.

- Agency agreements.
- Sale and purchase agreements and lease agreements.

When licensees are working with these documents, all work must be carried out under the direction and control of the supervising agent or branch manager.

An **agency agreement** is a legal contract between the agent and the principal (client –usually the client). Under the agency agreement (contract) the client authorises the agent to act on their behalf to sell their property. Under Section 126 of the Real Estate Agents Act, for an agent to be entitled to commission or expenses arising from real estate agency work, a written agency agreement is required. It must be signed by the client and the agent, comply with regulations and a copy must have been given to the client within 48 hours of signing.

Once an **agency agreement** is signed it is a legally binding contract which sets out the terms and responsibilities of each party including disclosure obligations, the services the agent will provide along with the associated costs and when the client will pay for the service.

A **sale and purchase agreement** are a legally binding contract between the client and the purchaser. It establishes the agreed terms and conditions of the sale and purchase of a property, business, or space. A **lease agreement** is a contract establishing the terms and conditions for a lessor to lease a space in a commercial or industrial property to a lessee.

Under Section 24 of the Property Law Act 2007 (PLA) contracts relating to the 'disposition' of land must be in writing and must be signed by all parties who are bound by the contract. The PLA defines 'disposition' as, among other things, sale, exchange, lease, assignment, transfer of land.

This means sale and purchase agreements and lease agreements **must** be in writing.

The diagram 'Real Estate – the residential sales process' later in this section shows how the agency agreement and sale and purchase agreement are used in the residential real estate sale process.

There are two key sections, one under the Property Law Act and another under the Real Estate Agents Act that apply to real estate contracts.

Property Law Act 2007

24 Contracts for the disposition of land is not enforceable unless in writing.

- (1) A Contract for the disposition of land is not enforceable by action unless-
 - (a) the contract is in writing or its terms are recorded in writing; and
 - (b) the contract or written record is signed by the party against whom the contract is sought to be enforced.
- (2) In this section, disposition does not include—
 - (a) a short-term lease; or
 - (b) a sale of land by order of a court or through the Registrar.

Real Estate Agents Act 2008

126 No entitlement to commission or expenses without agency agreement

- (1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—
 - (a) the work is performed under a written agency agreement signed by or on behalf of
 - i. the client and
 - ii. the agent
 - (b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and
 - (b) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by.
- (2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.
- (3) A court may not make an order described in subsection (2) unless satisfied that_
 - (a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and
 - (b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and
 - (c) failure to make the order would be unjust.
- (4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2017

REAL ESTATE AND THE RESIDENTIAL SALE PROCESS

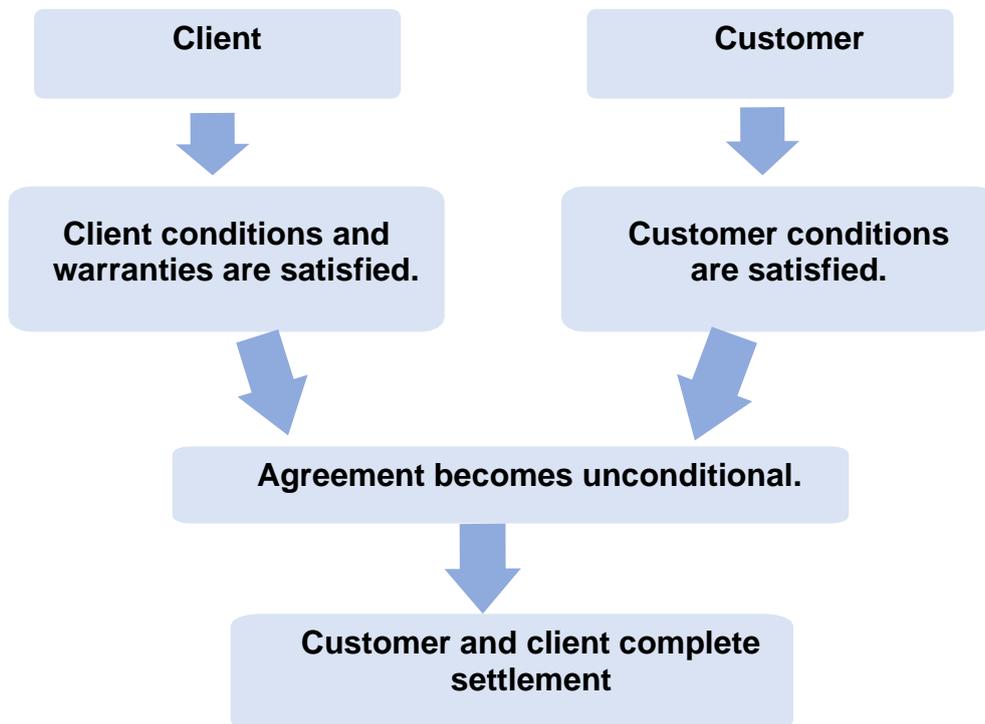
This diagram shows steps from the appraisal of the property to settlement. The steps related to the agency agreement and sale and purchase agreement contracts are shown in blue.

Agency Agreement

- Licensee appraises the property and qualifies the client.
- Agency agreement signed by the client and agent/agency.
- The Marketing programme starts.

Sale and Purchase Agreement

- Purchaser inspects the property.
- Offer is drafted by licensee on agreement form, signed by the purchaser.
- Licensee presents offer to client and negotiations begins.
- Licensee presents offer to client.
- Client agrees on terms and conditions or counteroffers.
- A binding contract created.



THE SIX ELEMENTS OF CONTRACT

These six elements must be present in any type of contract for the contract to be enforceable. They are offer and acceptance, consideration, intent, legal capacity, genuine consent, and legality of purpose.



The Elements of a contract in Brief	
Intent	For a contract to be enforceable, the parties to the contract must have intended to enter a legally binding relationship.
Offer and Acceptance	One party makes a clear offer for something and the other party accepts it.
Consideration	Each party agrees to exchange something of value, i.e., goods or services for money.
Capacity	The parties to the contract must have legal capacity. They must be able to legally enter into a contract, i.e., they must be of sound mind, not be an undischarged bankrupt and usually must be over 18 years old
Legal Purpose	The contract must be for a legal purpose because the law will not enforce an illegal act
Genuine Consent	The parties to a contract must enter it under their own free will by giving genuine informed consent. They did not enter the contract due to a misrepresentation, duress, undue influence, or a mistake.

Offer and acceptance.

The basic rules of offer and acceptance are as follows:

- An offer must be communicated.
- An offer indicates the willingness to enter into a legally binding agreement.
- The offer must be accepted.
- The acceptance must be communicated to the party who made the offer.

Offer and Acceptance as it applies in an agency agreement	Offer and Acceptance as it applies to a sale and purchase/lease agreement
<p>The agent offers to carry out agency work.</p> <p>The principal (client) accepts the offer of service and agrees to pay commission to the agent under the terms of the agreement.</p>	<p>The customer (the purchaser or lessee) offers to buy or lease the property, space, or business.</p> <p>The client (the client or lessor) accepts the offer to buy or lease the property, space, or business.</p> <p>Counteroffers by the client or lessor work the other way around, i.e., the client offers to sell rather than to buy.</p>

In a real estate transaction, where the licensee is working on behalf of a client or lessor, the licensee presents the offer to the client.

- The client can then consider the offer and decide whether to accept it, reject it or make a counteroffer.
- If the client or purchaser do not agree to either the offered price or conditions, the licensee can negotiate between the two (or more) parties to try to reach mutual agreement.

During the negotiation process, the price and conditions may change several times before an agreement is reached and during this time each of the parties may seek further legal or technical advice.

- The client and purchaser must initial any amendments in the contract to confirm they agree with the changes.

Important Note:

In real estate the person making the offer can be the purchaser or the client. Usually, it is the purchaser who will make the initial offer. If the offer is unacceptable, rather than reject it outright, the client may make a new offer back to the purchaser. This is called a counteroffer and has the effect of voiding the purchaser's offer. **When an offer is accepted, whether by the purchaser or the client, this acceptance must be communicated to the person who made the (last) offer.**

This is called 'conveying the acceptance'. It is deemed that acceptance is not complete until the offeror knows that their offer has been accepted. Until acceptance is complete either party can withdraw from negotiations as the contract has not yet been formed. Conveying acceptance may be completed verbally and once acceptance is conveyed there is a binding contract between the parties, which can then be dated.

Consideration

Consideration is the requirement for all parties to a contract to give up and exchange something of value.

The thing of value may be money, property, an act, or a promise.

Consideration as it applies to an agency agreement	Consideration as it applies to a sale and purchase/lease agreement
The agent's work and skill are exchanged for potential payment of commission by the principal (client).	A property, space, or business is given up to the purchaser or lessee in exchange for payment to the client or lessor.

Intent

Intent means that the parties deliberately aim to create a legally binding (enforceable) relationship.

Intent as it applies to an agency agreement	Intent as it applies to a sale and purchase/lease agreement
The client (principal) intends to be bound to pay commission for a successful sale and the agent intends to be liable for acting in the client's best interests.	<p>The client or lessor intends to sell or lease the property, space, or business.</p> <p>The purchaser or lessee intends to buy or lease the property, space, or business.</p>

Legal capacity

The parties to a contract must have full legal capacity to enter into the contract.

The parties must not be excluded from being able to sign contracts for any other reason.

Certain classes of people may have no capacity or restricted capacity by reason of:

- Age (minors under 18 years of age).
- Mental condition (if the party is of unsound mind, including as a result of intoxication).
- Status (for example, bankrupts).

Legal capacity as it applies to an agency agreement	Legal capacity as it applies to a sale and purchase/lease agreement
<p>The client has full legal capacity to enter the agency agreement, Alternatively, an authorised person signs the agency agreement.</p> <p>The licensee (with authorised authority of agent) signs the agency agreement.</p>	<p>The client, lessor, or authorised person signs the sale and purchase/lease agreement.</p> <p>The purchaser, lessee, or authorised person signs the sale and purchase or lease agreement.</p> <p>Both parties must be legally allowed to enter into the contract.</p>

In certain circumstances, minors can enter into legally binding contracts. However, in general, a minor will not be bound by a contract unless the court decides that the contract was fair and reasonable in every respect.

People of unsound mind may also have limited (or no) legal capacity. If a person entering into a contract does not fully understand the nature of the contractual relationship, that person may not be bound by the contract. This can include people who are temporarily of unsound mind due to the effects of alcohol or drugs.

Bankrupts do not have the legal capacity to enter into contracts, which means an undischarged bankrupt cannot legally purchase real estate.

Genuine consent

Genuine consent means that the parties entered into the contract freely and their consent is both genuine and informed. Informed consent means they must have had sufficient information to understand what they were agreeing to.

If it can be proved that either party was forced or fooled into entering into the contract, they will not be bound to it. If a party has entered into a contract as a result of undue influence, coercion, legal mistake, or misrepresentation, it is likely that they did not give genuine consent.

Genuine consent as it applies to an agency agreement	Relevance in sale and purchase/lease agreement
<p>The agency agreement is entered into without inappropriate pressure or coercion.</p> <p>The agreement must be reasonable and fair, and it must not be entered into as a result of misrepresentation.</p>	<p>The sale and purchase or lease agreement must be entered into without inappropriate pressure or coercion.</p> <p>The agreement must be reasonable and fair, and it must not be entered into through inappropriate pressure or coercion.</p>

Legality of purpose

Legality of purpose relates to the purpose of the contract - it must of course be legal. The law cannot be used to enforce an illegal act such as a contract for stolen goods or illegal drugs.

Legality of purpose as it applies to an agency agreement	Legality of purpose as it applies to a sale and purchase/lease agreement
<p>The agency agreement must be set up in relation to a legal real estate transaction.</p>	<p>The transaction must be a legal real estate transaction.</p>

NOTE:

Section 73 of the Contract and Commercial Law Act 2017 (repeals section 6 of the Illegal Contracts Act 1970) and confirms that illegal contracts have no effect.

CREATION OF AGENCY RELATIONSHIP

Agency is used in many situations other than real estate. For example, in the transportation of goods, for travel and in representing talent. The common law recognises that an agency can be created in four ways:

- Express authority
- Implied and usual authority
- Agency by estoppel
- Subsequent ratification

Creation of a real estate agency agreement in real estate

Real estate agents enter into a contract of agency with their clients by way of an agency agreement (i.e., through express authority).

Express authority

An express authority is where the authority has been specifically created. In other words, the parties enter into a contract of agency, the terms of which are stated and agreed. In real estate, this means that a client signs an 'agency agreement' before the agent does any work and agrees to pay the agent a fee or commission upon the successful completion of the work. The work to be done by the agent is clearly defined in the authority.

Fiduciary relationship

An agency agreement is a legal contract that creates a binding fiduciary relationship between two parties in real estate. The parties are the agent and the client (who is the principal in the agency agreement contract). The **principal** under an agency agreement (contract) means the person who authorises the agent to act on their behalf to sell their property – or, in the case of a purchaser's agent, to help them find one to buy.

A **fiduciary relationship** is the duty of loyalty. This relationship requires utmost trust and good faith between the licensee/agent and the client. The agent and all its licensees and employees must put the interests of the client first. The third party (customer) is entitled to be treated fairly and honestly but the agent's first and highest duty is to their client.

Under an agency agreement, the licensed agent agrees to perform real estate work on behalf of the client (the principal) and the client agrees to pay the agent for this work.

Other branch manager licensees and salesperson licensees employed, or contracted, by the agent will usually be involved in the transaction as they perform real estate work for, and on behalf of, the agent.

Commission

In many cases, salesperson licensees will prospect for and obtain clients. This work is always done on behalf of the licensed agent, as only licensed agents can be party to an agency agreement. A licensed real estate agent is the only person who can be paid a commission by a client for real estate work. Other licensees are paid their commission by the agent.

Client's agents and purchaser's agents

Agency agreements are most often with client clients or lessors who are selling or leasing their property, business, or space. In these circumstances, the Code of Conduct refers to the agent as the **client's agent**.

It is also possible to have a contract of agency between a licensed agent and a purchaser or lessee. In this case, the purchaser or lessee will agree to pay the agent for their services if the agent finds a property, business, or space for the client to buy or lease. In this situation, the agent licensee is acting as a **purchaser's agent**.

The agreement and termination

Licensees use standard agency agreements approved by their office.

In real estate, a contract of agency will terminate when the transaction completes, or when the term of the agency expires (which could be on a specified date or by notice in writing). It is worth noting that the fiduciary duties of the agent can continue after the expiry of the agency. For example, the agent cannot use information gained through the fiduciary relationship to his/her own advantage after the agency expires.

Other ways of creating an agency in general situations.

The following have less relevance to the real estate situation since the Real Estate Agents Act 2008 came into force. We will discuss these ways of creating an agency as they apply in a general context, e.g., in the transportation of goods, for travel and in representing talent.

Implied and usual authority

To make the express authority effective, the agent may be expected to undertake work in addition to that authorised by the express authority. In real estate, the agent has the implied authority to find a willing purchaser and act as an intermediary between the client and this purchaser. He does not have the authority to accept an offer on the client's behalf as agents in other areas of service may possess. An implied or usual authority is not written or specified in any way; it is just expected.

Agency by estoppel

This type of agency is rare and is unlikely to be applied in a modern real estate context because the agent would not be entitled to sue for commission. The principal, by conduct or words, represents to a third party that the agent has the authority to act on his behalf. The client is then **estopped** from denying the authority of the agent that has been apparently granted. Agency by estoppel is sometimes called apparent authority.

An example could be where a potential client refuses to list the property but tells the licensee that the any purchasers the licensee might find can be shown through at any time and that the key is under the mat. Apart from the lack of entitlement to a commission (agency not in writing s126) the licensee has all the responsibilities and duties of an agent which the client by his/her conduct cannot deny.

This is most often used when an agent makes regular purchases from a third party on behalf of a principal. Unless the third party is informed that the agent no longer acts for that principal payment for any unauthorised purchases would be enforceable against the principal.

Subsequent ratification

Subsequent ratification is where an 'agent' initially acts without authority and the principal enters into the contract after the agent has done this work.

In terms of real estate agency work

- Section 126 of the Real Estate Agents Act states that an agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless a written agency agreement has been signed by or on behalf of both the client and the agent.
- Rule 9.6 of the Code of Conduct confirms that licensees must not market or advertise any land or business, including website advertising or signage unless authorised by a client.
- through a written agency agreement. Marketing would include informing a potential purchaser about a property or showing that property.
- The effect being that any work done without an agency agreement in place is free of charge but could still carry fiduciary and legal responsibilities for the agent.

TYPES OF AGENCY AGREEMENT

There are two types of agency agreement.

Sole agency

Under a sole agency agreement, one real estate agent (and the licensees they employ or engage) has the exclusive right to market and organise the sale, lease, or purchase of the property, business, or space on behalf of the client.

Only the real estate agent named on the agency agreement (and the licensees they employ or engage) can carry out the real estate agency work specified in the agency agreement for the duration of the sole agency. The client signs a sole agency agreement with one licensed agent for a set period of time.

Key points regarding sole agency agreements:

- If a client changes their mind after they sign a sole agency agreement, they can cancel it (in writing, which includes by fax or email) by 5pm on the first working day after they have been given a copy of the agreement.

Note:

If the licensee carries out any real estate agency work before the agency agreement is cancelled, and this work results in the sale of the property, the terms of the agency agreement will be legally binding.

- If the client signs a sole agency agreement after an unsolicited approach from you (i.e., they did not ask for it) they are able to cancel the agency agreement within 5 working days of receiving a copy of the agreement.

In this situation, cancellation does not have to be in writing.

- If the sole agency is for a residential property and the term is more than 90 days, the licensee or the client can cancel the agreement at any time after 90 days.
- If the client sells the property, business, or space privately during the period of the agency, commission is payable to the sole agent.
- The agency should advise the client if there is a risk of them paying two commissions.

REA standard clauses for residential agency agreements also mean that commission is payable if the client sells to a purchaser the licensee has introduced during the period of the sole agency (if the sale occurs within **6 months** of the agency terminating).

With rural properties where the licensee introduced the customer under an Agency Agreement, and it is within the **12 months** of the agency agreement expiring or being cancelled, then the licensee would be able to claim commission.

Note:

If a licensee is approached by a potential client who wants to sign a sole agency with them, even though they have an existing sole agency agreement with another agency, REA recommends that the licensee's agency does not sign an agency agreement with this person until their existing agreement ends.

The terms in the agreement will determine what happens once if the sole agency is terminated. A sole agency can be cancelled as outlined in the last two bullet points but if the agreement comes to an end at a set date, then it terminates.

General agency

Under a general agency agreement, the client may engage more than one real estate agent (and the licensees they employ or engage) to work on a transaction at the same time.

Under a general agency, a client may also market and organise the sale, lease (or purchase) of the property, business, or space privately without being liable to pay commission.

The client needs to sign a general agency agreement with each different real estate agent they engage.

Key points regarding general agency agreements:

- Under a general agency, a client may market and organise the sale, lease (or purchase) of the property, business, or space privately without being liable to pay commission to any agent.
- There is no set time period for a general agency.
- The notice period for cancelling a general agency is usually contained in the agreement. The notice period is usually 7 to 14 days. Notice is given in writing, which can be given at any time after the commencement of the agency.
- Although the client signs a separate agreement with each agency, they should only pay a commission to the agency which introduces the purchaser and effects the sale.
- The agency should advise the client if there is a risk of them paying two commissions.

Note:

If a licensee is approached by a potential client who wants to sign a general agency agreement with them, even though they have an existing sole agency agreement with another agency, REA recommends that the licensee's agency does not sign an agency agreement with this person until their existing agreement ends.

Master agency is a type of sole agency that allows an agent to appoint sub agents to assist them to affect a sale with a pre-agreed, inbuilt agreement to share the commission paid to the master agent. For example, franchise and marketing groups use the master agency model where each member works as a sub agent to the listing agency. All the sub agents have a fiduciary duty to the master agent's client/principal. Joint exclusive agencies are a hybrid master agency with both agencies having equal status as both master and sub-agent contemporaneously.

REQUIREMENTS FOR ESTABLISHING AN AGENCY AGREEMENT.

Agency agreement required and must be in writing.

Section 126(1) of the Real Estate Acts 2008 confirms that an agent is **not entitled to claim commission or expenses** from a real estate transaction unless a **written agency agreement** is **signed** and in place.

Section 126(1) also confirms that the agency agreement must be in accordance with the Real Estate Agents Regulations 2009 and that a copy of it must be given to the client within 48 hours of signing it.

Real Estate Agents Act 2008

126 No entitlement to commission or expenses without agency agreement

- (1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—
 - (a) the work is performed under a written agency agreement signed by or on behalf of
 - i. the client and
 - ii. the agent
 - (b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and
 - (c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by.
- (2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.
- (3) A court may not make an order described in subsection (2) unless satisfied that_
 - (a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and
 - (b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and
 - (c) failure to make the order would be unjust.
- (4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2017

Licensee to provide approved guide and obtain signed acknowledgement.

Under Section 127 of the Real Estate Agents Act, the licensee must provide a prospective client with a copy of the REA's *Residential Property Agency Agreement Guide* and obtain a signed acknowledgement from the prospective client that they received the guide before they sign the agency agreement – **(only applies to the agency agreements for listing of residential properties)**

Click on the link below for an information sheet published by The Real Estate Authority (REA)

<https://www.rea.govt.nz/assets/Uploads/Resources/Info-sheets-280318//Agency-agreements-information-sheet.pdf>

These steps outline the requirements to establish an agency agreement for a residential property in line with the Code of Conduct and the REA Act 2008.

Rule 10.2	Provide prospective client with a written appraisal for the property that reflects current market conditions and is supported by sale prices of similar properties
Section 127	Provide prospective client with a copy of REA's guide to agency agreements and get a signed acknowledgement of receipt from the prospective client before they sign the agency agreement
Must explain the ability to cancel a sole agency by 5pm the next working day or at any time after 90 days.	
Rule 10.6	Provide prospective client with a written estimated cost (an actual dollar amount) of commission they will be required to pay based on the appraisal, including how the property will be marketed and advertised and any additional expenses this will involve, explaining that they do not have to agree to the additional expenses above.
Rule 10.6 (b)	When the agency agreement ends
Rule 10.6 (c)	How the land or business will be marketed and advertise, including additional expenses that such advertising and marketing will incur.
Rule 10.6 (d)	The client is not obliged to agree to the additional expenses referred to in Rule 10.6 (c)
Rule 10.6 (e)	That they can obtain further information on agency agreements and contractual documents from the Authority and how to access this.
Rule 9.10	A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.
Rule 9.7	Recommend prospective client gets legal advice, making sure they know they can seek technical or other advice and information, and giving them a reasonable opportunity to obtain that advice and information before they sign the agency agreement
Rule 9.9	Include all material particulars in or attached to the agency agreement before the licensee asks the prospective client to sign the agreement.
Rule 12.2 Rule 12.3	Ensure that the prospective client is aware of the company's in-house complaints procedures and <ul style="list-style-type: none"> ▪ that they can access the Authority's complaints process first without using the in-house procedures, and ▪ that use of the in-house procedures does not stop them from making a complaint to the Authority
Section 126	Obtain the prospective client's signature on the agency agreement
Section 126	Give the client a copy of the signed agreement within 48 hours of it being signed.

The Agency Agreement must be signed by the client/s and the agent (or licensee on the agent's behalf)

Non- Residential agency agreements differ slightly. There is no requirement to provide the approved guide (section 127 and 133) and the ability to cancel a sole agency by 5pm the next working day or at any time after 90 days does not apply.

DISCLOSURE REQUIREMENTS AND AGENCY AGREEMENTS

Agency agreement must disclose rebates, discounts, and commissions.

Under section 128 of the Real Estate Agents Act 2008, the agency agreement must disclose rebates, discounts, and commissions that arise from expenses: for example, benefits received by the licensee in relation to marketing or advertising expenses incurred on behalf of the client.

Non-disclosure may mean that the agent will not receive payment for those expenses.

Real Estate Agents Act 2008

128 Agency agreement must disclose rebates, discounts, and commissions.

- (1) An agent is not entitled to any expenses from a client for or in connection with any real estate agency work carried out by the agent for the client in connection with a transaction unless the agency agreement under which the agent performs that work contains a statement that—
 - (a) identifies the source of all rebates, discounts, or commissions that the agent will or is eligible to receive in respect of those expenses; and
 - (b) specifies the estimated amount of those rebates, discounts, or commissions (to the extent that the amount can reasonably be estimated).
- (2) This section does not limit the liability of any person under the Secret Commissions Act

Form required for disclosure of rebates, discounts, and commissions.

A standard form must be included in every agency agreement to capture and disclose relevant information concerning rebates, discounts, and commissions. This form is called 'Form 1 - *Agent's statement relating to rebates, discounts, and commissions*' and is included in the Real Estate Agents (Duties of Licensees) Regulations 2009.

This information is usually incorporated in standard Agency Agreement form. There is a complete Agency Agreement in the Portal under Resources.

Below is an extract from a typical Agency Agreement.

10.0 Agent’s Statement relating to Rebates, Discounts and Other Commissions

10.1 I, the Agent, confirm that in relation to any expenses for or in connection with any real estate agency work carried out by me for the Client in connection with the transaction covered by this agency agreement:

Delete one of the following:

- (a) I will not receive, and am not entitled to receive, any rebates, discounts or other commissions.
- (b) I will receive, or am entitled to receive, the rebates, discounts, and commissions specified below.

10.2 Omit this paragraph if you selected paragraph 1(a) above. If you selected paragraph 1(b) above, provide the specified details for each rebate, discount or commission.

.....

Expenses to be incurred [specify goods or services to which rebate, discount or commission relates]. Expenses means any sum or reimbursement for expenses or charges incurred in connection with services provided by an agent in the capacity of agent.

.....

Provider of rebate, discount or commission [specify name of person or organisation]

.....

.....

Amount of rebate, discount or commission \$[specify actual or estimated amount including GST*]

* Estimates must be clearly marked as such.

XXXXXXXXXX

Agent Signature

Date 20/10/2020

Note: Expenses means any sum or reimbursement for expenses or charges incurred in connection with services provided by an agent in the capacity of agent.

CANCELLATION OF AGENCY AGREEMENTS

Client may cancel sole agency agreement by 5pm next working day.

Under section 130 of the Real Estate Agents Act 2008, clients who sign a sole agency agreement for residential property have the right to cancel the agreement by 5pm on the first working day after they receive a copy of the signed agreement.

Clients must provide written notice of the cancellation to the agent/licensee.

If the agent carries out any work before the agreement is cancelled and this work results in the sale or lease of the property, business or space, the client must still pay the agent commission.

Real Estate Agents Act 2008

Section 30 Client may cancel sole agency agreement by 5 pm next working day.

- (1) A client who is party to a sole agency agreement with an agent may, by 5 pm on the first working day after the day on which a copy of the agreement is given to the client under section 126(1)(c), cancel the agreement by written notice to the agent.
- (2) A notice under subsection (1) may be served by fax or email.
- (3) Subsection (1) has effect despite any provision to the contrary in any agreement.
- (4) Even though a sole agency agreement has been cancelled, an agent may rely on that agreement if, before that cancellation,
 - (a) the agent carries out any agency work in accordance with the agreement; and
 - (b) that agency work enables the conclusion of a contract that effects a transaction to which the agreement relates.

Cancellation of sole agency agreement for residential property after 90 days

Under section 131 of the Real Estate Agents Act 2008, the client or the agent can cancel a sole agreement at any time after 90 days if the agreement is for a residential property and for a term longer than 90 days.

Real Estate Agents Act 2008

131 Parties may cancel sole agency agreements in respect of residential property 90 days after agreement is signed.

- (1) Any party to a sole agency agreement that relates to residential property and is for a term longer than 90 days may, at any time after the expiry of the period of 90 days after the agreement is signed, cancel the agreement by written notice to the other party or parties.
- (2) If the parties to a sole agency agreement to which subsection (1) relates agree in writing to renew the sole agency agreement, the signing of the renewal agreement is, for the purposes of that subsection, taken to be the signing of a new sole agency agreement.
- (3) For the purposes of subsection (1), a sole agency agreement is signed when it is signed by or on behalf of the client or, if there is more than 1 client, when the agreement is signed by the last client.
- (4) A notice under subsection (1) may be served by fax or email.
- (5) This section has effect despite any provision to the contrary in any agreement.
- (6) In this section, residential property does not include any property that—
 - (a) has been developed with other properties in a continuous area; and
 - (b) is proposed to be sold or otherwise disposed of by a vendor who also proposes to sell or otherwise dispose of, or who has sold or otherwise disposed of, some or all of those other properties.

Cancellation of general agency agreement

A general agency can only be terminated or cancelled by notice in writing to the agent.

Generally, the agency agreement will state the notice period for cancelling the agreement. The Act and Code do not dictate a notice period for cancelling a general agency. Industry practice is for between 7- and 14-days' notice to be given. If a notice period of more than 14 days is specified, it may be at risk of breaching the Code of Conduct.

UNINVITED DIRECT SALES

Subpart 2 Uninvited direct sales (sections 36K to 36S) offer protection to consumers who are approached by uninvited salespeople at their home or workplace or by telephone. These can include telemarketers and people door knocking to offer deals for power, insulation, phone connections etc.

These protections also require the licensee to give additional information to a client who was approached through an uninvited direct sale before they sign the agency agreement, and in the agency agreement itself.

They extend the statutory timeframe provided under the Real Estate Act for cancelling a sole agency agreement after it has been signed (section 130, REAA 2008).

Sections 36K to 36S

The Fair-Trading Act 1986

36K Meaning of uninvited direct sale agreement.

1. In this subpart, **uninvited direct sale agreement** means an agreement for the supply, in trade, of goods or services to a consumer—
 - (a) that is made as a result of negotiations (whether or not they are the only negotiations that precede the making of the agreement) between a supplier and the consumer in a situation described in either subsection (2) or (3); and
 - (b) **where the price paid or payable by the consumer under the agreement—**
 - I. is more than \$100; or
 - II. cannot be ascertained at the time of supply (regardless of whether the price ultimately paid or payable is \$100 or less).
- (2) The first situation is where the negotiations take place between the consumer and the supplier, in each other's presence, in the consumer's home or workplace, where the consumer did not invite the supplier to come to that place for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply).
- (3) The other situation is where the negotiations take place by telephone, where the consumer did not invite the supplier to make the telephone call for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply).
- (4) However, **uninvited direct sale agreement** does not include a renewal agreement.
- (5) For the purposes of this section, a consumer has not invited a supplier to—
 - (a) come to the home or workplace, or to make a telephone call, merely because the consumer has—
 - (i) given his or her name or contact details to the supplier other than for the predominant purpose of entering into negotiations relating to the supply of goods or services; or
 - (ii) contacted the supplier in connection with an unsuccessful attempt by the supplier to contact the consumer;
 - (b) enter into negotiations for a supply merely because the supplier has provided an unsolicited quote or estimate.

An uninvited direct sale is when:

- You approach a consumer uninvited at their home, workplace, or over the telephone, to try and sell goods or services.
- and
- an agreement is entered into for goods or services costing \$100 or more (or a price that is uncertain at the time of supply).

This can be done through a variety of methods like collecting a person's contact details through competition entries or Open Home registers. Other ways include flyer drops, business cards, phone calls, door knocking and offering free appraisals.

Section 36S is about the regulations and you can research them following this link and the search for Section 36S.

<http://www.legislation.govt.nz/act/public/1986/0121/61.0/DLM96439.html>

Important points for real estate agencies/licensees

Under sections 36K to 36S, important points for real estate agencies and licensees are as follows:

- Agency agreements count as uninvited direct sales if they are the result of unsolicited telemarketing or door-to-door sales approaches.
- In usual circumstances, a client can cancel a signed sole agency agreement so long as they provide written notification of the cancellation by 5pm on the **first** working day after they receive a signed copy of the agreement (section 130 REAA 2008). This is known as the cooling-off period.
- However, if uninvited direct sales lead to a client signing an agency agreement, the client is entitled to cancel the agreement up to **five** working days after the date they are supplied with a signed copy of the agreement.
- Before the agreement is signed, the licensee must provide **oral notification** to the client that they are entitled to cancel the agreement within five working days after the date they are supplied with a signed copy. This notification must include telling the client how to go about cancelling the agreement.
- The licensee must also ensure the front page of the agency agreement states that the client is entitled to cancel the agreement within five working days.
- Real estate agencies must have policies and procedures in place to manage sales that result from uninvited direct sales approaches. This documentation must be designed to make sure agencies and their licensees comply with the requirements for the disclosure and use of extended cooling off periods. Licensees are responsible for following these policies and procedures.

NOTE:

If a consumer initiates the contact with the business or its agent, this does not count as an uninvited direct sale.

A renewal agreement does not count as an uninvited direct sale agreement either.

Marketing via electronic messaging is not covered by this legislation. It is covered under the Unsolicited Electronic Messages Act 2007.

The Fair-Trading Act is found at:

<http://www.legislation.govt.nz/act/public/1986/0121/61.0/DLM96439.html>

Under sections 36K to 36S of the Fair-Trading Act, important points for real estate agencies and licensees are as follows:

SALE AND PURCHASE AGREEMENTS AND LEASE AGREEMENTS

Sale and purchase agreements

A sale and purchase agreement is a legally binding contract. It establishes the agreed terms and conditions of the sale and purchase of a property, business, or space.

Once the conditions set out in the agreement have been satisfied, a sale and purchase agreement legally require the parties to the contract to complete the sale or purchase of the property, business, or space.

The following standard agreements from REINZ/ADLS are commonly used:

- *Agreement for Sale and Purchase of Real Estate*
- *Particulars and Conditions of Sale of Real Estate by Auction*
- *Particulars and Conditions of Sale of Real Estate by Tender*
- *Agreement for Sale and Purchase of a Business*

Under section 36(2A) of the Lawyers and Conveyancers Act 2006, a newly licensed salesperson, who has less than six months' experience as a licensee, is not allowed by law to prepare sale and purchase agreements or advise either clients or customers about their legal rights and obligations that relate to the preparing of sale and purchase agreements.

Lease agreements

Lease agreements are used in relation to commercial and industrial properties when a lessor leases space to a lessee. Note that this unit does not cover residential tenancy agreements.

An Agreement to Lease (Heads of Agreement) is an agreement to grant a lease in the future. This document is nearly always the first to be negotiated between lessor and lessee. This agreement and negotiations are usually handled by the real estate licensee.

The standard agreement from REINZ/ADLS is commonly used, which is called the *Agreement to Lease*.

The *Agreement to Lease* document will cover:

- **matters that are to be completed prior to occupation by the lessee.**
- **the terms of the Deed of Lease that will apply to the lease.**

A Deed of Lease (usually prepared by the lessor's solicitor) records the actual grant of the right to lease the premises by the lessor to the lessee, on the terms and conditions set out in the Deed of Lease.

Also relevant is an *Agreement to Assign Lease*. This document covers the agreement by the existing lessee to assign the lease to an incoming lessee. Under this agreement, the new lessee will also agree to purchase the existing lessee's assets (if any).

Sale and purchase agreements and lease agreements must be in writing.

Section 24 of the Property Law Act 2007 confirms that **sale and purchase agreements** for real estate and **lease agreements** (excluding short-term leases) must be in writing.

Note:

Key rules, legislation and regulations that apply to sale and purchase agreements and lease agreements are covered at the end of this study guide.

Licensee to provide client and purchaser with guide on sale and purchase.

Section 133 applies to residential property sales only. Before the sale and purchase agreement is signed, the licensee must give both the client and purchaser a copy of the REA's *Residential Property Sale and Purchase Agreement Guide*.

The client and purchaser must both provide signed acknowledgement to confirm they have received it.

The Real Estate Agents Act 2008

133 Approved guides to be provided when contractual document provided.

- (1) An agent must ensure that subsection (2) is complied with before a person signs a contractual document if the contractual document—
 - (a) relates to the proposed sale of a residential property in respect of which the agent is carrying out real estate work; and
 - (b) was provided to the person by the agent or by a licensee on behalf of the agent.
- (2) The agent or a licensee on the agent's behalf must have—
 - (a) provided the person with a copy of the approved guide; and
 - (b) received a signed acknowledgment from the person that the person has been given the approved guide.
- (3) In this section—

approved guide means a guide that—

 - (a) is about the sale of residential property;
 - (b) has been approved by the Authority for the purposes of this section.
- (4) A contravention of this section does not affect the validity of any contract.

Licensee to give copy of contractual document.

Under section 132 of the Real Estate Agents Act 2008, the licensee must give parties to a sale and purchase agreement or lease agreement a signed copy as soon as possible.

The Real Estate Agents Act 2008

132 Licensee to give copy of contractual document.

As soon as practicable after a person signs a contractual document and gives that document to a licensee carrying out real estate agency work in connection with the document, the licensee must give the person an accurate copy of the document.

Key rules relating to sale and purchase agreements and lease agreements	
10.11 and 11.5	If a licensee is employed or engaged by an agent, the licensee must provide the agent with a copy of every written offer that the licensee submits.
10.12 and 11.6	An agent must retain, for a period of 12 months, a copy of every written offer submitted. This rule applies regardless of whether the offer was submitted by the agent or by a licensee employed or engaged by the agent and regardless of whether the offer resulted in a transaction.

Key legislation and regulations under the Real estate Agents Act that apply:

To agency agreements and lease agreements.

- Section 126 No entitlement to commission or expenses without agency agreement
- Section 127 Approved guide to be provided before agency agreement for residential property signed.
- Section 128 Agency agreement must disclose rebates, discounts, and commission.
- Section 130 Client may cancel sole agency agreement by 5 pm next working day.
- Section 131 Parties may cancel sole agency agreements in respect of residential property 90 days after agreement is signed.
- Form 1 (as required by Section 128) – Agent's statement relating to rebates, discounts, and commissions (published by REA)

To sale and purchase agreements and lease agreements.

- Section 132 Licensee to give copy of contractual document.
- Section 133 Approved guide to be provided when residential contractual document provided.
- Section 134 Contracts for acquisition by licensee or related person may be cancelled
- Section 135 Client to be provided with a valuation.
- Section 136 Disclosure of other benefits that licensee stands to gain from transaction.
- Section 137 Meaning of licensee and person related to licensee in sections 134 to 136.
- Form 2 (as required by Section 134) – Client consent for licensee to acquire interest in property (published by REA)
- There are also standard clauses for residential and rural agency agreements from REA/REINZ.

Key legislation and regulations for contracts under the Fair-Trading Act 1986

- Section 9 Misleading and deceptive conduct generally
- Section 26A Unfair contract terms in standard form consumer contracts
- Section 36M Cancellation of uninvited direct sale agreement by consumer

Risk Management

- **Sometimes we need to protect ourselves, so it is always good practice for licensees to:**
- **Keep good diary notes and document any discussions you have with clients or potential customers. Make sure these are accurate and dated.**
- **Discussions or disclosures need to be confirmed in writing, preferably by email so you have documented evidence.**
- **Ensure you focus on facts about the state of the property or real estate market**
- **Do not be afraid to say you do not know something - offer to get back to customers with answers once you have verified the information.**
- **Always advise clients and customers to seek independent legal advice.**
- **If in doubt think about Rule 10.7 - Disclose (with clients written permission)**
- **Always seek guidance from your supervising agent or branch manager**

DISCLOSURE OF OTHER BENEFITS THAT LICENSEE STANDS TO GAIN FROM TRANSACTION.

A licensee who carries out real estate agency work relating to a transaction must disclose in writing to every prospective party to the transaction whether the licensee, or any person related to the licensee (as defined in Section 137), may benefit financially from the transaction. For example, if the client was his/her sister the licensee needs to disclose this fact to the purchaser is his/her sister and they may benefit financially from the transaction.

Real Estate Agents Act 2008

136 Disclosure of other benefits that licensee stands to gain from transaction.

- (1) A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.
- (2) Subsection (1) does not apply to any matter disclosed under section 128 or 134.
- (3) The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.
- (4) For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.
- (5) A contract entered into in contravention of this section may not be cancelled merely because of that contravention.

This information must be disclosed before or at the time that the prospective party is given any contractual documents to read or sign.

Below is a link to the [REA Act 2008 Section 137](#)

Contracts for acquisition by licensee or related person may be cancelled.

Under Section 134 of the Real Estate Agents Act 2008, a licensee carrying out real estate agency work, directly or indirectly for a client, cannot acquire the property or business being marketed, or an interest in it, without the consent of the client on the prescribed form. The same applies to any person related to the licensee. Section 137 defines a related person.

If the client agrees to the licensee or a related person acquiring the property or business, or an interest in it, they must:

- Give this consent in the form provided by the licensee. Form 2: Client consent for licensee to acquire interest in property, prescribed in the Duties of Licensees Regulations 2009
- The licensee must provide the client with an independent valuation, completed at the licensee's expense.
 - For residential and lifestyle properties, the **valuation** must be completed by an independent registered valuer.
 - For a business, the **valuation** must be completed by an independent chartered accountant.

If the client signs the consent form before receiving the independent valuation, the licensee, must:

- indicate a provisional valuation of the property on the consent form.
- give the client a valuation completed by an independent registered valuer or chartered accountant (in the case of a business) within 14 days of them signing the consent form.

Section 135 outlines the requirements for the valuation.

Under section 134 of the Act, the client can cancel any contract relating to the property if:

- the licensee has not complied with the disclosure requirements, or
- if the independent valuation provided is greater than the provisional valuation.

There is no obligation for the client to pay the commission if the contract is cancelled in these circumstances.

Form 2 can be found in the Duties of Licensees Regulations 2009 at:
<http://www.legislation.govt.nz/regulation/public/2009/0281/latest/whole.html#DLM2372545>

OBTAINING SIGNATURES FROM THE APPROPRIATE PARTIES

It is crucial that the appropriate parties sign agency agreements, sale and purchase agreements and lease agreements.

The appropriate signatories are the **parties to the contract**, or a **nominated authorised person** who have they authorised to sign on their behalf (such as a power of attorney)?

In situations where one owner is signing on behalf of others, or a party to the contract has nominated an authorised person to sign on their behalf, it is important to get **written confirmation** of this authority.

Written confirmation of authority varies depending on the types of parties involved, which is covered off under 'Parties who may be involved in a transaction'.

Obtaining incorrect signatures on contracts can have several implications:

- the agent's entitlement to expenses or commission may be affected.
- a transaction may be delayed or halted.
- a complaint may be made (and upheld) against the agent or licensee, and
- the agent and/or licensee may experience damage to their reputation.

Appropriate signatories in agency agreements

An agency agreement is between the real estate agent and the client (the principal to the contract).

Usually, the salesperson licensee who has obtained the listing will act as the agent's authorised person and sign on the agent's behalf.

The client will usually sign the agency agreement. However, they may instead nominate an authorised person to sign on their behalf: for example, a person with power of attorney or a solicitor.

If an authorised person is signing the agency agreement on behalf of the client, it is important to check this authority and to obtain written confirmation of this authority.

Confirming legal ownership when completing an agency agreement

Where the client entering the agency, agreement is offering a property, business or space for sale or lease, legal ownership and the names of owner(s) should be confirmed against the details of the proprietor (owner) provided on the current Computer Register (Certificate of Title).

It is common for a property, business, or space to have more than one owner: When there is more than one owner like tenants in common, partners in a business partnership, or trustees acting on behalf of a trust you may need to check other documents.

If this is the case, all the owners must sign the agency agreement. If one or more owners are not available to sign the agreement, the licensee must sight written confirmation that one owner has the authority to sign on behalf of the owner who is not signing. The licensee should keep a copy of this written confirmation.

When a Computer Register shows a company owns the property, it is important to check the register of companies to confirm the names of the director or directors in the company (who will be the appropriate signatory or signatories).

Click on the link below to find the register of companies:

<https://companies-register.companiesoffice.govt.nz/>

APPROPRIATE SIGNATORIES IN SALE AND PURCHASE AGREEMENTS AND LEASE AGREEMENTS

A sale and purchase agreement are between the vendor(s)/client(s) and the purchaser(s)/purchaser(s). A lease agreement is between the lessor(s) and the lessee(s).

These parties will need to sign the sale and purchase agreements or lease agreement unless they have nominated an authorised person to sign on their behalf for it to be binding and enforceable under the law. A contract for disposition of land must be signed by the party against whom the contract is sought to be enforced. (Property Law Act 2007, s24(1)).

Sometimes the purchaser is unsure of who they want the legal owner to be. In these cases, the purchaser enters into a contract to purchase the property with the words 'and/or nominee' included after their name. This insertion gives the named party the right to 'nominate' another party as the legal owner at any time prior to settlement, either jointly with the original purchaser or independently. For example, this may be because they are considering setting up a trust, or a company, or one of the intended purchasers is unavailable to sign the agreement. Whatever the situation, the named party must realise that they are legally responsible to complete the purchase if no other party is nominated.

Multiple signatories in sale and purchase agreements and lease agreements

Where the sale of a property or business involves more than one client, each of the clients must sign the sale and purchase agreement, or evidence will be required confirming that one of the clients has the authority to sign on behalf of the others. The same applies if there is more than one purchaser.

The same applies when there is one or more than one lessee. The lease agreement for commercial/industrial space which involves more than one lessor, requires each of the lessors to sign the lease agreement, or provide evidence confirming that one of the lessors has the authority to sign on behalf of the others.

If all parties to the contract do not sign the sale and purchase agreement or lease agreement, the licensee must **sign and keep a copy of this written authority** to sign on behalf of the other parties. A copy of this evidence would be provided to the solicitors acting for the client and the purchasers (or lessor and lessee), along with the signed agreement.

NOTE:

It is important to remember that under section 36(2A) of the Lawyers and Conveyancers Act 2006, a newly licensed salesperson, who has less than six months' experience as a licensee, is not allowed by law to prepare sale and purchase or lease agreements. They are also not allowed to advise either clients or customers about their legal rights and obligations that relate to the preparing of sale and purchase or lease agreements.

But it would be beneficial for all newly licensed salespeople to observe as many situations as possible which involve the signing of sale and purchase agreements and lease agreements to increase their knowledge and industry experience.

If a licensee is the party presenting the sale and purchase agreement or lease agreement and having it signed in their presence, they are negotiating on behalf of their client. Once agreement is reached, any deposit collected is held by the agent as a neutral stakeholder and may not be released without all parties' consent.

OTHER PARTIES WHO MAY BE INVOLVED IN A TRANSACTION.

The following parties may be involved in real estate transactions and may be required to sign agency agreements, sale and purchase agreements and lease agreements.

Nominated 'authorised persons' (for example with power of attorney)

A nominated 'authorised person' is a party who has been authorised to act on another party's behalf. A power of attorney is an authority that a party (the donor) gives to another party to act on their behalf.

There are two kinds of power of attorney:

- Ordinary power of attorney
- Enduring power of attorney.

Ordinary power of attorney

An ordinary power of attorney is when one party grants authority to another party to act on their behalf. The attorney may be granted the power to act in any and all matters or they may only be authorised to act in regard to specified matters. For example, if someone is going overseas for a long period and wants someone they trust to manage the sale of their property during their absence they could give power of attorney for the particular purpose or for a timeframe.

If an ordinary power of attorney has been set up for a fixed term, it remains valid only until that time period expires. However, it may be revoked (cancelled) before the end of that term. An ordinary power of attorney that does not have a fixed term may also be revoked at any time.

For an ordinary power of attorney, the donor must be mentally fit to make the decision to grant the power of attorney. This means that the power of attorney will no longer be valid if the donor loses this capacity (for example, as a result of an accident or illness that has significantly affected the person's mental function).

Enduring power of attorney

An enduring power of attorney is when a party is given authority to act on behalf of the donor because the donor no longer has the mental capacity to make their own decisions.

This allows decisions to continue to be made for the donor by someone they trust. There are two types of enduring power of attorney:

- Enduring power of attorney for personal care and welfare
- Enduring power of attorney for property

If a party with power of attorney is signing documents on behalf of a party to the contract, it is important that the licensee.

- Check that the power of attorney has come into force (been 'invoked'), and
- Sight a non-revocation confirmation form (signed by the party's solicitor).
- Take a copy of both the invoked power of attorney and the non-revocation confirmation form and file these alongside the agency agreement and any subsequent sale and purchase agreement.

Section 19 of the Property Law Act 2007 specifies the manner and form in which persons holding a power of attorney must sign instruments relating to land (including sale and purchase agreements).

19 Powers of attorney

- (1) Anything done by or to an attorney on behalf of the donor of a power of attorney has the same effect as if it had been done by or to the donor if—
 - (a) it is within the attorney's powers; and
 - (b) it is done while the power of attorney is in force.
- (2) Subsection (1) applies subject to subsection (3) and [section 12](#).
- (3) (3) An instrument executed by an attorney on behalf of the donor of a power of attorney must—
 - (a) be made in the name of the donor; and
 - (b) state that it is being executed on the donor's behalf by the donor's attorney; and
 - (c) otherwise, be executed by the attorney in the same manner as would be required if the attorney were a party to the instrument.

Individuals

An individual is known legally as a 'natural person'. They are free to enter into a contract as long as they have legal capacity.

When working for an individual client offering a property for sale, licensees must check that the individual signing an agency agreement and sale and purchase agreement is the registered owner on the current Certificate of Title.

If the individual has nominated an authorised person to sign an agency agreement, sale and purchase agreement or lease agreement on their behalf, the licensee must obtain written evidence of this authority.

Co-owners (joint tenants or tenants in common)

Two or more individuals might own a property under a co-ownership arrangement.

This might be set up as a joint tenancy or as tenants in common. These types of co-ownership are covered in more detail in the learner guide for Unit 23134.

When working for co-owner clients offering a property for sale, licensees must check that the co-owners signing an agency agreement and sale and purchase are the registered owners on the Computer Register (Certificate of Title).

It is important for a licensee to make sure that all co-owners sign an agency agreement, sale and purchase agreement or lease agreement.

In some cases, one owner may not be able to sign the agreement (e.g., because he/she is out of the country). In these situations, one co-owner can sign behalf of another co-owner if the licensee has obtained written confirmation that they are authorised to sign on the other owner's behalf.

Companies

Companies in New Zealand are incorporated under the Companies Act 1993. A company is a legal entity in its own right, and can hold property in its own name and will therefore be named as proprietor (owner) on the Certificate of Title.

When working in a transaction involving company ownership, licensees should check the number of directors on the companies register on the New Zealand Companies Office website.

The register of companies can be found at: <https://companies-register.companiesoffice.govt.nz/>

A director, managing director or CEO may be given the authority to act on behalf of the company in relation to a particular real estate transaction, or all real estate transactions. If a director/authorised person purports to act on behalf of a company in a transaction with a third party the agreement is generally enforceable. (Companies Act, s18).

The sale would be enforceable unless the two exceptions below are triggered.

- if another director or shareholder objects to the transaction they may apply to prevent it under the company's constitution (which gives rise to a potential claim of damages from the third party), or
- if the third party knew or ought to have known that the director/authorised person was acting outside the company constitution when undertaking the transaction, it may be unenforceable. The registration of the company's constitution on the New Zealand Register or Company Office website is not sufficient to be deemed knowledge of a third party. (Companies Act, s19)

A licensee should use reasonable care and skill to confirm that the person acting on behalf of a company has the authority of the company to do so. Where practicable signatures of all registered directors of a company, or written confirmation of authority should be obtained.

Partnerships

Under section 8 of the Partnership Act, every partner in a business partnership is an 'agent' of the 'firm' (partnership), and of his or her partners, for carrying out their usual type of business.

A real estate transaction is likely to fall outside most partnership's usual type of business, Therefore, to bind the partnership, all partners or a properly designated partner must sign an agency agreement, sale and purchase or lease agreement.

A licensee must therefore obtain written evidence that one or more partners can sign on behalf of the other partner(s). Otherwise, all of the partners must sign the agency agreement, sale and purchase agreement or lease agreement.

If the partners were the clients, the partnership would be specified on the Computer Register (Certificate of Title

Sole traders

A sole trader is a person in business who is trading on their own. They are responsible for their business debts, including Tax and ACC levies, and they keep control of the business and its profits.

When signing up an agency agreement or sale and purchase agreement, the processes described in the previous section titled 'Individuals' applies to sole trader.

Trustees (acting on behalf of a trust)

Legally, a trust is not considered a person. Instead, in the real estate context, a property is owned by the individual trustees, who manage the trust's assets on behalf of the beneficiaries. The names of each of the trustees of a trust will be recorded as proprietors on the Computer Register (Certificate of Title). When offering a property for sale it is important for the licensee to check the Certificate of Title to make sure that all trustees sign an agency agreement, sale and purchase agreement or lease agreement. Otherwise, they must obtain written confirmation that one or more trustees has authorisation to sign on behalf of the other trustee(s): for example, in a trust deed.

Mortgagees

A mortgagee is the lender in a mortgage, typically a bank. A mortgagee sale occurs when the owner is in default under the conditions of their mortgage, and the mortgagee sells the property to get back the money it is owed. The sale is under the control of the mortgagee and not the proprietor (owner) recorded on the Computer Register (Certificate of Title). This means it is the mortgagee rather than the proprietor who signs the agency agreement and the sale and purchase agreement as the client.

Most mortgagee sales do not confirm vacant possession and do not include chattels in the sale. The mortgagee does not usually give warranties in relation to building permits, code compliance certificates, boundary issues etc.

Mortgagee sales are usually conducted through tender or auction. Further information on this can be found in Learner Guide 26150.

Executors of an estate

If a property was held in a deceased person's name as sole owner or as tenants in common, the property forms part of the deceased person's estate.

An executor is the person who has been appointed in the will to manage the person's estate after death. An administrator is appointed when someone does not have an executor.

Before the property can be sold, the following must have occurred:

- Probate (if there is a will) or Letters of Administration (if there is no will) must have been completed.
- An Application for Transmission (Personal Representative) (in all cases) will need to have been completed.

When the transmission is registered, the property will be put into the name of the deceased person's estate. The title will show that the property is held in the name of [the executor] 'as Executor' or [the administrator] 'as Administrator'.

Additional clauses are usually inserted into the sale and purchase agreement as protection for the executor(s)/administrator(s). These clauses confirm that the executor or administrator does not necessarily know about any compliance issues or alterations that may have been undertaken at the property. Evidence of Power of Attorney will be required to ensure the correct party is signing the Sale and Purchase Agreement.

After settlement, it is usual for the solicitors acting for the sale to transfer the proceeds of the sale over to the estate administration file. The proceeds are then usually paid to the beneficiaries.

In Summary

- **Always obtain and check the Record of Title before you complete an Agency Agreement.**
- **Verify who owns the property and/or signatories required.**
- **Checks that the power of attorney has come into force (been 'invoked'), and**
- **Sight a non-revocation confirmation form (signed by the party's solicitor).**
- **Keep a copy of both the invoked power of attorney and the non-revocation confirmation form with the Agency Agreement.**

Other documents you may need to check to ensure the correct parties are signing are:	
Incorporated Company	NZ Companies Business Register and a Company Extract or Authority to Act
Partnership	Partnership Agreements
Sole Trader	NZ Business number on the Companies Register
Trust	Trust Deed

NOTE:

Marketing must not to begin before all the appropriate signatories have signed the agency agreement. This includes all residential property, businesses or space being offered for sale or lease. You need to obtain a copy of the Title to verify ownership.

The Sale and Purchase Agreement will already have the owner's details inserted in it from the Agency Agreement, so a Record of Title is not required, for the Sale and Purchase Agreement.

DUTIES AND RESPONSIBILITIES IN AN AGENCY RELATIONSHIP

The duties and responsibilities covered in this section include:

- Duties and responsibilities related to law of tort.
- Contractual duties and responsibilities
- Statutory duties and responsibilities
- Fiduciary duty
- Duty of care

Common law duties

Some duties and responsibilities which apply to all agency agreements are created by common law (case law and precedents). These are decisions by the courts that create precedents about things such as duty of care, negligence, and certain types of liability. Tort law addresses situations where a person commits a civil wrong against another. Taking a person to court for giving negligent advice or failing to take reasonable care are often thought to be modern consumer protections, but those consumer protection statutes are based on well settled common law requirements of tort.

The duties/responsibilities of the agent would also apply under tort law, for example avoiding negligence (carelessness) in the real estate agency work he or she carries out for the client.

Fiduciary duty

Fiduciary duty is another common law principle. The basis of a fiduciary relationship is **the duty of loyalty**.

A **licensee** acting for, and on behalf of, the agent is **bound** by the same **fiduciary obligations** as the agent. Fiduciary duty is the highest level of care and requires the agent (and licensees) to put the interests of the client ahead of all others including themselves.

The fiduciary relationship is one of utmost trust. Each party has the duty/responsibility to give full disclosure to the other.

A licensee's fiduciary obligation to their client continues until settlement and, in some cases, can continue beyond that. A licensee's duty of confidentiality to a client continues indefinitely.



Rule 6.1 from the Code of Conduct confirms that all licensees must comply with their fiduciary obligations to clients. Rule 9.1 confirms that while licensees must act in the best interests of their client and must follow their instructions. However, this duty does not extend to acting illegally. Unlawful instructions must not be followed.

The fiduciary duties/responsibilities of the agent to the client are to:

- Give full disclosure to the client.
- Act in the best interests of their client and follow their instructions (as long as they are not acting illegally – unlawful instructions must not be followed) (Rule 9.1)
- Keep client information confidential.

The customer sits outside the fiduciary relationship which exists between the agent and the client. However, The Code of Conduct confirms the obligation to **deal fairly** and **in good faith** with **customers** as well as clients.

While an agent's, and licensee's, fundamental obligations are to the client, agents and licensees also have a **duty of care** to their customers.

Duty of care

Duty of care (under tort law) is a requirement that a person acts with care, attention, caution, and foresight towards others, in a way that any reasonable person would be expected to act in the circumstances.

If a licensee's actions do not meet this standard of care, they may be found to be negligent.

Negligence refers to the actions, or failure to act, of one party that causes harm to another party.

The Duty of Care responsibilities of the agent and their licensees extend to all parties and include:

- Exercise reasonable care in their actions, by considering the potential harm they might cause to another party, their property, or interests.
- Exercise skill, care, competence and diligence 'at all times' when carrying out real estate agency work (Rule 5.1)

Statutory duties and responsibilities

Statutory duties and responsibilities in an agency relationship are defined under statutes (legislation, rules, and regulations). For example, under the Fair Trading Act a licensee has the responsibility to **not** make false representations to their client or customer. Under the Privacy Act a licensee has the responsibility to only use the personal information collected from clients or customers for the use outlined when it was collected.

The statutory duties/responsibilities of the agent and their licensees may include (for example):

- Providing the client with an approved guide before the agency agreement is signed, and receive signed acknowledgement from the client that they have been given the approved guide (Real Estate Agents Act 2008 Section 127(1))
- **Not** making an unsubstantiated representation with respect of the property the agency agreement relates to (Fair Trading Act 1986, Section 12A (1))
- **Not** being **negligent** in their actions.

The REA Act 2008 and the Code of Conduct rules clarify agent and branch manager obligations relating to supervision.

Rule 8.3 of the Code of Conduct requires agents operating as a business to ensure that all salespersons employed or engaged by them are properly supervised and managed.

Section 50 of the REA Act 2008 states that a salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.

Properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure that the work is performed competently and that the work complies with the requirements of this Act.

Contractual duties and responsibilities

Contractual duties and responsibilities are created by the signing of a contract (for example an agency agreement).

For instance, the contract may include a statement about when the licensee will contact the client to inform them on the progress of the sale process (e.g., after each open home).

The duties/responsibilities of the agent under the agency agreement include (for example):

- Acting on behalf of the client to market and sell the property as outlined in the agency agreement.
- Acting within the scope of authority or power outlined in the agency agreement.

The duties/responsibilities of the principal (client) under the agency agreement include (for example):

- Compensating the agent as stated in the agreement (i.e., pay the commission amount and any amount agreed for marketing)
- **Not** entering into a contract of agency with any other real estate agency if they have signed a sole agency agreement with a particular agency.

Note:

Negligence is a statutory breach under the Real Estate Agents Act 2008. Under section 72(c), **negligence** is deemed as **unsatisfactory conduct** and under section 73(b) **serious negligence** is deemed as **misconduct**.

Claiming commission – what you need to know.

Standard clauses in agency agreements for residential and rural property

If a client decides to change their real estate agent, it can sometimes be confusing as to what notice period they need to give to cancel the original agency agreement, or if they will still need to pay commission to the former agent.

This can be unclear for clients and can cause complaints. It can also lead to disagreements between licensees.

The REA and REINZ have standard clauses that real estate licensees are encouraged to use in agency agreements for residential and rural property transactions.

These clauses are designed to help to remove uncertainty about an agent's right to claim commission under sole and general agency agreements when a new agency agreement is signed with another agent, or if the property is sold privately later.

Agents using the standard clauses are not entitled to commission unless a sale and purchase agreement is signed during the term of their agency and their entitlement to commission will relate only to that particular sale and purchase agreement.

Under the standard clauses, the agent only has a right to claim commission in the following situations:

- **For Sole Agency** – when the client enters into a sale and purchase agreement during the sole agency period and that agreement is unconditional or becomes unconditional later.
- **For General Agency** – when the client enters into a sale and purchase agreement during the general agency period with a purchaser introduced by that general agent (or where the agent has been instrumental in the sale) and that agreement is unconditional or becomes unconditional later.

In residential transactions, the client is liable to pay the agent commission if the client sells the property privately within 6 months of the agency coming to an end (either sole or general agency) to a person introduced by the agency or where the agency was instrumental in the sale. Introduction may or may not include a physical viewing of the property and will be a finding of fact. For example, how did the purchaser come to know that the property was for sale? If it was via the agency marketing, it is likely to be considered introduction.

For rural transactions, where a property is sold privately to someone previously introduced to the property by the agent, the client is liable to pay the agent commission if the private sale is within 12 months of a sole or general agency coming to an end.

The Code of Conduct outlines Commission

Rule 9.10 confirms that licensees have a positive obligation to explain the risks of double commission to a client before they sign an agency agreement. A licensee should ask to see a copy of any previous agency agreement/s where applicable. This will assist the licensee to correctly advise the client on procedures to cancel an existing general agency. Note that an existing sole agency cannot be cancelled by notice.

Rule 9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

Rule 9.11 confirms that if an agency agreement is cancelled, the client must be given a written list of customers who could be potential purchasers as a result of the agent's activities. If one of these customers buys or leases the property later, commission may then be owed to the agent that introduced the customer to the property.

9.11 On cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

Rule 9.14 confirms that licensees cannot act as a client's agent and a purchaser's agent in the same transaction.

9.14 A licensee must not act in a capacity that would attract more than 1 commission in the same transaction.

Conjunctional sales

A conjunctional sale is another situation that affects commission.

A conjunctional sale is when a listing agency for a property, space or business agrees to allow a separate real estate agency to introduce a potential purchaser or lessee. If the sale or lease of a property, business or space to the purchaser becomes unconditional, the agencies share the commission paid by the listing agency's client.

This commission sharing may be an informal agreement between the agents. However, it is best practice for both agents to complete and sign a formal conjunctional agreement which confirms details on terms, commission, disclosure, and access to the property, space, or business.

It is important that all licensees involved in conjunctional sales make sure that they act in the client's best interests and uphold their fiduciary duty to the client or lessor. Even though the third-party licensee is introducing, or working with, the purchaser their primary responsibility is to the client who will be paying the commission.

Note:

A 'third party agency' is the agent who does not have the listing but introduces the purchaser to the transaction and shares in the listing agent's commission.

DISCHARGE OF CONTRACTS

A contract has a life. It is created, then eventually it is discharged. Discharge happens when the rights and obligations created by the contract come to an end. When this happens, the contract is no longer operating.

A contract may end in different ways.

Performance

The most common, and preferred method of discharge is that the contract is discharged by **performance**.

In law, performance means a person (or people) doing what they are required to do under the terms of the contract. In terms of a real estate sale, this means that the purchaser pays in full, and the client transfers the title on the settlement date.

Agreement

Discharge by **agreement** of the parties means that all parties to the contract agree to cancel it.

For discharge by agreement to occur, there must be **accord** and **satisfaction**. This means that each party must **agree** to cancel the contract and **be satisfied** with the cancellation terms.

It may be that both parties are happy to agree to cancel the contract without any compensation for damage or loss from one to the other. Alternatively, it may be that one party has to persuade or induce the other by offering **new consideration** (a benefit which the parties must bargain for). This means the parties would need to reach agreement as to the intended new course of action. Once the action has been mutually agreed there is satisfaction.

In real estate, sale and purchase agreements and lease agreements are usually subject to conditions that allow the purchaser/lessee to cancel the contract, without penalty, if those conditions are not satisfied. Therefore, there is usually a right of discharge by agreement incorporated into the contract at the stage before it goes unconditional.

These conditions give the purchaser the right to cancel a contract under specified circumstances.

Clause 9 of the Agreement for Sale and Purchase of Real Estate includes some common conditions. These include that the offer is subject to the purchaser being able to obtain a mortgage to buy the property, obtain a satisfactory LIM report, Builder's report and toxicology report.

Parties may also agree to other customised conditions in the 'Further Terms of Sale' section of the contract.

Clause 10.8(2) of the Agreement for Sale and Purchase of Real Estate confirms the following.

'the party or parties for whose benefit the condition has been included shall do all things which may reasonably be necessary to enable the condition to be fulfilled by the date of fulfilment'.

This clause requires purchasers to take the necessary steps to satisfy any conditions, within reason. For example, the conditions might relate to securing a loan, getting any specialist reports on the property, or selling their own property first. If the contract includes a condition that the purchaser will sell their own property first, they might reasonably be required to market their property and consider offers. However, they would not have to accept an unreasonably low offer on their property.

Breach

In general terms, a breach of contract occurs when one party to the contract does not fulfil their contractual obligations.

A breach can occur in the following circumstances:

- When a party does not perform their obligations within the time frame agreed in the contract.
- When a party does not perform their obligations in the way the contract requires.
- When a party does not perform their obligations at all.

If one party performs their obligations under the contract, but the other party does not, there is a breach of contract. For example, a real estate sale and purchase agreement falls over because one party breaches their obligations under the agreement (for example the client does not provide vacant possession on the settlement date). However, the other party is ready, willing, and able to fulfil their obligations under the agreement (for example, settle the purchase price). This 'other party' is said to be the 'performing party' because they have performed the specific act, or acts, required under the contract. The 'performing party' can seek remedies for the breach of contract.

The legal remedies available depend upon the nature and seriousness of the breach and whether the issues breached were significant reasons for a party to enter into the contract in the first place. Remedies will often be prescribed in the contract itself. In the example above, the general terms of the agreement set out penalty interest rates that could be applied.

Remedies for breach of contract that may apply under contract law are as follows:

- Damages - an order for a party in breach to pay money to another party to the contract affected by the breach.
- Restitution - an order for the party in breach to return any money or property given to the party affected by the breach under the contract. In the example above, if the client refused to transfer title on the settlement date because they no longer wanted the sale to go ahead, the purchaser would be entitled to the return of their deposit (and damages)
- Cancellation– termination of the contractual duties of both parties. A party to a contract may cancel when the other party makes it clear that they do not intend to perform or completely perform their obligations under the contract. (s36 CCLA)
- Reformation – a remedy designed for rectifying (correcting) terms of a contract that are unequal (inequitable). The remedy may mean the court changing the contents of a contract to rectify these inequities.
- Specific performance – an order that forces a party in breach to perform their obligations under the contract (as nearly as practicable).

Section 37 of the Contract and Commercial Law Act 2017 provides for the cancellation of a contract where a party was induced to enter it by a misrepresentation or the terms have been, or will be, breached.

In a real estate situation, once a sale and purchase agreement has been declared unconditional, and the client is ready, willing, and able to settle, a purchaser only has the right to cancel the agreement without penalty if the provisions of section 37 apply.

Under the terms of the contract, if a purchaser or lessee cancels a contract without due cause, the client or lessor can:

- enforce the agreement, and claim penalty interest on the unpaid purchase or lease price and/or
- after the expiry of a settlement notice served on the purchaser / lessee, either:
- sue the purchaser or lessee for specific performance, requiring the transaction to go ahead; or

Note: specific performance means forcing the purchaser to perform in accordance with the terms of the contract (rather than suing for damages)

- cancel the agreement, keep the deposit up to the value of 10% of the purchase or lease price, and sue for damages if their actual loss is greater than 10% of the purchase or lease price.

A good example of a breach is when the purchaser fails to pay deposit as required by a signed sale and purchase agreement.

Clause 2.2 of the Agreement for Sale and Purchase of Real Estate says:

'If the deposit is not paid on the due date for payment, the vendor may at any time thereafter serve on the purchaser notice requiring payment. If the purchaser fails to pay the deposit on or before the third working day after service of the notice, time being of the essence, the vendor may cancel this agreement by serving notice of cancellation on the purchaser. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.'

Failure of purchaser to settle without grounds for cancellation.

If the purchaser cannot, or refuses to settle on settlement date, without grounds to cancel the agreement, various remedies are available to the client as outlined in REINZ's Agreement for Sale and Purchase of Real Estate (2012).

The client can insist that the contract remains in place and claim penalty interest on the unpaid purchase price.

The agreement states that, after the expiry of a settlement notice served on the purchaser, the vendor could:

- sue the purchaser for specific performance, requiring the purchaser to buy the property; or
- cancel the agreement, keep the deposit up to the value of 10 % of the purchase price, and sue the purchaser for damages, if their actual financial loss amounts to more than 10% of the purchase price.

Note:

Clause 3.0 of the Agreement for Sale and Purchase of Real Estate covers possession and settlement clauses, including purchaser default and vendor default situations.

Frustration

On rare occasions an outside event can frustrate a contract, leading to **discharge by frustration**. This can also be called **impossibility**, meaning that it is impossible for the contract to proceed.

The event which causes the frustration is not the fault of either party because it is beyond their control. Had it not occurred; the parties would have completed their obligations.

Subpart 4—Frustrated contracts, sections 60-69 of the Contract and Commercial Law Act provides some remedies in such cases.

Real estate contracts include clauses to protect against risks for parties to the contract during performance of the contract; for example, insurance requirements and 'force majeure' provisions to protect against certain events (such as earthquakes, floods etc.) that are outside of the control of parties to the contract. These provisions would be relied on in such circumstances.

Note: 'force majeure' means forces or circumstances beyond someone's reasonable control that would prevent them from completing the terms of the contract.

Cases concerning frustration are rare.

An example would be Planet Kids Ltd v Auckland Council which was taken to the Supreme Court. Follow this link to read the case.

[Planet Kids Ltd v Auckland Council](#)

ENFORCEABILITY OF A CONTRACT

Parties must always enter a contract under their own free will, giving genuine informed consent.

The contract must be reasonable and fair, and the party must not be induced into it through a misrepresentation or mistake. A party must enter a contract without undue influence (pressure) or duress.

If there was a legal mistake, a misrepresentation, undue influence or duress then it may affect the enforceability of the contract because the element of genuine consent was not present.

Legal mistake

The Contract and Commercial Law Act 2017 repeals and combines several pieces of legislation into one Act. The Contract and Commercial Law Act 2017 does not significantly change the provisions of the Acts it now combines but it uses more modern language than the repealed legislation.

The Contract and Commercial Law Act 2017 relates contractual mistakes, and the main sections that relate to real estate contracts are:

- Section 24: Relief may be granted if mistake by one party is known to another party or is common or mutual.
- Section 25: Mistake does not include mistake in interpretation of contract.
- Section 26: Decision to enter into contract not influenced by mistake if party aware of it.
- Section 28: Nature of relief

Legal concepts associated with legal mistake.

- A remedy is how a court enforces or satisfies a right when a person's financial, personal or property rights or interests have been adversely affected.
- A legal remedy is a monetary compensation to place the affected party in the same position as they would be in if the contract had been performed, and to allow for the party to recover monetary losses suffered as a result of the breach.
- An equitable remedy is for other types of resolution.

Under section 28 of the Contract and Commercial Law Act 2017, parties to a contract may seek a legal remedy (also called 'relief') but only if the conditions stated in sections 24-26 apply.

Under Section 24 of the Contract and Commercial Law Act there are 3 requirements to obtain relief:

- Is there a unilateral, common, or mutual mistake?
- Did the mistake influence the parties to enter the contract?
- Did the mistake result in a substantially unequal exchange of value or a disproportionate burden/benefit?

Note: The mistake must make the bargain substantially unfair to one or both parties.

Unilateral mistake arises where one party is influenced by a mistake (that was material to their decision to enter into the contract) and the other party is aware of the mistake (but does not inform the other party).

Common mistake arises where both parties are influenced by the same mistake when entering into the contract.

Mutual mistake arises where each party is influenced by a different mistake about the same aspect of the contract.

THE CONTRACT AND COMMERCIAL LAW ACT 2017

Relief in relation to legal mistakes.

If a contract is entered into as a result of a legal mistake, the court may grant **relief** in the following ways:

- **Cancel the contract.**
- **Vary the contract.**
- **Order restitution or compensation.**

A mistake, in relation to that contract, **does not include** the following:

- A mistaken interpretation by a party where they thought something meant something different to the reality (section 25).

A mistake that was known about, but the party decided to proceed anyway (section 26).

No relief would be granted in the two circumstances described above.

Misrepresentation

Sections of the Contract and Commercial Law Act 2017 that relate to **misrepresentation are:**

- Section 35(1) Damages for misrepresentation
- Section 37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached.

Contract and Commercial Law Act 2017 – Section 35 –

Contract and Commercial Law Act 2017 35 Damages for misrepresentation

- (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),
- (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
 - (a) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

Damages for misrepresentation

Section 35(1) (a) of the Contract and Commercial Law Act 2017 allows for damages in the same manner and to the same extent as if the misrepresentation were a term of the contract. There is no entitlement to damages for deceit or negligence which means no damages will be awarded under this legislation if a customer was induced into the contract or suffered additional pain or loss.

If a misrepresentation is made by the agent or licensee working on behalf of the client but the client was not at fault, the agent may be instructed by the Court to indemnify the client. This means the agent would be required to cover the cost of any court decisions made against the client.

An example would be if a spa pool were promised but not included in the chattels and was not. There on settlement day, then the compensation would only be for the cost of the spa pool to be replaced. There would be no allowance for claims of damages for negligence.

Contract and Commercial Law Act 2017 – Section 37 – Cancellation of the Contract

Section 37 of the Contract and Commercial Law Act 2017 covers cancellation of contracts between parties. If misrepresentation under Section 35 is established, the customer may be able to lawfully cancel the sale and purchase/lease agreement under Section 37.

Contract and Commercial Law Act 2017**37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached.**

- (1) A party to a contract may cancel it if—
 - (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
 - (b) a term in the contract is breached by another party to the contract; or
 - (c) it is clear that a term in the contract will be breached by another party to the contract.
- (2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if, —
 - (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
 - (b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be, —
 - i. substantially to reduce the benefit of the contract to the cancelling party; or
 - ii. substantially to increase the burden of the cancelling party under the contract; or
 - iii. in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.
- (3) Subsection (1) is subject to the rest of this subpart but does not limit section 36.

Legal concepts associated with misrepresentation.

- Section 35 of the Contract and Commercial Law Act 2017 deals with situations where **misrepresentation** has occurred, and a party has been **induced** into entering into a contract based on that misrepresentation.

Note:

Induce means persuade or influence.

- **Misrepresentation** occurs when a **false** or **incorrect** statement is made to another party about a **material fact**.
- A **misrepresentation** can be **fraudulent** – that means it is deliberate or it can be **innocent**- that means not deliberate or accidental.

Note:

A **material fact** is information that is **important** enough to **influence** a party **to act in a certain way** e.g., a customer deciding to enter into a sale and purchase, or lease agreement based on information they are given. A material fact might relate to the physical state of a property, space, or business, or other issues or events that affect it.

Example

A party interested in buying an operational business would expect to be presented with turnover figures for that business. If the turnover figures appear healthy to them, that may be a material fact that induces them to make an offer for the business. If, in fact, the turnover figures presented to that party are different (higher) than the real turnover for the business, this would-be misrepresentation.

- It **does not matter** under this legislation if misrepresentation is **fraudulent** (deliberate) or **innocent** (not deliberate). Parties can still have liability even if they do not know the information is false or incorrect.
- **By or on behalf of another party to that contract** means that a misrepresentation could be made by either the party themselves (the client or lessor) or by another party acting on their behalf (a real estate agent or licensee). The legal requirements regarding misrepresentation are the same in either case.

Cancellation of contract in relation to misrepresentation

The Contract and Commercial Law Act 2017 covers situations where a customer may be entitled to cancel a contract because of a misrepresentation made by a party selling or leasing a property, business, or space, or by real estate licensee acting on behalf of their client.

Section 37 of the Contract and Commercial Law Act 2017 covers cancellation of contracts between parties. If misrepresentation under section 35 is established, the customer may be able to lawfully cancel the sale and purchase/lease agreement under section 37.

Section 35 of the Contract and Commercial Law Act 2017 does not allow for entitlement to damages for deceit or negligence. This means that no extra damages will be awarded under this legislation if a customer was induced into the contract or suffered additional pain or loss.

The customer is legally entitled to bring action under both the Contract and Commercial Law Act 2017 and the Fair-Trading Act 1986.

If a misrepresentation is made by the agent or licensee working on behalf of the client but the client was not at fault, the agent may be instructed by the Court to indemnify the client. This means the agent would be required to cover the cost of any court decisions made against the client.

Undue influence and duress

Undue influence comes about when there is a relationship between the parties which means that the weaker party places trust and confidence in the stronger party, but that trust is abused. In other words, one party takes advantage of the other party for their own personal gain.

Under Section 14(2) of the Fair-Trading Act 1986 a licensee cannot use physical force, harassment or coercion when attempting to sell or lease land, or when attempting to collect payment for the land.

As the professional in the transaction, your conduct must be genuine and sincere, allowing the customer to make their decision based on all the facts, and without any unfair pressure from you. They must 'own' their decision.

Fair Trading Act 1986

14 False representations and other misleading conduct in relation to land

(2) No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land.

Rule 9.2 from the Code of Conduct also prohibits licensees from putting clients and customers under undue or unfair pressure.

Rule 9.2 A licensee must not engage in any conduct that would put a prospective client, client or customer under undue or unfair pressure.

Real Estate negotiations may be extremely stressful but will rarely result in pressure that would constitute duress. Unfair pressure has a much lower threshold; therefore, parties to a negotiation should always be provided the opportunity to seek independent professional advice.

Unfair contract terms

Section 26A of the Fair-Trading Act confirms that clauses that conflict with the interests of the consumer cannot be used in consumer contracts.

Fair Trading Act 1986

26A Unfair contract terms in standard form consumer contracts

- (1) If a court has declared, under [section 46L](#), that a term in a standard form consumer contract is an unfair contract term, a person must not—
 - (a) **include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court);**
or
 - (b) **apply, enforce, or rely on the unfair contract term in a standard form contract.**
- (2) The prohibitions in subsection (1) do not apply to any contract entered into before this section comes into force; but if the contract is varied or renewed on or after this section comes into force, the contract must be treated as a new contract for the purposes of subsection (1).
- (3) However, in the case only of a contract of insurance (as defined in [section 7](#) of the Insurance (Prudential Supervision) Act 2010) entered into before this section comes into force, the prohibitions in subsection (1) do not apply to—
 - (a) **the contract; or**
 - (b) **any variation of the contract; or**
 - (c) **any new contract that has the effect of operating as a renewal of the contract, and any subsequent renewal.**

Section 46L defines when a contract term is unfair.

Fair Trading Act 1986

Declaration of unfair contract terms

46L When term in consumer contract is unfair.

- (1) A term in a consumer contract is unfair if the court is satisfied that the term—
 - (a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

Note:

It is **the court who determines whether or not the terms of the contract are** unfair or not. Unfair clauses in an agency agreement would breach Rule 9.12 of the Code of Conduct.

9.12 A an agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.

THE CODE OF CONDUCT AND KEY RULES FOR [E:\xxLearner Guides Word\23135 Learner Guide.docx - bookmark77](#) **AGREEMENTS**

Key rules that relate to legislation, regulations and standard clauses in real estate contracts.

Key rules relating to agency agreements	
5.1	A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work
5.2	A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules) and other legislation relevant to real estate agency work.
6.4	A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.
9.2	A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.
9.6	Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.
9.7	Before a prospective client, client, or customer sign an agency agreement, a sale and purchase agreement, or another contractual document, a licensee must— <ul style="list-style-type: none"> (a) recommend that the person seek legal advice; and (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).
9.8	A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.
9.9	A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for a signature unless all material particulars have been inserted into or attached to the document.
9.15	Licensees must not take part in business or professional activity other than real estate agency work where that business or activity would, or could reasonably be expected to, compromise the discharge of the licensee's obligations
10.5	Before a prospective client signs an agency agreement, the licensee must explain to the prospective client how choices that the prospective client may make about how to sell or otherwise dispose of his or her land or business could impact on the individual benefits that the licensee may receive.
10.6	Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing— <ul style="list-style-type: none"> (a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the appraisal provided under rule 10.2: (b) when the agency agreement ends. (c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur: (d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c):

	(e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.
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Key rules relating to agency agreements continued	
10.7	<p>A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either—</p> <ul style="list-style-type: none"> (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.
10.8	<p>A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.</p>
Key rules relating to buyer's agency agreements – (the client is the purchaser)	
11.2	<p>Before a prospective client signs a purchaser's agency agreement, a licensee must explain to the prospective client and set out in writing—</p> <ul style="list-style-type: none"> (a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the average of the estimated price range of the land or business that the client is seeking to purchase: (b) when the agency agreement ends: (c) any additional services that the licensee will provide, or arrange for the provision of, on the client's behalf and the expenses relating to those services payable by the client: (d) that the client is not obliged to agree to the additional expenses referred to in rule 11.2(c): (e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information

Key rules that apply to sale and purchase agreements and lease agreements	
5.1	A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work
5.2	A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules) and other legislation relevant to real estate agency work.
9.2	A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.
9.7	Before a prospective client, client, or customer sign an agency agreement, a sale and purchase agreement, or another contractual document, a licensee must— <ul style="list-style-type: none"> (a) recommend that the person seek legal advice; and (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b)
9.8	A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.
9.9	A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.
9.10	A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for a signature unless all material particulars have been inserted into or attached to the document.
10.10	A licensee must submit to the client all offers concerning the grant, sale, or other disposal of any land or business, provided that such offers are in writing.
11.4	A licensee must submit all offers that the licensee is instructed by the client to make concerning the purchase or acquisition of any land or business, provided that such offers are in writing.

Resources

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Real Estate Agents (Duties of Licensees) Regulations. (2009).
<http://www.legislation.govt.nz/regulation/public/2009/0281/latest/DLM2372545.html>

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