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# LAW • COMMISSION

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*Report No 29*

## A New Property Law Act

June 1994  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

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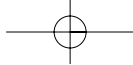
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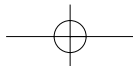
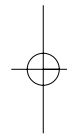
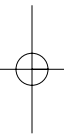
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28 June 1994

Dear Minister

I am pleased to submit to you Report No 29 of the Law Commission,  
*A New Property Law Act*.

Although property law could never be described as glamorous in comparison with other areas of legal practice, it is nevertheless fundamental to the workings of our society, dealing as it does with transfers, leases, mortgages and similar transactions. "Property" means in this context both land and all other things capable of ownership.

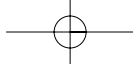
The new Act which accompanies this Report is intended to replace a statute which is now over 40 years old and was itself very largely a compilation of provisions introduced many years before, some dating from the Conveyancing Ordinance of 1842, one of our earliest legislative provisions. It would also repeal and replace ancient English statutes dating back to the thirteenth century.

The new Act is not intended as a complete codification of property law, much of which will continue to be governed by the common law. It will, however, provide a convenient statement of some of the common law and it will modify portions of it which are no longer thought to be satisfactory. As well, some parts of the new Act, particularly in relation to mortgages and leases, will provide a partial code.

We recommend the enactment of the draft legislation contained in this Report.

Yours sincerely  
K J Keith  
President

Hon Douglas Graham MP  
Minister of Justice  
Parliament House  
WELLINGTON



# I

## Introduction:

### A New Property Law Act

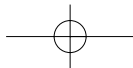
#### NATURE OF PROPOSED ACT

1 The Law Commission began its Preliminary Paper *The Property Law Act 1952* (NZLC PP16 1991) with the following observation on the nature of the current property law legislation:

The Property Law Act 1952 contains a collection of miscellaneous rules relating to property of all kinds, including land. It is not a code, more a repository for legislative supplements to or corrections of judge-made law. Where it has been thought that the rules of common law or equity had fallen short of producing a sensible solution to a problem concerning the creation, disposition or control of property interests, legislative attention has been given to the problem by way of a section in the Property Law Act or one of its predecessors. (para 1)

2 The draft Property Law Act which the Law Commission now proposes can bear the same description, although it will be found to contain rather more comprehensive material than the Property Law Act 1952 (“the 1952 Act”), particularly in relation to the law of mortgages. There it can be regarded as a partial codification in the sense that a considerable quantity of rules of the general law have been brought, either amended or unamended, into the draft Act. Occasionally a full code is attempted: examples include the rules for the cancellation of agreements for sale and purchase where the purchaser is in possession and for relief against the purchaser’s loss of the interest in the land (ss 51–54) and the like provisions for cancellation and relief in relation to leases of land (ss 203–214).

3 One of the most important objectives of the new Act is to set forth rules of property law accessibly and in a manner which, allowing for the subject matter, can readily be understood. As some of the





provisions of the 1952 Act have survived from as long ago as the Conveyancing Ordinance of 1842 without redrafting, this has in some instances required major surgery.

## RELATIONSHIP WITH OTHER ACTS

4 The new Act deals with rules which are applicable to property generally or to particular kinds of property generally. It is not the place to seek provisions of a specialist nature like those designed for the protection of consumers. So the new Act contains provisions restricting the ability of mortgagees of land and goods to exercise their enforcement powers, but it does not usurp the more detailed provisions of the Hire Purchase Act 1971 which set out the rules relating to repossession by a vendor under a hire purchase agreement made at retail. Nor does the new Act interfere with the function of the Residential Tenancies Act 1986 in affording protection to tenants of premises for residential purposes. It does, however, contain some general rules relating to leases, excluding residential tenancies.

5 It is important that the relationship between the new Property Law Act and other Acts is well understood. If a provision of the new Act and a provision of any other Act conflict, the provision in the other Act prevails except as otherwise expressly provided: s 7(3). So, for example, the rules in the new Act concerning land must be read subject to the provisions of the Land Transfer Act 1952, unless it is otherwise stated in the section where any of those rules are found. When the new Act says that something can be done in a particular way, it has to be remembered that the prescribed method may be sufficient as between the parties to the transaction but may very well have to be formalised by execution and registration of a document in compliance with the Land Transfer Act 1952. Likewise, the Act applies to transactions relating to Maori land but, as an overriding requirement, those transactions must be carried out in compliance with Te Ture Whenua Maori Act 1993 or other applicable statutes.

6 In para 25 of NZLC PP16 we described as “very messy” the layout of Part VIII of the 1952 Act relating to the sections dealing with dwellinghouse leases (inserted in 1975). We tentatively proposed that these sections should either be removed to the Residential Tenancies Act 1986 or that the scope of that Act should be extended so that they were no longer necessary. The latter course is being adopted: it is proposed that s 6 of the Residential Tenancies Act 1986 be replaced so that that Act can apply in all cases in which residential premises are let on fixed term tenancies unless the parties exclude its application at

the time when the tenancy is entered into. However, s 142 of the Residential Tenancies Act 1986 will remain, so that, as at present, the general rules about leases in the new Property Law Act will not apply to residential tenancies. As provided in the Residential Tenancies Act 1986, however, reference may be made to those rules in certain circumstances.

7 The draft Act brings the provisions of the Contracts Enforcement Act 1956 within the new Act, without change in substance except for a minor matter relating to guarantees. The comparable provisions relating to land transactions are found in property law statutes in England and the Australian states. Two sections of the 1952 Act (ss 131 and 132) dealing with the powers of trustees under marriage settlements are simply repealed, with a minor amendment being made to s 14 of the Trustee Act 1956 as a consequence. The sections are a dead letter and the provisions of the Trustee Act 1956 will amply suffice.

8 The sections in the 1952 Act proscribing the imposition in connection with dispositions of property of restrictions on the grounds of colour, race, ethnic or national origin or requiring sterility (ss 33A and 33B) and the section concerning the validity of property agreements between co-habitees (s 40A) are being moved to the Human Rights Act 1993, where they are more appropriately placed. It is proposed to extend the latter to cover agreements between persons of the same gender.

## RELATIONSHIP WITH LAND TRANSFER ACT 1952

9 Part of the Law Commission's task has been the rationalisation of rules now found in the 1952 Act and those in the Land Transfer Act 1952. Some of the latter, while now applying only to registered interests, appear to warrant general application. In a few cases, provisions which do not now apply to land under the Land Transfer Act 1952 should, we think, do so. We refer, for example, to the implied covenants in Part VI of the 1952 Act. In the new Act they will apply to both registered and unregistered dealings, though they will have to be read subject to the provisions of the Land Transfer Act 1952. Where Land Transfer Act 1952 provisions should be of general application, they are moved into the new Act and the old provisions repealed to avoid duplication: ss 96, 98, 104, 106, 108(1) and 110 of the Land Transfer Act 1952. Sections 107 and 108(2) are repealed and s 115 is significantly amended for reasons which are mentioned in the commentary to the new Act (paras 778–780).

10 The sections in the 1952 Act pertaining only to deeds system land are relegated to schedule 1 of the new Act. They are rarely, if ever,

availed of and are retained as a matter of precaution only. Except as indicated, the commentary upon the new Act is written in relation to Torrens title land only.

## IMPERIAL ENACTMENTS REPEALED

11 The Law Commission's first report on *Imperial Legislation in Force in New Zealand* (NZLC R1 1987), identified the imperial legislation which became part of the law of New Zealand and which should be kept in force. The Law Commission indicated then and later that it planned to review categories of those enactments, including the property law statutes, with a view to their repeal and replacement where required. Section 264 of the new Act will, among other things, repeal all of the imperial enactments relating to property which were preserved in the First Schedule to the Imperial Laws Application Act 1988. In addition, ss 83 and 86 of the Fires Prevention (Metropolis) Act 1774 and s 6 of the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act), also preserved by the 1988 Act, are given their quietus. The new Act addresses in modern language such of these provisions as require continuing attention: some are simply repealed as being unnecessary. These changes are explained in the commentary to schedule 7 (paras 823–840).

## THE LAW COMMISSION'S REPORT ON PERSONAL PROPERTY SECURITIES

12 A difficulty which exists in the preparation of the draft legislation contained in this Report is that the Law Commission does not yet know whether certain of its recommendations in earlier reports will be carried into legislation and, if so, whether that will happen before property law legislation is enacted. We refer especially to the proposed Personal Property Securities Act (NZLC R8 1989). The problem is particularly acute in relation to reform of the law on contractual tacking: ss 86–89 of the draft Act (paras 355–371). The deficiencies of s 80A of the 1952 Act cannot be fully cured until a coherent registration regime for personal property securities is operative. The Law Commission has, for the purposes of this Report, assumed that the Personal Property Securities Act will be in force before a new Property Law Act (and will, as recommended, absorb the Motor Vehicle Securities Act 1989) and that the Chattels Transfer Act 1924 will have been repealed.

## CROWN TO BE BOUND

13 The 1952 Act does not, with certain limited exceptions, bind the Crown. In NZLC PP16 at para 35, the Law Commission tentatively concluded that the new Act should do so in accordance with the principles stated in its report, *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17 1990). It made that suggestion after consultation with Crown lawyers. No submission was received to the contrary: indeed, many supported the proposal. Section 6 therefore provides that the new Act will bind the Crown. However, once again, this statement should not be read in isolation: regard must be paid to other statutes, such as the Land Act 1948, which may contain provisions which override the new Act in relation to dealings by the Crown. A statutory provision in the Land Act 1948 may dispense the Crown from a restriction which would otherwise be placed upon it by the new Act. Crown related statutes may work the other way, too, by imposing upon it restrictions which are not placed on others in relation to dealings with property. It is obviously impractical, and could be dangerous, to try to list these (ever changing) situations in the new Act. The Law Commission emphasises that, where there is a conflict between the provisions of the new Act and any other Act, the other Act prevails except as otherwise expressly provided: s 7(3).

## TERMINOLOGY

14 The Law Commission's policy has been to give the widest possible definition to certain key words which occur frequently in the new Act. **Covenant**, for example, means a promise expressed or implied in an instrument and also includes a promise in a short term lease that is not in writing: s 3. **Instrument**, in turn, is any writing which creates or affects legal or equitable rights or liabilities. For the sake of completeness, it is stated to include a covenant expressed or implied in an instrument, except where otherwise provided, and a variation of an instrument. **Lease** is defined to include both registered and unregistered leases and agreements to lease. It also includes a **short term lease**, which means a lease for a fixed term of less than one year, a periodic tenancy for one year or less, or a statutory tenancy (of a kind found in the 1952 Act in s 105 and now in s 176 of the new Act). The consequence is that the rules of the new Act relating to leases, unless the context otherwise requires, apply just as much to short term oral or written tenancies as they do to long term leases which are registered or are intended to be registered under the Land Transfer Act 1952. The

intention is that the use of these common expressions is to be restricted, if at all, not by the way in which they are defined but by the context in which they appear in particular provisions.

15 In para 21 of NZLC PP16, in discussing the need for modernisation of language in the new Act, we suggested that, in relation to the termination of leases for breach, the new Act should use the expression "termination". We have, however, reconsidered this point, deciding that it is more appropriate (and consistent with the Contractual Remedies Act 1979) to speak in terms of "cancellation" where a lease contract is being brought to an end on account of a breach of the lease. We have therefore reserved the expression "termination" for use when the Act is dealing with a notice to quit; namely a right given to lessor or lessee to bring the lease to an end otherwise than by reason of any breach.

16 The word "possession" wherever it appears in relation to land will mean legal possession: the right either to enjoy physical occupation or to receive the rents and profits of the land. In s 176 which deals with short term leases, the term "occupation" is used. In this context, physical possession of the land is being contemplated.

## ATTORNEYS AND AGENTS

17 We draw attention to s 5, which removes the need to refer to attorneys and agents throughout the Act. It declares that, except in relation to those sections dealing with the giving or service of notices under the Act (ss 259 and 260), where **agent** is expressly defined, anything which a person is required or authorised to do or suffer by a provision of the Act may be done or suffered by that person's duly authorised attorney or other agent.

## TENURES PROJECT

18 In 1992 the Law Commission, in a Preliminary Paper entitled *Tenure and Estates in Land* (NZLC PP20 1992), proposed the disentanglement of the method under which land is held in New Zealand from its feudal origins, and the abolition of the doctrine of estates, with the consequent conversion of fee simple estates in land to allodial ownership. Many helpful submissions have been received on this paper, most of which have been supportive of the proposal. The Law Commission is continuing to give consideration to this matter but does not wish it to be a cause of delay to the long overdue reform of the 1952 Act. The question of tenures and estates will accordingly be the subject of a separate report. The proposed Act which accompanies this

Report is drafted on the assumption that the present land title system continues, at least in the meantime. The Law Commission believes that it would not be difficult to convert the terminology of the new Property Law Act to achieve consistency with the final recommendations it is likely to make in terms of NZLC PP20. As indicated in NZLC PP20, this could be done as part of the amendments to the Land Transfer Act 1952, which are understood to be forthcoming.

## DEPARTURES FROM PRELIMINARY PAPER

19 This Report departs from some of the proposals which were provisionally put forward in NZLC PP16. We mention the more important of them.

### *Assignment of things in action*

20 The reform of s 130 of the 1952 Act has proved to be difficult—hardly a surprise to anyone who is a student of this subject. We have tried to achieve simplification, although the topic will remain fairly complicated. Our proposals deal with both legal and equitable assignments of things in action. Equity separates the effectiveness of an assignment as between the parties from its effect upon the debtor, the latter being affected only when in receipt of notice that the assignment has occurred. Subpart 2 of part 4 will apply this equitable approach to legal assignments. The subpart also attempts to clarify the law concerning the completion of equitable assignments and that relating to assignments of an income stream (cash) which may be derived in the future under an existing right possessed by the assignor.

### *The rule in Hopkinson v Rolt*

21 Under this rule, any advances made by a prior mortgagee, after notice of the existence of a subsequent mortgage, rank behind the subsequent mortgage in priority, except in circumstances in which the first mortgagee is compelled to make those further advances. In NZLC PP16 at paras 362–365, we suggested that perhaps the rule should be abolished entirely, recognising that, if the Law Commission's proposals for a Personal Property Securities Act (NZLC R8) are implemented, the rule will be abrogated for securities over personal property. However, several submissions made the point that the rule is a convenient one for securities in relation to land. Our further enquiries revealed that it has been retained in North American jurisdictions in relation to land, despite its abolition under the personal property securities regimes which operate there. On the other hand, submissions on NZLC PP16

did not advocate the retention of the *Hopkinson v Rolt* rule for chattels and other personal property. Section 89 therefore preserves the rule and sets it out in statutory form, but applies it only to land and registered ships (which have a Torrens style title system under the Ship Registration Act 1992). The section then proceeds to create some exceptions to the general rule, based upon those found in s 80A of the 1952 Act but drafted in a way which attempts to meet the criticisms of that section which were discussed in paras 354–356 of NZLC PP16. The new section should be read in conjunction with ss 86, 87 and 88.

#### *Warning before exercise of mortgagee's powers*

22 In NZLC PP16 at para 300, the Law Commission provided a draft for a section to replace s 92 of the 1952 Act. This met with broad approval but there has been substantial redrafting to take account of particular criticisms. There was very little support for, and much criticism of, our tentative proposal that a notice of intention to exercise powers under a mortgage should become stale after 12 months. That has been deleted.

23 We have not found it easy to differentiate between a general floating debenture and a mortgage of specific property. The Law Commission does, however, confirm its view that a receiver under a general mortgage debenture should be able to be appointed and to take possession of land without a warning notice having to be given, though sale should not proceed until the period of notice has elapsed. But where the receiver is appointed under a mortgage, rather than a general debenture, the notice must have been given and the specified period must have elapsed before the receiver enters possession. The Law Commission is conscious that in many cases, particularly where a loan is made to a company, security may be taken both by way of specific mortgage and by general debenture. There may be some minor anomalies in the way in which the new sections (ss 105–109) will apply to some of these situations. However, we believe that they will leave sufficient flexibility for the operation of corporate receiverships while at the same time providing reasonable protection for debtors.

24 Submissions were supportive of the proposal that a regime of the type of s 92 should operate in relation to mortgages of goods. Sections 110–115 achieve this.

25 A major cause for concern with the present s 92 is that a guarantor or other covenanting party whom the mortgagee has neglected to advise of a forthcoming mortgagee sale (and the mortgagee's intention

to claim any deficiency) is automatically released from liability. Under the new Act (s 106 in relation to land and s 111 in relation to goods), the covenantor will not be released unless able to prove prejudice, and then only to the extent of the prejudice.

#### *Application of proceeds of mortgagee's sale*

26 Several submissions made the point that the proposed restatement of the rules now found in s 104 of the Land Transfer Act 1952, governing the application by a mortgagee of the proceeds of the sale of the security, should include provision for the repayment of a prior ranking mortgage or other charge. The Law Commission had been concerned that in some (relatively rare) instances a right to redeem the prior mortgage might not exist because it secured a contingency which could not presently be measured, or secured the payment of income for an indeterminate period. However, this is not sufficient reason for rejecting the submissions made to the Law Commission, and s 155 is now drafted to allow payment of moneys due under a prior mortgage where the sale by the subsequent mortgagee is made on the basis that the prior mortgage will be discharged before title is transferred to the purchaser. Necessarily, this will not be possible unless a right to redeem the prior mortgage exists: as to which see s 93 (paras 376–382).

#### *Continuing liability of assignor of a lease*

27 NZLC PP16 (paras 441–454) drew attention to the difficulty which can be caused for someone who has assigned a lease and then finds that there remains a continuing and open-ended liability, concurrently with the assignee, for payment of future rent and other outgoings due under the lease and future observance of the lessee's covenants. We mentioned that radical change had been proposed in England, under which, after a further assignment, the original assignor would be released. We noted, however, that such a change in the law might lead, as a matter of balance, to some reluctance by the court to override a lessor's refusal to consent. We suggested, somewhat conservatively, that the law might be changed, so that after an assignment a lessee would continue to be liable for the performance of the assignee, but that the lessee's liability would be that of a guarantor rather than a concurrent obligor.

28 We confirm this proposal but would now go further, in an endeavour to meet the submissions made to us. In the end, it seemed to the Law Commission that the best solution was one which is relatively arbitrary; namely a provision (out of which it would not be possible to contract) under which an assignor will be automatically released from



future liability after a maximum of 5 years from the date of the assignment of the lease. That would place a cap upon the assignor's liability. In addition, because the assignor would be equated with a guarantor, the assignor would also be released by any variation of the lease made without the assignor's consent (with the exception of rent reviews and other matters actually contemplated by the lease document at the time of the assignment). It would not be a valid ground for withholding consent to an assignment that the lessee will be released after 5 years: see s 190 and subpart 5 of part 9. The Law Commission observes that, although they could in theory be circumvented by a lessor's insistence upon a lease with an absolute prohibition on assignment and that any disposition be made by way of sublease, few prospective lessees will be prepared to take up a long term lease upon that basis. Furthermore, anyone who does so and then proceeds to try to dispose of the lease by subletting will have been made well aware (as many assignors presently appear not to be) of the continuing liability. The Law Commission believes that the period of 5 years is sufficiently long to protect the legitimate interests of reasonable lessors, who will accept that the liability of an outgoing lessee should not be open-ended.

#### *Agreements for sale and purchase*

29 Two matters discussed in chapter V of NZLC PP16 are not being pursued further. The first is a proposal to reform by statute the law relating to the giving of mortgages by vendors of land. Submissions received by the Law Commission cogently pointed out difficulties which might be caused and which we have been unable to remove by amending the proposal. The difficulties outweigh the value of the reform.

30 Secondly, we proposed reform of the law relating to tender of payment by bank cheque, though at the same time hoping that the courts might effect their own reform of the judge-made law. Happily, this has now occurred. In *Williams v Gibbons* [1994] 1 NZLR 273, the Court of Appeal decided that "in contracts for the sale of land there is an implied term that tender of a bank cheque in settlement shall be good tender of the amount expressed thereon", with the proviso that the cheque may be refused "only if the recipient has reasonable grounds for believing that because of insolvency the bank may not honour it". In light of this ruling, there is now no apparent need for statutory intervention.

## II

# Analysis of Major Provisions

31 This chapter outlines the major provisions to be found in the proposed new Act. More detail is to be found in the commentary accompanying each section.

### APPLICATION OF ACT

32 The new Act applies to

- all New Zealand land,
- all other property wherever situated, and
- all instruments wherever and whenever executed,

to the extent that New Zealand law governs any matter in relation to that land or property or those instruments for which the Act applies: s 7(1). The Act will apply subject to normal choice of law principles.

33 New rules introduced by the Act will usually be applicable to existing instruments. But, in some cases, this general principle is overridden by particular sections; for example, the covenants implied by part 7 apply only to instruments taking effect after the Act comes into force.

### DEEDS AND OTHER INSTRUMENTS

34 The Law Commission pointed out in chapter II of NZLC PP16 that there was a choice available between two paths for reform in the law relating to deeds. The first involved minor adjustments to the sections of the 1952 Act. The second would dispense altogether with deeds, leaving the formalities of conveyancing and other transactions to be specified in individual statutes. It has been decided to take the first

path because, as pointed out at para 62 of NZLC PP16, although deeds do not have the importance attached to them in former times, there is still a residue of situations in which the use of a formal document is required and it is necessary either to preserve the concept of a deed or, instead, to define the ingredients of an equivalent document. Moreover, the removal of the distinction between formal and informal documents could make serious, perhaps unintended, inroads into the law of contract. It also seemed to the Law Commission that the requirement for the use of a deed has a protective function: a layperson will usually resort to a lawyer for its preparation and will therefore have the opportunity of taking advice on the contemplated transaction.

35 Section 9 of the new Act prescribes certain requirements for the creation and delivery of a deed. Among other minor reforms, the section clarifies the law relating to delivery of a deed, provides that an unauthorised material alteration of a deed has no greater or lesser effect than it would have upon any other instrument, and confirms that a witness to the signature of a deed must not be a party to the deed. Provision is made for the mode of execution of a deed on behalf of the Crown.

36 Section 9 also deals with the manner in which a body corporate may enter into a deed. It reflects a policy, illustrated by the Companies Act 1993, of dispensing with the need for bodies corporate to have and use common seals. The section overrides other statutes in this regard by allowing a New Zealand body corporate to enter into obligations which are required to be done by a deed by means of a writing signed by two or more directors of the body corporate or, if there is only one director, by that person, whose signature must be witnessed by a non party. Also, where the constitution of the body corporate permits, it may execute a deed by signature of only one director or person or member of a specified class of persons. A foreign body corporate also has the choice of entering into obligations in a manner permitted under the law of the place where it was created. Section 10 provides for the manner in which bodies corporate may enter into different types of obligations.

37 A promise made by deed will be capable of being the subject of specific performance, despite the absence of valuable consideration for the promise: s 15. At present, the court in its equity jurisdiction will not enforce such a promise because, although it is contained in a deed, it nevertheless remains a voluntary promise: the promise may be enforced only by an action for damages at common law.

## ABOLITION OR MODIFICATION OF COMMON LAW RULES AFFECTING PROPERTY

38 Part 3 of the new Act contains a restatement of some fundamental rules of property law. The equivalent part in the 1952 Act was Part II. There, many of the rules stated were a modification to an underlying rule of common law but, unless the reader has knowledge of the underlying rule, it can be difficult to make sense of the modification. In contrast, in the new Act the statement made is of the rule as modified. It has also been thought sensible to make direct statements of certain basic principles. In s 20 there is a declaration that

- a grant from the Crown of an estate in fee simple confers a right of freehold tenure without any incident of tenure for the benefit of the Crown;
- an estate in fee simple is transferable without the permission of the Crown or the need to make any payment to the Crown (though this must be read subject to any other enactment);
- an attempt to convey a fee simple subject to the reservation of a fee simple to the person conveying it (subinfeudation) is prohibited.

39 Of course, these basic principles are unchanged in the new Act, but for the first time they are now to be set out in a New Zealand statute. The opportunity is also taken (in s 22) to confirm that future estates and interests can be created within the limits of the rule against perpetuities, as modified by the Perpetuities Act 1964.

## FORM AND EFFECT OF CERTAIN TRANSACTIONS RELATING TO LAND AND OTHER PROPERTY

40 In part 4 of the new Act, there are the formal requirements which are to govern property transactions, together with rules concerning the effect of some transactions. Sections 38 and 41 bring provisions now found in the Contracts Enforcement Act 1956 within the new Act. Section 38 continues the requirement that a contract for the disposition of land must be in writing or recorded in a written memorandum, in either case signed by or on behalf of the party against whom the contract is sought to be enforced. In NZLC PP16 (paras 101–125), the Law Commission canvassed the possibility of following a change in the law relating to this question that was made recently in England. There it is now required that the express terms of any land contract must be set out in one document signed by all the parties. The terms can, however, be incorporated by reference to another document. The

new English rule is quite rigid and prevents a contract in relation to land coming into existence orally: it is no longer sufficient to have a memorandum of an oral contract and, as there can be no oral contract, there is no longer any room for the doctrine of part performance.

41 The Law Commission indicated in NZLC PP16 that it accepted the criticisms made of the existing law. It also suggested some modifications to the new English reforms in light of New Zealand conveyancing practices. Nevertheless, we expressed some reservations about following the English reform, at least until there has been an opportunity to see how it works in practice. For the most part, the submissions received on NZLC PP16 commended the Law Commission for its caution in this respect. It has therefore been decided not to recommend proceeding with the reform at this time, though the application of the reform in England should be closely monitored and the position reconsidered at an appropriate future time. By then the expanding role of the equitable remedies, particularly estoppel, may also be clearer and it may be possible to be rather more comfortable about their ability to mitigate any harsh consequences which may be caused by a requirement that land contracts can be made only in writing. In the meantime, it seems better to persevere with the current law despite its deficiencies.

42 However, in relation to guarantees, it is thought desirable to dispense with the possibility of the enforcement of an oral guarantee by reason of the existence of a signed memorandum of its terms. We observed in para 124 of NZLC PP16 that guarantees are rarely documented in this way and suggested that there be a requirement that a contract of guarantee must actually be entered into in writing signed by the guarantor. No submission criticised this proposal and we are recommending accordingly. The proposal can be found in s 41.

43 Section 39 replaces s 49A of the 1952 Act. It deals only with dispositions of possessory interests and subsisting equitable interests in land or mixed funds. It requires these to be in writing signed by or on behalf of the person making the disposition. There will no longer be a requirement that a disposition of an equitable interest in personal property be in writing. Section 39 also requires a signed writing for the creation of an inter vivos trust.

44 Section 40 preserves the doctrine of part performance except in relation to guarantees.

45 In subpart 2 of part 4 there is a proposal for a major reform of the law relating to assignment of things (or choses) in action. The new subpart 2 of part 4 goes further than its predecessor: s 130 of the 1952

Act. It allows any thing in action, that is, a right enforceable only by bringing legal proceedings as opposed to a right which can be enforced by taking possession, to be assigned at law by a writing signed by or on behalf of the assignor. Unlike s 130, it does not postpone the effectiveness in law of the assignment as between assignor and assignee until notice of the assignment has been given to the debtor. It separates the effect of the assignment from the effect on the debtor of the notice. But, under the new section, as under s 130, it is only absolute assignments (and not those which are conditional or by way of charge only) which are capable of taking effect at law. The section also deals with the effectiveness and completion of equitable assignments, clarifies the law relating to attempts to assign without consideration moneys to accrue in the future pursuant to existing rights (eg, the assignment of a future income stream which may arise from an existing partnership agreement), and deals with assignments of part of a thing in action, permitting such a part to be assigned at law (which cannot be done at present), subject to the observance of a procedural requirement for the joining of the assignor in any proceedings brought by way of enforcement against the debtor.

46 The Law Commission's proposals on assignments of things in action will be found to differ very substantially from the tentative suggestions made in paras 226–247 of NZLC PP16. We thank Professor Stuart Anderson, Dean of the Law Faculty of the University of Otago, and Roger Fenton, Barrister, of Auckland for their detailed and illuminating submissions on NZLC PP16. Subpart 2 of part 4 draws in very large measure on their extensive knowledge of the law in this technical and difficult area.

## SALES AND LIKE TRANSACTIONS

47 Part 5 of the new Act contains several rules relating to sales and purchases of land and other property and includes, in subpart 2, a new version of the long standing power for the court to set aside alienations of property made with an intention of defrauding (ie, prejudicing) creditors (s 60 of the 1952 Act).

48 Subpart 1 of part 5 is intended to be a code governing the circumstances in which a vendor of land may cancel the agreement by reason of a breach on the part of the purchaser after the purchaser has gone into possession. A warning notice to the purchaser is required and the purchaser also has a right to apply to the court for relief against the loss of the interest in the land. The subpart is drafted on a stand alone basis, unlike s 50 of the 1952 Act which equates the vendor and purchaser

relationship with that of lessor and lessee by cross-referring to s 118 of the 1952 Act.

49 Section 55 contains an adaptation of provisions which appear in the property law statutes in the United Kingdom and the Australian states whereby a purchaser can recover a deposit paid to a vendor of land in circumstances in which the purchaser is not entitled to cancel the contract but, equally, the vendor would not be granted specific performance of the contract. The section implements proposals made in NZLC PP16 at paras 195–205.

50 Section 56 remedies an unsatisfactory situation arising from recent case law described in NZLC PP16 at paras 206–210. It enables a purchaser of property to waive a contingent condition, notwithstanding that it gives rights of cancellation to both vendor and purchaser in the event of non-fulfilment. Under the new section, that fact does not in itself prevent the condition being construed as being for the exclusive benefit of the purchaser.

51 The subject of voidable alienations was briefly discussed in chapter VII of NZLC PP16 at paras 248–258. The provisions of subpart 2 of the draft of the new Act draw upon that discussion. Section 67(1) of the subpart would permit a creditor, an Official Assignee or a liquidator of a debtor to make an application to the court where a disposition of property has been made by the debtor with the intention of prejudicing any of his or her creditors. It would not matter whether the disposition was made before or after the debt was incurred. Section 69 provides protection for persons acquiring property from the debtor in good faith and for valuable consideration without knowledge of the debtor's intent to prejudice creditors, or where there has been a consequent change in the defendant's circumstances. In para 252 of NZLC PP16, it was suggested that such a defence might require that the requisite consideration be "adequate consideration", which would avoid the suggestion that something less than full consideration paid in cash or kind was adequate to protect the transaction. Submissions on this last point were fairly evenly divided but the Law Commission has been persuaded that the new section should not depart from the current position in this respect. It would, in any event, be a rare case in which a transaction made for clearly inadequate consideration would be supportable as having been made in good faith by the person who acquired the asset from the debtor. On the other hand, where a transaction is made in good faith and without knowledge of an intent to prejudice creditors on the part of the debtor, it may be unreasonable to require justification of the purchase price.

52 The subpart has been drafted on a stand alone basis so that it can operate separately from sections which pertain to similar situations in the Insolvency Act 1967, the Companies Act 1955 and the Companies Act 1993.

## COVENANTS AND POWERS

53 Part 6 brings forward into the new Act some rules concerning covenants which appeared in ss 66–70 of the 1952 Act. No change of any real substance is made. (The provisions governing the benefit and burden of covenants running with the land which now appear in ss 63, 64 and 64A of the 1952 Act have been carried forward but will be found in part 10 as ss 226, 227 and 228.) Section 74(2) prevents any covenant being implied *as a matter of law* in any instrument except under the draft Act or another enactment: it thus excludes common law covenants which are entirely replaced by the statutory implied covenants.

## COVENANTS IMPLIED IN INSTRUMENTS

54 The new sections to be found in part 7 (ss 75–79) and schedule 3 replace Part VI of the 1952 Act but now apply to all land instead of being restricted to land which was not under the Land Transfer Act 1952. They are, however, consistent with the provisions of the Land Transfer Act 1952. Sections 96 and 98 of the Land Transfer Act 1952, which overlap the new sections, would be repealed.

55 Section 75 creates implied covenants in a transfer or assignment of land for the right to convey, for quiet enjoyment and for further assurance. Like the other covenants implied under part 7, it will apply only to covenants contained in instruments coming into operation after the new Act comes into force. All of these implied covenants can be negated, varied or extended if the parties to a transaction so wish.

56 Section 76 implies covenants for payment of rent and observance of the terms of a lease where a leasehold interest is transferred or assigned. Section 77 contains rather more limited covenants which are to apply where an instrument is executed by a trustee or other fiduciary, or by a mortgagee. The same limited covenants apply in relation to a memorandum of discharge of a mortgage. Section 78 implies covenants in encumbrances of property, including mortgages and charges. Finally, in s 79 there are to be found covenants to be implied in transfers or assignments of land where the interest being transferred or assigned will remain subject to an existing encumbrance. The transferee or assignee impliedly covenants to pay all money and perform all other



obligations secured by the encumbrance as and when they fall due and to indemnify the transferor or assignor against the consequences of his or her failure to do so.

## MORTGAGES

57 Part 8 deals with the subject of mortgages of land and personal property. It is the most extensive portion of the new Act and contains many reforms. In reading the sections, it is necessary to be alert to whether they apply to property generally or only to a particular form of property, such as land or goods.

58 The Act distinguishes between a **mortgage**, which includes a charge, and a **mortgage debenture**, which is defined in s 3 as “an instrument creating a charge on property of a body corporate, that property being all, or substantially all of the assets of the chargor body corporate”. The reason for separately defining mortgage and mortgage debenture is that it is recognised that it would be inappropriate to impose upon the holders of floating general debentures over the assets of a company all of the restrictions to be imposed upon the exercise of powers of sale and entry into possession by mortgagees. So, for example, a receiver appointed under a general mortgage debenture will be able to take possession of a corporate asset without giving the prior warning notice required of a mortgagee under the new s 105. It is, of course, very difficult to distinguish between a mortgage and a mortgage debenture, as the latter, in relation to a particular asset, is not necessarily a floating charge, either from its inception or at the point when the debenture holder wishes to have the receiver seize possession of the asset. As a mortgage debenture is a species of charge, which is in turn a species of mortgage, it has been thought best to focus on the breadth of the debenture charge, that is, a general charge over all or substantially all the assets of the company, as opposed to a specific mortgage or charge over a single asset or limited number of assets. A partial dispensation from the restrictions in subpart 4 of part 8 is given for general mortgage debentures created by bodies corporate.

59 It was proposed in NZLC PP16 (paras 340–343) that similar restrictions to those now found in s 92 of the 1952 Act should apply in relation to the sale of chattels by a mortgagee. This proposal was supported by the submissions received by the Law Commission. The sections to give effect to it are ss 110–114, which refer to “goods” rather than “chattels”, on the assumption that the new Personal Property Securities Act (NZLC R8) will have been enacted before the new Property Law Act. It should be noted that there is no restriction upon

taking possession of goods by a mortgagee. (The restriction relates only to sale and the use of an acceleration clause, by which moneys that would not have otherwise fallen due can be called up.) Further, a warning notice of intention to enforce a mortgage over goods is not required where the mortgage is over stock being sold at retail in the ordinary course of business: s 113(d).

60 Section 80 provides that a mortgage of land takes effect as a charge only. In practical terms, this brings about no real change to the law since that is the rule for land registered under the Land Transfer Act 1952. Unregistered interests are equitable only (with the exception of short term leases: see s 176). Any documentation in the form of a legal mortgage is therefore confirmed as operating only as a charge unless it is done by registered memorandum of transfer. Thus a mortgage of a lease in the form of an assignment of the leasehold interest to the mortgagee will not operate as an assignment but merely as a charge over the leasehold interest of the mortgagor. No comparable reform is made in relation to mortgages of property other than land, as it is recognised that there may sometimes be good reason for taking security by way of legal mortgage and, indeed, this is commonly done in an instrument by way of security. However, as already indicated, the powers of a legal mortgagee under such an instrument will be regulated by ss 110–114.

61 The new ss 86, 87 and 89 replace s 80A of the 1952 Act. Section 89 anticipates the enactment of a Personal Property Securities Act, as proposed by the Law Commission (NZLC R8). Such an Act would govern priority as between competing security interests in relation to personal property generally and, if enacted in the form proposed by the Law Commission, would abolish the rule in *Hopkinson v Rolt* (1861) 9 HL Cas 514; 11 ER 829 in relation to personal property.

62 The new s 89 therefore extends only to land and interests in registered ships, both of which fall outside the Personal Property Securities Act proposal (NZLC R8). The new section opens with a statement of the law in *Hopkinson v Rolt* (subs (1)) and then creates some exceptions where a priority limit is stated in a registered mortgage. This exception will enable a prior mortgagee to preserve priority for further advances made after that person has knowledge of the existence of a subsequent charge. A separate exception is contained in s 87 for a situation in which a mortgage specifies a principal sum, which is then able to be advanced by instalments regardless of whether the mortgagee has been given notice of a subsequent mortgage. All non-contractual forms of tacking are abolished by s 86(3).

63 The new s 88 gives priority to advances made by a mortgagee for the protection and realisation of the security, examples being the payment of rates or insurance premiums in respect of the property and the expenses encountered in exercising a power of sale. It is not necessary to stipulate in the mortgage document that such expenditure is secured by the mortgage or that it has the same priority as the principal sum.

64 Section 91 has to be read in conjunction with schedule 4 to the new Act. The schedule contains an updated version of the Fourth Schedule of the 1952 Act in which are found implied terms for mortgages.

65 Sections 93 and 94 restate the rules relating to the right of a mortgagor and others interested in mortgaged property to redeem the security.

66 Section 103 abolishes foreclosure in respect of all kinds of property. Foreclosure on mortgaged land is already prohibited by s 89 of the 1952 Act, but there is no prohibition in relation to other forms of property, although in practice the use of the power is never sought by mortgagees.

67 Sections 105, 106 and 109 replace s 92 of the 1952 Act. In brief, they contain the following rules:

- A mortgagee, general mortgage debenture holder and a receiver must ensure that a notice has been issued, in accordance with the section, prior to exercising a power of sale.
- A mortgagee, debenture holder and receiver under a mortgage (but not a receiver under a general mortgage debenture) must ensure that a notice is issued in accordance with the section prior to taking possession.
- A mortgagee (but not a mortgage debenture holder) must ensure that a notice is issued in accordance with the section prior to calling up moneys in reliance on an acceleration clause.

68 In each case, the minimum length of the notice is 20 working days. An **acceleration clause** is defined in s 3 as one under which moneys secured by mortgage become payable or may be called up as becoming payable, on a date earlier than that on which they would otherwise have become payable. The notice has to be given where such a clause is triggered by a **default**—meaning *either* a failure to pay moneys secured by an instrument on the due date or to perform or observe any covenant expressed or implied in the instrument, *or* the occurrence of any other event, other than the arrival of the due date, on

the occurrence of which any moneys secured by an instrument become payable, or may be called up as becoming payable, under any term expressed or implied in an instrument. The intention is to require warning notice to be given under s 105 (or, in relation to goods, under s 110) before a mortgage is called up after the occurrence of an event, such as the sale of the property, which is not itself failure on the part of the mortgagor to perform the obligations under the mortgage.

69 Section 105 requires notice to be given to subsequent mortgage holders and certain other persons. Section 106 requires notice to be given to a former mortgagor and a covenantor; that is, to someone other than the current or former owner of the mortgaged property who is liable under the mortgage. The commonest example of a covenantor is someone who has guaranteed the mortgage.

70 In ss 110–114 there is an equivalent set of sections in relation to mortgages of goods, but the restrictions relate only to exercise of the power of sale or use of an acceleration clause. No warning notice is required before a mortgagee takes possession of the goods.

71 Subpart 5 of part 8 is concerned with rules relating to mortgagees in possession. Section 115 prescribes the means by which possession can be taken and s 116 defines when a mortgagee becomes a mortgagee in possession: upon entering into or taking physical possession or receiving income as mortgagee in possession or, if possession of land or goods is ordered by a court, as from making the application to the court.

72 Section 118 makes changes to the rules in s 91 of the 1952 Act relating to the leasing of property by a mortgagee. Sections 119–122 confer upon a mortgagee in possession powers of management of the mortgaged land. Section 124 details the manner in which income received by a mortgagee in possession must be applied, and s 127 sets out new rules for accounting by a mortgagee in possession. Provision is made for interest to be calculated with half yearly rests or rests of a shorter or longer interval provided for in the mortgage. Sections 125 and 126 carry forward, in the case of current mortgagors that are companies, the rules that applied under s 101 of the Companies Act 1955 to the holders of any mortgage debenture secured by a floating charge over the company's assets.

73 Sections 128–139 repeat with minor modifications provisions which were inserted into the 1952 Act by the Property Law Amendment Act 1993. They require notice of entry into possession to be given and certain accounting records to be kept. They also require regular reports by the mortgagee in possession.

74 Sections 140–144 deal with the withdrawal of a mortgagee from possession and reverse the common law rule that a mortgagee may not withdraw (except upon repayment, sale or appointment of a receiver). However, s 141 requires that the court shall first consent to the withdrawal.

75 Section 146 repeats s 103A of the 1952 Act (inserted by the 1993 Amendment) and imposes on a mortgagee exercising a power of sale a duty of care to the mortgagor and any former mortgagor, covenantor, subsequent mortgagee or subsequent encumbrancer to obtain the best price reasonably obtainable as at the time of sale.

76 Section 148 confers upon a mortgagee certain incidental powers relating to a sale. Section 149 allows a mortgagee to adopt an agreement for sale and purchase of the property previously entered into by the mortgagor and to enforce that agreement against the purchaser.

77 Section 153 provides for the transfer or assignment of mortgaged property by the mortgagee to a purchaser. Where the mortgagee is also the purchaser (which can only happen by way of Registrar's sale or a court order under ss 166 and 167 and s 168 respectively), the transfer or assignment documentation must be executed in accordance with those sections. Section 154 provides for protection of a purchaser acquiring property from a mortgagee.

78 Section 155 governs the application of proceeds of sale of mortgaged property. Unlike s 104 of the Land Transfer Act 1952 which it replaces, it extends to sales of all kinds of mortgaged property. Also unlike s 104, it authorises the mortgagee to apply proceeds of sale in repayment of a prior mortgage—provided, of course, that the prior mortgagee is obliged, in terms of s 93, to accept repayment. The reform enables a subsequent mortgagee to contract with a purchaser on the basis that the property is being sold free of the prior mortgage, except in the rare circumstances in which the prior mortgagee is not obliged to release the security (such as where it secures a contingent liability).

79 Sections 159–167 replace ss 99–101 and 103 of the 1952 Act dealing with sales through the Registrar of the High Court. It was strongly submitted to the Law Commission by some practitioners that Registrar's sales should be completely abolished, as their perceived useful functions of protecting the mortgagee from claims by the mortgagor and enabling the mortgagee to buy in are, respectively, illusory and able to be achieved by the device of using a related third party purchaser (eg, a shelf company). The first of these criticisms has considerable merit in the light of s 103A of the 1952 Act: see comment

on s 146 (para 75). However, we think that the second criticism is not entirely justified; it may not prove to be possible to avoid the prohibition on a mortgagee purchasing simply by use of a shelf company or by purchase in the name of a relative and there may therefore be occasions on which a mortgagee who wishes to buy in at a fair price will continue to wish to have the protection of the Registrar's sale procedure. Certainly, if we are wrong, no harm will have been done in continuing to provide for it. It will remain to be seen how frequently applications are made to the Registrar.

80 Section 168 authorises the court to assist a mortgagee who wishes to sell mortgaged property or to complete such a sale which has already been made. It is particularly designed to help unregistered equitable mortgagees of land but can apply also in the case of mortgages of goods or other property. The court is empowered to order a sale and to regulate its conduct.

81 Subpart 7 of part 8 has some provisions about the appointment of a receiver in respect of mortgaged land. In large measure the sections in this subpart parallel those found in England and the Australian states. Section 170 provides for the remuneration of a receiver. Like the other sections in the subpart, it does not apply to a receiver appointed under a floating charge. Section 171 deals with the application of income acquired by such a receiver. Section 172 is a reminder to such a receiver who is selling mortgaged land of the existence of other relevant provisions in the new Act and the Receiverships Act 1993. Section 173 governs the distribution of proceeds arising from the sale of mortgaged land by a receiver.

82 Section 174, which is the only provision in subpart 8 of part 8, is an adaptation of s 104 of the 1952 Act, under which a person who acquires land subject to an existing mortgage becomes liable to the mortgagee under the mortgage.

## LEASES OF LAND

83 The leases which are dealt with in part 9 are leases of land only. The part has no application to leases of any form of personal property.

84 Section 177 is, in substance, a re-enactment of s 105 of the 1952 Act, implying a lease which can be terminated on one month's notice where no term has been agreed upon by the parties or there is a holding over after the end of an agreed term. The period of notice is now to be 20 working days.

85 Section 178 is intended to mitigate the harsh effects of the common law rule that the duration of a lease must be certain when the term of the lease commences. Under the new section, it will be sufficient if an event upon which the lease is to terminate is adequately defined as to be identifiable when it occurs. But, if that event does not occur before the tenth anniversary of the date of commencement of the lease and the lease is still running on that date, it will terminate either on that tenth anniversary or on a later termination date specified in the lease.

86 Section 180 confirms the common law rule that a lease to or from joint tenants is terminable by notice given by one of them.

87 Section 181 will permit a sublease to be granted for the same term as a head lease and will also validate, during the term of the head lease, a sublease which purports to be granted for a longer term. Both will operate as a sublease and not as an assignment unless a contrary intention appears.

88 Sections 183–186 and 188 provide for a new set of implied covenants in leases. Section 190 controls the circumstances in which a lessor can refuse to consent to an assignment of a lease or a request by the lessee that the permitted user under a lease be altered. The section applies only in the case of leases where the lessee's right to assign, sublet, etc or to change the use of the premises is expressed to be subject to the consent of the lessor. It does not apply where there is an absolute prohibition against assignment, subletting or change of use.

89 Sections 193 and 192 carry forward, respectively, the substance of ss 112 and 113 of the 1952 Act, but extend the running with the reversion of the burden and the benefit of covenants to all covenants, whether or not they pertain to the subject matter of the lease. However, in the case of those covenants that do not pertain, that is, personal covenants, the new sections will apply only to those contained in leases coming into operation after the new Act comes into force.

90 Sections 196–200 are concerned with the effect of a transfer or assignment of a lease of land, but apply only to those occurring after the Act is in force. They make such a transfer or assignment effective immediately it occurs, although there may still be a breach of the lease by reason of the assignment, and the lessor's rights to refuse consent or take measures to enforce the provisions of the lease in this respect are preserved. When an assignment becomes effective in terms of the section, the transferee or assignee automatically becomes liable for payment of rent and observance of the terms of the lease, and covenants in the lease can be enforced between the assignee and the

lessor (both ways) without the need for further documentation (except in the case of purely personal covenants in leases which antedate the new Act). The outgoing transferor or assignor remains liable to the lessor, but an important reform is that this liability is to expire 5 years after the assignment. The Law Commission discussed the problem of the continuing liability of an assignor in NZLC PP16 at paras 441–454. Widely differing views were expressed in submissions, although there was general agreement on the need for reform. In the end, after discussing the proposal now made with persons practising in this area of law, we have been persuaded that an arbitrary 5-year cut-off date is the preferable solution. Sections 196–200 also equate the position of an assignor to that of a guarantor for the purpose of any variation in the lease which is not provided for in lease documentation agreed to or accepted by the assignor.

91 Sections 203–207 contain a code about the manner in which a lease or licence to occupy land can be cancelled by the lessor or licensor on the grounds of breach of the lease or licence or because an event has occurred which gives a right of cancellation. Together with ss 208–211, dealing with relief against cancellation in such circumstances, they replace s 118 of the 1952 Act. They govern the manner in which a lessor may exercise a right to cancel—by applying to the court for an order for possession or by re-entering peaceably—and require warning notice to the lessee to be given in various circumstances. They prescribe the matters which must be dealt with in any such notice. Among other changes made to the existing law, a court order for possession is to be effective when made or at a later date specified by the court, rather than backdating to the date of the application to the court by the lessor. Different requirements for notice are prescribed depending upon whether the lessor’s complaint is failure to pay rent or failure to observe some other covenant. Provision is made for service of notices on mortgages and sublessees known to the lessor.

92 Sections 208–211 are a code relating to relief against forfeiture and are to exclude the equitable jurisdiction of the court. They confer a wide power upon the court to grant relief where a lease or licence to occupy land has been cancelled in terms of s 203.

93 Section 212 brings forward the substance of s 119 of the 1952 Act and enables a sublessee or sublicensee to obtain relief where the superior lease or licence has been cancelled under s 203. Section 213 brings forward (with some slight amendments) the substance of ss 120 and 121 of the 1952 Act. It applies where the lessor has refused to extend or renew a lease or licence, or to grant a new one, or to sell the



reversion because of a breach or a failure to give notice in due time. Application for relief has to be made to the court within 3 months after the date on which the lessor serves a notice informing the lessee or licensee of refusal.

94 As has been indicated, ss 203–213 apply to licences to occupy land, as well as to leases. However, the separate status of leases and licences is preserved. The fact that relief is available to a licensee does not equate the licence with a lease by conferring property rights upon the licensee.

95 Section 215 abolishes the lessor's right to distrain. The Distress and Replevin Act 1908 is to be repealed.

96 Section 216 reforms the law relating to removal of fixtures by a lessee. Agricultural fixtures will now be covered by the same rules as other fixtures. A lessee is to have a reasonable time to remove fixtures after the expiry of a lease.

97 Section 217 reforms the rules relating to the effect of unlawful eviction upon a lessee's obligations, particularly when the eviction relates to only part of the premises. Rent is then apportioned while that situation continues. It will not matter how the unlawful eviction occurred.

98 Section 218 is based upon chapter XIV of NZLC PP16, and prohibits a lessor (and the insurer of a lessor) from claiming against a lessee where the premises are destroyed or damaged by fire, flood, explosion, lightning, storm, earthquake, volcanic activity or the occurrence of any other peril against which risk the lessor is insured or has covenanted to insure. It will make no difference that the event which gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee or of a person for whose acts or omissions the lessee is responsible. However, the section does not apply where the destruction or damage was intentional or if anything done by the lessee (or a person for whose acts or omissions the lessee is responsible) has rendered insurance money irrecoverable.

## EASEMENTS AND PROFITS AND COVENANTS

99 Part 10 of the new Act contains sections which are, in very large measure, a re-write of ss 63–64A and 122–126G of the 1952 Act. There are relatively few changes in substance, but the sections have been re-written in more modern style and are placed in what is thought to be a more logical order. The reforms brought about in relation to positive

covenants and vehicular rights of way by the Property Law Amendment Act 1986, which was based on the work of the Property Law and Equity Reform Committee, have been brought forward. Subpart 1 contains some general rules on easements or profits. In s 222 the right to acquire an easement or profit by prescription is abolished, although prescriptive rights which have already matured are not disturbed.

100 In subpart 2 there are rules relating to land covenants. Section 228 provides that positive covenants created after 1 January 1987 run with the land, and is the successor of s 64A of the 1952 Act which came into force on 1 January 1987. Both positive and restrictive covenants will be able to be noted against land transfer titles to the same extent and with the same effect as is now the case under s 126A of the 1952 Act. In ss 230–233 there is provision for resolving disputes over the repair and maintenance of vehicular rights of way or the work necessary to be done in terms of a positive covenant. These sections allow notices and cross-notices to be given, with the court having power to resolve differences. The present powers of the court to enforce vehicular rights of way in positive or restrictive covenants, found in s 126F of the 1952 Act, are brought forward by s 234. Likewise, the court will continue to have power to modify or extinguish easements or covenants: s 235. There is provision in s 223, as there is in s 126B of the 1952 Act, for implied covenants in vehicular rights of way where express covenants are not binding between the owners of dominant and servient tenements. The substance of the provisions of the 1952 Act concerning easements of light or air—found in ss 123–125—are brought forward by ss 224 and 225.

## SPECIAL POWERS OF THE COURT RELATING TO LAND

101 Subpart 1 of part 11 re-enacts the substance of s 128 of the 1952 Act, but contains considerably more detail. An owner or occupier of land is enabled to apply to the court for an order authorising entry on or over neighbouring land for the purposes of erecting or repairing buildings.

102 Sections 129 and 129A of the 1952 Act provide for the granting of relief in the case of encroachment or where a building or other structure has been placed on the wrong land by mistake. These situations are now dealt with in subpart 2 of part 11. The subpart will confer a discretionary jurisdiction upon the court to make orders for restitutionary relief when the expectations of an applicant in relation to the siting of a structure have been defeated in whole or in part and the land

owner has been unjustifiably enriched. Orders can be made for the vesting of the land or the structure or the creation of an easement or a right of possession. There is, once again, provision for compensation.

103 The landlocked land provision in the 1952 Act (s 129B) comes forward as subpart 3 of part 11. Section 129C, which gives power to the court to order removal or trimming of trees, or removal or alteration of structures injuriously affecting a neighbour's land, will now be in subpart 4 of part 11. Instead of being restricted to a situation in which the applicant's land is residential in character, the new section applies to all land, although orders cannot be made for preservation of a view unless the applicant's land is or can be used for residential purposes.

## DIVISION OF PROPERTY AND APPORTIONMENT

104 In part 12 there is a new version of the power of the court to order sale or division of co-owned property—a modern version of the Partition Acts, but applying to all kinds of property and not merely to land: ss 254–257. There is also a modernised version of the Apportionment Act 1870: s 258.

## SERVICE OF NOTICES

105 In part 13 of the new Act, ss 259–261 provide for the service of notices under the Act to be either by way of “acknowledged delivery” (an independent delivery service where a receipt of acknowledgement is obtained) or by another form of delivery which results in actual receipt of the document by the person to whom it is directed. There will no longer be a need to obtain the leave of the court before service is effected overseas. Detailed provision is made for service in special circumstances, such as service upon a bankrupt, a company which has been dissolved or the Crown.

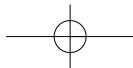
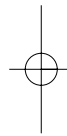
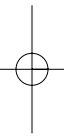
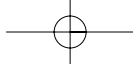
## JURISDICTION OF DISTRICT COURTS

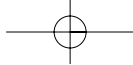
106 The Law Commission understands that the general jurisdiction of the District Courts is currently under review and, for this reason, it is not at this time putting forward any proposal for significant change in relation to property matters. Section 262 confers on District Courts largely the same jurisdiction as they now possess, but also gives them power to dispense with service of notices under the Act or to order substituted service in any such case.

## SCHEDULES

107 The new Act contains the following schedules:

- Schedule 1 contains a restatement of the little used provisions of the 1952 Act relating entirely to deeds system land.
- Schedule 2 contains the form of certificate of non-revocation of a power of attorney.
- Schedule 3 contains covenants to be implied into instruments creating, transferring, assigning or encumbering property.
- Schedule 4 contains covenants, conditions and powers to be implied in mortgages of land and fixed mortgages of goods.
- Schedule 5 contains covenants, conditions and powers to be implied in leases of land.
- Schedule 6 contains rights to be implied in vehicular rights of way.
- Schedule 7 contains a list of the imperial enactments ceasing to be part of the law of New Zealand.
- Schedule 8 contains a list of the enactments repealed by the new Act.
- Schedule 9 contains the consequential amendments to other enactments.





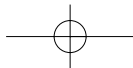
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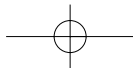
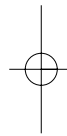
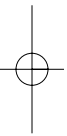
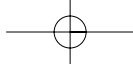
## Draft Property Law Act

#### *Note about format*

In its report, *The Format of Legislation* (NZLC R27 1993), the Law Commission recommended that, in publishing all New Zealand legislation, a new format should be adopted, involving changes to both typography and design. The purpose is to increase readability, and in that way improve access to the law for those who use it.

The draft Property Law Act is reproduced in the format which the Law Commission recommended.





# PROPERTY LAW ACT 199-

Public Act [ ]  
 Royal assent: [ ]  
 Comes into force: [ ]

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## PROPERTY LAW ACT

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The Parliament of New Zealand enacts the  
Property Law Act 199-

PART 1  
PURPOSE AND APPLICATION

**1 Purpose**

The purpose of this Act is to make the law relating to real and personal property more accessible and better suited to present and future needs by restating and developing that law and codifying it in part.

**2 Entry into force**

This Act comes into force on — 199-.

Origin: 1952/51 s 1

**3 Definitions**

In this Act

**acceleration clause** means a term expressed or implied in an instrument under which, by reason of a default, any moneys secured by a mortgage become payable, or may be called up as becoming payable, on a date earlier than that on which they would otherwise have become payable;

**address**, in relation to any person, means the actual or last-known place of residence or business of that person, except where, in sections 128, 129, 137 and schedule 2, the context otherwise requires;

**administrator** means a person to whom probate of the will of a deceased person or letters of administration are granted, and includes a trustee corporation which, under the *Administration Act 1969*, is deemed to be an executor or administrator;

**bankrupt** means adjudged bankrupt, and includes the case where a person has died and that person's estate has been ordered to be administered by an appointee within the meaning of section 159 of the *Insolvency Act 1967*, and **bankruptcy** has a corresponding meaning;

**company** means

- (a) a company under the *Companies Act 1955*, or
- (b) a company under the *Companies Act 1993*,  
as the case requires;

**company under the *Companies Act 1955*** means a company formed and registered under that Act or the *Joint Stock Companies Act 1860*, the *Companies Act 1882*, the *Companies Act 1903*, the *Companies Act 1908* or the *Companies Act 1933*;

**company under the *Companies Act 1993*** means

- (a) a company registered under Part II of that Act;
- (b) a company reregistered under that Act in accordance with the *Companies Reregistration Act 1993*;

**conveyance** includes any deed of assignment, appointment, lease, settlement or other assurance by deed of any property, and **convey** has a corresponding meaning;

**co-owner** means a tenant in common or a joint tenant;

**court**, in relation to any matter, means the court by which the matter falls to be determined;

**covenant** means a promise expressed or implied in an instrument, or in a short term lease that is not made in writing;

**covenantor**, in relation to a mortgage, means a person other than a mortgagor who has agreed to pay money or perform obligations secured by a mortgage, and includes a guarantor;

**creditor** includes a person who,

- (a) in the liquidation of a company or an overseas company, would be entitled to claim that a debt is owing to that person by the company in accordance with section 277 of the *Companies Act 1955* or by the company or the overseas company in accordance with section 303 of the *Companies Act 1993*, as the case requires, or,
- (b) in the bankruptcy of an individual, would be entitled to prove a debt or liability under section 87 of the *Insolvency Act 1967*;

**current mortgagor**, in relation to mortgaged property, means a mortgagor who is currently the owner of the property;

**debenture**, except in the expression **mortgage debenture**, means a secured or unsecured debenture;

**deed**, in relation to land under the *Land Transfer Act 1952*, includes an instrument having the effect of a deed under that Act;



**default** means

- (a) a failure to pay any money secured by an instrument on the due date, or to perform or observe any other covenant expressed or implied in an instrument, or
- (b) any other event, other than the arrival of the due date, on the occurrence of which any moneys secured by an instrument become payable, or may be called up as becoming payable, under any term expressed or implied in an instrument;

**deficiency**, in relation to a sale of land or goods under a power of sale expressed or implied in a mortgage, means any amount by which the amount received on the sale and available to a mortgagee in accordance with section 155, or available to a receiver in accordance with section 173, as the case requires, is less than the amount secured by the mortgage and then owing to the mortgagee;

**director**,

- (a) in relation to a company, means any person occupying the position of director of the company, by whatever name called, and,
- (b) in relation to a body corporate other than a company (not being a corporation sole), includes a person occupying a position in the body corporate that is comparable with that of a director of a company, and,
- (c) in relation to a corporation sole, means the holder of the office constituted as the corporation sole;

**disposition**,

- (a) except in section 64, means any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, disclaimer, appointment, settlement or other assurance, and includes the creation of an easement, *profit à prendre*, or any other interest in property and the creation of a trust in the lifetime of the settlor or by will, and a devise, bequest or appointment by will in respect of property;
- (b) in section 64, has the meaning given to that term by that section;

**discharge sum** means the sum nominated by a vendor mortgagee under section 161, in respect of land or goods, or both, proposed to be sold, upon payment of which the vendor mortgagee will become bound to discharge the mortgage over the land or goods, or both;

**encumbrance** includes a mortgage, a trust securing the payment of money or a lien;

**former mortgagor**, in relation to mortgaged property, means a mortgagor who has ceased to be the owner of the property but remains personally liable to the mortgagee for the payment of money or the performance of obligations secured by the mortgage;

**goods** means tangible personal property other than

- (a) chattel paper, or
- (b) a document of title to goods, or
- (c) a negotiable instrument, or
- (d) a security, or
- (e) money;

and includes crops and the unborn young of animals, but does not include trees until they are severed or minerals until they are extracted;

**income**, when used with reference to land, includes rents and profits;

**instrument** means a writing, including an enactment, which creates or affects legal or equitable rights or liabilities, and includes any covenant expressed in an instrument or implied in an instrument under this or any other enactment, and, except where otherwise provided, any variation of an instrument;

**joint tenants**, in part 9, includes tenants in common;

**land** includes all estates and interests, whether freehold or chattel, in real property;

**land under the *Land Transfer Act 1952*** means all land referred to in section 10 of that Act, and **land not under the *Land Transfer Act 1952*** means all other land to which this Act applies;

**lease**

- (a) means a lease of property, whether registered or unregistered, and includes a short term lease and an agreement to lease, and,
- (b) in sections 180, 203 to 214 and 219, has the extended meaning given to that term by section 175;

**lessee**

- (a) means a person who enters into a lease as lessee, and includes a person who has accepted a transfer or assignment of a lease, and,
- (b) in sections 180, 203 to 214 and 219, has the extended meaning given to that term by section 175;

**lessor**

- (a) means a person who enters into a lease as lessor, but if there has been a transfer or assignment of the reversion expectant on the lease, **lessor** means a person who has accepted that transfer or assignment, and,
- (b) in sections 180, 203 to 214 and 219, has the extended meaning given to that term by section 175;

**mortgage** includes

- (a) any charge over property for securing the payment of money or the performance of an obligation, and
- (b) any registered mortgage, and
- (c) any mortgage arising under a mortgage debenture;

**mortgage debenture** means an instrument creating a charge on property of a body corporate, that property being all, or substantially all, of the assets of the chargor body corporate;

**mortgagee** means a person to whom a mortgage is given as mortgagee, but, if the mortgage has been assigned in accordance with section 83, **mortgagee** means the assignee of the mortgage for the time being;

**mortgagee in possession** means a mortgagee who has exercised a power to enter into possession of mortgaged land or goods in accordance with section 115;

**mortgagor** means a person who

- (a) has given a mortgage over his or her property, or
- (b) has accepted, subject to a mortgage, a transfer, assignment or transmission of mortgaged property;

**occupier**, in relation to land,

- (a) in subpart 2 of part 10, subparts 2 and 3 of part 11 and schedule 6,
  - (i) means a person who is in occupation of the land under a lease, or a licence to occupy the land in consideration of rent or a payment in the nature of rent, for a term of not less than 10 years certain or a renewal, for a term of any length, of such a lease or licence, or under a lease validated under section 178, or who remains in occupation of the land, with the consent of the lessor, after the term of a lease or licence referred to in this paragraph, or any renewal of it, has expired, or,
  - (ii) if there is no such occupier and there is a mortgagee in possession, means that mortgagee in possession, or,
  - (iii) if there is no such occupier or mortgagee in possession and a receiver appointed by the mortgagee is exercising powers to manage the land or demand and recover income from it, means that receiver;

but does not include any other person for the time being occupying the land;

- (b) in subpart 1 of part 11, has the meaning given to that term by paragraph (a) except that the reference to a lease or licence for a term of not less than 10 years certain is to be read,

- (i) in relation to land of an applicant, as a reference to a lease or licence for a term of not less than one year certain, and
  - (ii) in relation to neighbouring land, as a reference to a lease or licence for a term of any length;
- (c) in subpart 4 of part 11, has the meaning given to that term by paragraph (a), except that the reference to a lease or licence for a term of not less than 10 years certain is to be read as a reference to a lease or licence for a term of not less than one year certain;

**Official Assignee** means an Official Assignee or Deputy Assignee appointed under the *Insolvency Act 1967* and having charge of a bankrupt person's estate and includes an appointee within the meaning of section 159 of that Act;

**overseas company** means a body corporate that is incorporated outside New Zealand;

**owner**, in subpart 2 of part 10 and in part 11, in relation to land, means

- (a) the holder of an estate in fee simple or a life interest in that land, or
- (b) the holder of a licence to occupy that land within the meaning of section 121A of the *Land Transfer Act 1952*, or
- (c) the holder of a deferred payment licence within the meaning of section 65 of the *Land Act 1948*;

and, in relation to a public reserve, includes the local authority, trustees, or persons having control of the reserve;

**periodical payment** means a payment that

- (a) is payable by a person to any other person (whether or not in respect of a fixed or ascertainable period), and
- (b) is in the nature of income (and not in the nature of an instalment of a purchase price, repayment of capital or capital gain) in the hands of the recipient,

whether the payment is described as a rent, rentcharge, salary, pension, bonus, dividend, interest, outgoing or otherwise, but does not include an annual sum payable to a person entitled to it under a policy of assurance of any description;

**person bound**, except where the context otherwise requires, means an owner or occupier of land against whom an easement or a positive covenant or a restrictive covenant burdening the land is enforceable;

**person entitled**, except where the context otherwise requires, means an owner or occupier of land who is entitled to enforce an easement or a positive covenant or a restrictive covenant benefiting the land;

**person entitled to redeem**, in relation to mortgaged property, means any person with an interest in the mortgaged property and entitled to redeem it, and includes the current mortgagor, any former mortgagor and any covenantor;

**positive covenant** means a covenant, including a covenant expressed or implied in an easement, under which the covenantor undertakes to do something in relation to the covenantor's land which would beneficially affect the value of the covenantee's land or the enjoyment of that land by any person occupying it;

**property**

- (a) means everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property, and includes any estate or interest in property, and,
- (b) in section 64, has the extended meaning given to that term in that section;

**receiver** means a receiver, or a manager, or a receiver and manager in respect of any property appointed

- (a) by or under any deed or agreement, or
  - (b) by a court in the exercise of a power conferred on the court or in the exercise of its inherent jurisdiction,
- whether or not the person appointed is empowered to sell any of the property in receivership; but does not include a mortgagee in possession or the agent of a mortgagee in possession;

**redeem**, in relation to mortgaged property, includes the right to have the property discharged from a mortgage over that property, and **equity of redemption** has a corresponding meaning;

**registered**,

- (a) in relation to an instrument concerning land under the *Land Transfer Act 1952*, means registered under that Act;
- (b) in relation to an instrument concerning land that is not under the *Land Transfer Act 1952*, means registered under the *Deeds Registration Act 1908*;
- (c) in relation to an instrument concerning a ship, means registered in Part A of the New Zealand Register of Ships established under the *Ship Registration Act 1992*;
- (d) in relation to an instrument concerning personal property other than a ship, means recorded in a financing statement registered in the Register of Personal Property Securities set up under the *Personal Property Securities Act 1999*;

and **register**, **registrable**, **registration** and **unregistered** have corresponding meanings;

**Registrar,**

- (a) in sections 38, 98, 136, 146, 148, 153, 159, 160, 161, 162, 163, 164, 166, 167 and 168, except where the context otherwise requires, means the Registrar of the High Court, and in sections 100 and 102, means the Registrar of the court by which the matter falls to be determined;
- (b) in sections 128, 137, 139 and 144,
  - (i) in relation to a company or an overseas company, means the Registrar of Companies appointed in accordance with section 357(1) of the *Companies Act 1993*;
  - (ii) in relation to a society registered under the *Industrial and Provident Societies Act 1908*, means the Registrar of Industrial and Provident Societies;
  - (iii) in relation to a society registered under the *Incorporated Societies Act 1908*, means the Registrar of Incorporated Societies;
  - (iv) in relation to a friendly society or a credit union registered under the *Friendly Societies and Credit Unions Act 1982*, means the Registrar of Friendly Societies and Credit Unions;
  - (v) in relation to any other body corporate registered under an enactment, means a person discharging the powers, functions and duties of a registrar under that enactment;

**rentcharge** means a rent secured by a mortgage over land;

**restrictive covenant** means

- (a) a covenant, including a covenant expressed or implied in an easement, under which the covenantor undertakes to refrain from doing something in relation to the covenantor's land which, if done, would detrimentally affect the value of the covenantee's land or the enjoyment of that land by any person occupying it, or
- (b) a restrictive covenant in gross expressed or implied in an easement;

**ship** means a ship registered in Part A of the New Zealand Register of Ships established under the *Ship Registration Act 1992*, and includes any share of a ship;

**short term lease** has the meaning given to that term by section 176;

**signed**, in relation to a body corporate, means executed by the body corporate as provided in section 9(4) or signed on behalf of the body corporate by a person acting under its express or implied authority;

**structure**,

- (a) in part 11, means any building, driveway, path, retaining wall, fence, plantation or other improvement, and
- (b) in subpart 2 of that part, has the extended meaning given to that term by section 237;

**superior lease** means a lease in respect of which a sublease is entered into;

**territorial authority**, in relation to land, means the territorial authority (within the meaning of the *Local Government Act 1974*) of the district in which the land is situated;

**vehicular right of way** means an easement entitling the owner or occupier of the land benefited by the easement to pass with vehicles over the land burdened by the easement, such easement having been created by

- (a) an instrument registered under the *Land Transfer Act 1952*, or
- (b) a contract or arrangement that is otherwise enforceable at law or in equity against the person bound;

**vendor mortgagee** means a mortgagee who applies to the Registrar under section 160 to conduct the sale of mortgaged land or goods, or both;

**working day** means any day of the week other than

- (a) Saturday, Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, and Labour Day;
- (b) a day in the period commencing with 25 December and ending with 5 January in the following year;
- (c) the day observed as the anniversary of any province in which an act is to be done.

Definitions: **High Court, person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 2

#### 4 Interpretation

- (1) A reference in this Act to a person who acquires, claims, or derives title to, property through some other person includes a person to whom an estate or interest in land under the *Land Transfer Act 1952* passes under section 41 of that Act on the registration of an instrument and who thereby succeeds to the estate or interest in the land previously held by that other person, either directly or after the estate or interest has passed to one or more intermediate successors.
- (2) A reference in this Act to the date of the coming into operation of an instrument means,
  - (a) in the case of a will, the date of death of the person who made the will, and,
  - (b) in the case of an enactment, the date on which the enactment comes into force, and,
  - (c) in any other case, the date on which the instrument is first executed by one of the parties to it.

- (3) A reference in this Act to the coming into operation of an obligation not made in writing means the date on which the obligation is entered into.

Deinitions: **land, land under the *Land Transfer Act 1952*, instrument, property, registration, s 3; person, *Acts Interpretation Act 1924* s 4**

See also: *Land Transfer Act 1952* s 41

#### 5 **Attorney or agent may act**

Except as provided in sections 259 and 260 and in clause 7 of schedule 1, anything which a person is required or authorised to do or to suffer by a provision of this Act may be done or suffered by that person's duly authorised attorney or other agent.

Deinitions: **person, *Acts Interpretation Act 1924* s 4**

#### 6 **Crown bound**

This Act binds the Crown.

#### 7 **Application of Act**

- (1) Except as otherwise provided, this Act applies to
- (a) all land in New Zealand, and
  - (b) other property wherever situated, and
  - (c) instruments wherever executed, and whether coming into operation before or after this Act comes into force,
- to the extent that the law of New Zealand governs any matter in relation to that land or property or those instruments for which this Act provides.
- (2) This Act does not apply to land having the status of Maori customary land under *Tē Ture Whenua Māori Act 1993*.
- (3) In the event of an inconsistency between a provision of this Act and a provision of any other enactment, that other enactment prevails, except as otherwise provided.

Deinitions: **instrument, land, property, s 3**

See also: ss 4(2) and 264

#### 8 **Provisions having effect only in relation to land not under the *Land Transfer Act 1952***

The provisions set out in schedule 1 have effect in relation to, and only in relation to,



- (a) land not under the *Land Transfer Act 1952* (not being land owned by the Crown), and
- (b) instruments relating to such land.

Definitions: **instrument, land, land not under the *Land Transfer Act 1952***, s 3

Origin: 1952/51 s 3

See also: *Land Transfer Act 1952* s 10

## PART 2 DEEDS AND OTHER INSTRUMENTS

### 9 Requirements of a deed

- (1) The only requirements for the execution and the delivery of a deed, whether or not it relates to property, are those set out in this section.
- (2) A deed must be in writing.
- (3) An individual person must execute a deed by signing it, and the signature must be witnessed as required by subsection (6).
- (4) A body corporate must execute a deed in one of the following ways:
  - (a) notwithstanding anything to the contrary in any other enactment, a deed may be signed in the name of the body corporate
    - (i) by two or more directors of the body corporate, or
    - (ii) if there is only one director, by that director, or
    - (iii) if the constitution of the body corporate so provides, by one director, or other person or member of a specified class of persons,and must be witnessed if so required by subsection (6);
  - (b) a deed may be executed by the body corporate as provided in any other enactment relating to the execution of a deed by the body corporate;
  - (c) a deed executed by a body corporate not incorporated by or under the law of New Zealand may be executed in any manner other than those set out in paragraphs (a) and (b) which would be authorised by the law of the place in which the body corporate is incorporated if the deed were executed in that place and were governed by that law.
- (5) A deed must be executed by the Crown by signature on behalf of the Crown by one or more Ministers of the Crown or other officers or servants of Her Majesty the Queen in right of New Zealand having express or implied authority to sign the deed on behalf of the Crown, and must be witnessed if so required by subsection (6).

- (6) The signing of a deed in accordance with subsection (4)(a) or subsection (5), by an individual person, or by one person only on behalf of a body corporate or of the Crown, must be witnessed by at least one other person who is not a party to the deed. Each witness must sign the deed and, if the signing takes place in New Zealand, must add the name of the city, town or locality where he or she lives and his or her occupation or description, but no particular form of words is required.
- (7) A deed is binding when delivered by the person to be bound by it or by another person having express or implied authority to deliver it on behalf of the person to be bound by it, that is to say
- (a) when it is apparent from the circumstances that the person sought to be bound by the deed intended to be bound by it, or,
  - (b) if the binding force of the deed was subject to the fulfilment of one or more conditions, when each of those conditions has been fulfilled.
- (8) A deed which has been delivered enters into force on the date provided in the deed, or, in the absence of any such provision,
- (a) on delivery, if the deed was delivered unconditionally, or,
  - (b) on the occurrence of the circumstance in which the person bound by the deed contemplated that it would enter into force, if the deed was delivered in escrow.
- (9) The rule that a deed becomes invalid if there has been a material alteration to it after its execution is abolished, but the abolition of that rule does not validate any such alteration if it is invalid on any ground other than that rule.
- (10) An attorney executing a deed on behalf of an individual person or a body corporate or the Crown must be appointed by deed.

Definitions: **deed, director, property, signed**, s 3; **writing, person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 4 and 5

### 10 Obligations entered into by bodies corporate

- (1) This section applies to any contract or other obligation entered into by a body corporate if
- (a) the body corporate is incorporated by or under the law of New Zealand, or
  - (b) the contract or other obligation is entered into in New Zealand, or
  - (c) the proper law of the contract or other obligation is the law of New Zealand.

- (2) Notwithstanding anything to the contrary in any other enactment, a contract or other obligation to which this section applies may be entered into as follows:
- (a) if it would, by New Zealand law, be required to be by deed if entered into by an individual person, it may be entered into by a deed or instrument executed by the body corporate as provided in section 9(4);
  - (b) if it would, by New Zealand law, be required to be in writing if entered into by an individual person, it may be entered into on behalf of the body corporate in writing by a person acting under the express or implied authority of the body corporate;
  - (c) if it would not, by New Zealand law, be required to be in writing if entered into by an individual person, it may be entered into on behalf of the body corporate in writing or orally by a person acting under the express or implied authority of the body corporate.

Definitions: **deed, instrument**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

See also: ss 38, 39 and 41

### 11 Construction of supplementary or annexed deed

A deed expressed to be supplementary to a previous deed or directed to be read as an annex to a previous deed is to be read, and has effect, as if it were endorsed on the previous deed or contained a full recital of that deed.

Definitions: **deed**, s 3

Origin: 1952/51 s 8

### 12 Receipt in body of deed

For the avoidance of doubt, a receipt contained in the body of a deed is as valid and effectual in all respects as a receipt endorsed on a deed, and any rule of law to the contrary is abolished.

Definitions: **deed**, s 3

Origin: 1952/51 s 6

### 13 Powers of appointment

- (1) An appointment to be made by deed or writing (other than a will) is not valid unless it is executed in accordance with the requirements for the execution of a deed.
- (2) The exercise of a power of appointment in the manner required by subsection (1) is a valid exercise of that power notwithstanding the fact

that the instrument conferring the power may have required some other or additional formality.

Definitions: **deed, instrument**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 9 and 11

#### 14 Disclaimers

A disclaimer of land is not valid unless it is made by deed or by order of a court.

Definitions: **court, deed, land**, s 3

Origin: 1952/51 s 12

#### 15 Specific performance of voluntary promises made by deed

- (1) A court may make an order for the specific performance of a voluntary promise made by deed, and cannot refuse to do so on the ground that there was no valuable consideration for the promise.
- (2) This section applies only to deeds coming into operation on or after — 199- [date on which this Act comes into force].

Definitions: **court, deed**, s 3

See also: s 4(2)

#### 16 Powers of attorney

- (1) Subject to compliance with subsection (2), and, where applicable, with section 9(10), anything done or suffered by an attorney on behalf of the donor of a power of attorney that is within the attorney's powers and is done or suffered while the power of attorney continues in force is as effectual in law as if it had been done or suffered by the donor.
- (2) An instrument executed by an attorney on behalf of the donor of a power of attorney must be made in the name of the donor and must state that it is being executed on the donor's behalf by the donor's attorney, but otherwise must be executed by the attorney in the same manner as would be required if the attorney were a party to the instrument.

Definitions: **instrument**, s 3

Origin: 1952/51 s 134

#### 17 Continuation in force of power of attorney until notice of revocation received

- (1) Unless it provides otherwise, a power of attorney continues in force until notice of an event revoking the power has been received by the attorney.

- (2) A person dealing with an attorney in good faith, and without notice of an event revoking the power of attorney, and any other person who, in good faith, claims through the first-mentioned person, may rely on a certificate of non-revocation of the power of attorney in the form set out in schedule 2 as conclusive proof of the non-revocation of the power of attorney as at the date of the certificate, if the certificate
- (a) is signed by the attorney, or, if the attorney is a body corporate, by a director or officer of the body corporate or a person acting on behalf of the body corporate in some other capacity, and
  - (b) is given immediately before, or at any time after, the doing of a thing by the attorney.
- (3) A person who gives a certificate of non-revocation in accordance with subsection (2) that falsely states that that person, or that, to the best of that person's knowledge and belief, any other person, has not received notice of an event revoking a power of attorney, knowing that statement to be false, commits an offence and is liable on conviction to a fine not exceeding \$5000.

Definitions: **director, signed**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 135 and 139

### 18 Irrevocable powers of attorney

- (1) This section applies to a power of attorney that is expressed in the instrument by which it is given to be irrevocable, or irrevocable for a fixed period.
- (2) A power of attorney to which this section applies and which is given for valuable consideration is not revoked by notice of an event which would otherwise revoke a power of attorney, if that notice is received by the attorney at any time, in the case of an irrevocable power, or, in the case of a power that is irrevocable for a fixed period, during that period.
- (3) A power of attorney to which this section applies and which is not given for valuable consideration is not revoked by notice of an event which would otherwise revoke a power of attorney if that notice is received by the attorney during the period of one year after the date of the instrument, or any shorter period for which the instrument is expressed to be irrevocable.

Definitions: **instrument**, s 3

Origin: 1952/51 ss 136 and 137

### 19 Construction of instruments

In an instrument, unless the context otherwise requires,

- (a) “month” means a calendar month;
- (b) “person” or any term descriptive of a person includes a body corporate;
- (c) words denoting a gender include each other gender;
- (d) words in the singular include the plural, and words in the plural include the singular.

Definitions: **instrument**, s 3

Origin: 1952/51 ss 13 and 70

PART 3  
ABOLITION OR MODIFICATION OF COMMON LAW  
RULES AFFECTING PROPERTY

**20 Feudal incidents of an estate in fee simple abolished**

It is declared that

- (a) a Crown grant of land, or a certificate of title having the force and effect of a Crown grant of land, issued before or after this Act comes into force for an estate in fee simple confers on the person named in the Crown grant or the certificate of title a right of freehold tenure (free and common socage) without any incident of tenure for the benefit of the Crown;
- (b) an estate in fee simple is transferable, and has always been transferable, without the permission of the Crown or the need to make any payment to the Crown;
- (c) an instrument purporting to create, transfer or assign an estate in fee simple in any land subject to the reservation to the person executing the instrument of an estate in fee simple (subinfeudation) continues to create, transfer or assign an estate in fee simple without any such reservation.

Definitions: **instrument, land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Quia Emptores 1289-90*

See also: s 25(1)

**21 Abolition of obsolete estates and rules**

- (1) The following are declared to have been abolished:
  - (a) estates tail and estates by wrong;
  - (b) the making of a forfeiture by any conveyance;
  - (c) the passing of the legal estate in any land by any of the following means:
    - (i) a covenant to stand seized;

- (ii) livery of seisin;
  - (iii) a contract for the sale and purchase of land;
  - (d) the rule of law known as the rule in *Shelley's* case.
- (2) In an instrument coming into operation on or after 1 January 1953 (the date of the abolition of estates tail by the *Property Law Act 1952*), words which, before that date, would have created an estate tail are to be taken as creating an estate in fee simple.
- (3) Words in an instrument which, but for the abolition of the rule of law known as the rule in *Shelley's* case, would have operated to give a person an interest in fee simple are to operate as words of purchase and not of limitation.

Definitions: **conveyance, covenant, instrument, land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 15-17 and 22

See also: s 4(2)

## 22 Future estates and interests

Estates and interests in property taking effect at a future time may be created within the limits of the rule against perpetuities as modified by the *Perpetuities Act 1964*.

Definitions: **property**, s 3

Origin: 1952/51 ss 18 and 19

## 23 Doctrine of *interesse termini* abolished

The legal doctrine of *interesse termini*, relating to leases for a term to begin on a future date, is abolished.

Definitions: **lease**, s 3

## 24 Life estate in a leasehold estate

An estate for life may be created in respect of a leasehold estate in land.

Definitions: **land**, s 3

Origin: 1952/51 s 19

## 25 Creation and disposition of estates and interests in property

- (1) Every estate, interest or right in property that a person is capable of creating or disposing of may be created or disposed of either during that person's lifetime or by will.

- (2) Subsection (1) does not make a joint tenancy severable by will.

Definitions: **disposition, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Wills Act 1837* s 3; 1952/51 s 21

## 26 Contingent remainders and interests

- (1) In this section, a **contingent remainder** or **contingent interest** means a remainder or interest which depends upon
- (a) a future event which may or may not occur, or
  - (b) a condition which may or may not be fulfilled.
- (2) A contingent remainder or contingent interest in land may follow a leasehold estate in that land.
- (3) A contingent remainder or contingent interest in land, expressed to take effect upon the ending of a preceding estate in that land, does not become void only because the preceding estate ends before the occurrence of the event or the fulfilment of the condition upon which the contingent remainder or contingent interest depends.
- (4) Different estates in land vested in the same person do not merge if those estates are separated by the contingent remainder or contingent interest in that land of some other person.

Definitions: **land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 20

## 27 When gifts over cease to be capable of taking effect

- (1) When a person is entitled to an estate or interest in land, subject to a gift over to any other person if the first-mentioned person has no issue, or no issue of a specified class (whether or not at any specified time or within any specified period), the gift over ceases to be capable of taking effect as soon as there is issue, or a member of the specified class of issue, who attains the age of 20 years, notwithstanding that, in either case, issue may subsequently fail.
- (2) In this section, **gift over** includes a gift over expressed to take effect upon the ending of an estate or interest preceding that of the person whose estate or interest is subject to the gift over.

Definitions: **land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 23

See also: *Wills Act 1837* s 29



**28 Meaning of “heirs” and similar words**

- (1) This section
  - (a) applies to an instrument coming into operation on or after 1 January 1953 (being the date on which the *Property Law Act 1952* came into force), and
  - (b) has effect subject to the terms of the instrument.
- (2) Words in an instrument to which this section applies, conferring an estate or interest in property on
  - (a) the heir or heirs of a person, or
  - (b) the next of kin of a person, or
  - (c) the next of kin of a person to be determined in accordance with the *Administration Act 1969*, or
  - (d) the family of a person, or
  - (e) the relatives of a person,or words to the like effect are to be construed as conferring that estate or interest on the persons who, on the intestacy of that person, would take beneficially under the *Administration Act 1969*, and in the same shares.
- (3) Words in an instrument to which this section applies conferring an estate or interest in property on the heir or heirs of the body of a person are to be construed as conferring that estate or interest on the issue of the person who would take beneficially on the intestacy of that person in accordance with a direction under the *Administration Act 1969* to hold that person's property for the issue of the intestate on the statutory trusts.
- (4) Words in an instrument to which this section applies conferring any estate or interest in any property on
  - (a) the male heir or heirs of a person or of the body of a person, or
  - (b) the female heir or heirs of a person or of the body of a person,are to be construed as conferring that estate or interest on the male issue of that person or the female issue of that person, as the case requires, who would take beneficially on the intestacy of that person in accordance with a direction under the *Administration Act 1969* to hold that person's property for the issue of the intestate on the statutory trusts.

Definitions: **instrument, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 37 and 38

See also: s 4(2); *Adoption Act 1955* s 16(2); *Administration Act 1969* s 80; *Status of Children Act 1969* s 3(2); *Te Ture Whenua Maori Act 1993* s 107(3)

**29 Future interests to carry accumulated income**

An interest in property to take effect at a future time, created by an instrument coming into operation on or after 1 January 1953 (being the date on which the *Property Law Act 1952* came into force), carries the income from that property which accumulates during the period between the date on which the instrument comes into operation or any preceding interest ends (whichever is the later) and the date on which the future interest takes effect, unless that instrument makes some other provision for the disposition of that income during that period.

Definitions: **disposition, income, instrument, property**, s 3

Origin: 1952/51 s 35

See also: s 4(2)

**30 Vendor's lien taken away**

A vendor of land has no legal or equitable lien over the land by reason of the non-payment of any purchase money.

Definitions: **land**, s 3

Origin: 1952/51 s 28

**31 Voluntary or equitable waste by a life tenant or lessee**

- (1) A life tenant or a lessee of land is liable in damages to the person entitled to the reversion or remainder expectant on the estate for life or the lease for the tort of voluntary waste and the tort of equitable waste, unless that liability is excluded by an express or implied term of the grant of the estate for life or the lease, as the case requires.
- (2) Where a grant or lease referred to in subsection (1) excludes liability for waste or for voluntary waste, the life tenant or lessee remains liable for equitable waste, unless the grant or lease expressly provides to the contrary.

Definitions: **land, lease, lessee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *The Statute of Marlborough 1267*

**32 Voluntary or equitable waste by a co-owner**

A co-owner of land is liable in damages to every other co-owner for loss arising from any act or omission which would be the tort of voluntary waste or the tort of equitable waste if done or omitted by a life tenant or a lessee.

Definitions: **co-owner, land, lessee**, s 3

**33 Permissive waste abolished**

The tort of permissive waste is abolished.

**34 Release of part of land from rentcharge**

- (1) Where an encumbrance over land secures a rentcharge, and is released in respect of part only of the land, the rentcharge remains secured by the encumbrance over the residue of the land.
- (2) Where the owner of the residue of the land which remains subject to the encumbrance is not the owner of the part released and has not consented to the release, the owner of the residue is entitled, in respect of the rentcharge, to the same contribution from the owner of the part released as would have been payable by that owner if there had been no release.

Definitions: **encumbrance, land, rentcharge**, s 3

Origin: 1952/51 s 31

See also: *Land Transfer Act 1952* s 111

**35 Bodies corporate may hold property as joint tenants**

- (1) A body corporate which has the power to acquire and hold property may acquire and hold property as a joint tenant with one or more individual persons or other bodies corporate.
- (2) Where a body corporate is a joint tenant of property, then if,
  - (a) in the case of a company, it is removed from the New Zealand register, or,
  - (b) in the case of an overseas company registered under Part XVIII of the *Companies Act 1993*, it is removed from the overseas register, or,
  - (c) in any other case, it ceases to exist,the property devolves on the surviving joint tenant.

Definitions: **company, overseas company, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 32

**36 Release and disclaimer of powers**

- (1) This section applies to a power to deal with or dispose of property, whether or not the power is coupled with an interest (that is to say, whether or not the person having the power has an interest in the property to which the power relates), but does not apply to a power coupled with a duty (that is to say, to a power in the nature of a trust).

- (2) A person having a power to which this section applies
- (a) may release the power by deed or by contract, or
  - (b) may disclaim the power by deed.
- (3) The release of a power to which this section applies extinguishes the power.
- (4) On the disclaimer of a power to which this section applies,
- (a) the person who disclaimed the power may not exercise or join in the exercise of the power; but,
  - (b) unless the instrument creating the power provides otherwise, any other person to whom the power was given and who has not disclaimed it may continue to exercise the power.

Definitions: **deed, instrument, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 34

### 37 Appointments may be made among different objects

- (1) Where an instrument creates a power to appoint property among several objects, the power may be exercised so as to exclude any one or more of those objects or to appoint shares of differing sizes to any one or more of them.
- (2) This section has effect subject to the terms of the instrument creating the power.

Definitions: **instrument, property**, s 3

Origin: 1952/51 s 40

## PART 4 FORM AND EFFECT OF CERTAIN TRANSACTIONS RELATING TO LAND AND OTHER PROPERTY

### *Subpart 1—Writing required in certain cases*

### 38 Writing required for enforcement of contracts relating to land

- (1) A contract for the disposition of land is enforceable in a proceeding only if
- (a) the contract is in writing or there is a written memorandum of its terms, and
  - (b) the contract or the written memorandum is signed by the party against whom the contract is sought to be enforced.
- (2) This section does not apply to
- (a) a short term lease, or

(b) a sale of land by order of a court or through the Registrar.

Definitions: **court**, **disposition**, **land**, **Registrar**, **short term lease**, **signed**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1956/23 s 2

See also: s 40

### 39 Writing required for certain dispositions of interests in land

- (1) A disposition of
  - (a) an existing interest in land acquired by taking possession of the land, or
  - (b) an existing equitable interest in land, or
  - (c) an existing equitable interest in a mixed fund consisting partly of land and partly of other property
 must be made in writing signed by the person making the disposition.
- (2) A trust in respect of land taking effect in the lifetime of the settlor of the trust must be created in writing signed by the settlor.
- (3) This section does not apply to a short term lease.
- (4) This section does not affect
  - (a) the creation or operation of a resulting, implied or constructive trust, or
  - (b) the making or operation of a will, or
  - (c) the disposition of any interest in land by operation of law.

Definitions: **disposition**, **land**, **property**, **short term lease**, **signed**, s 3; **person**, **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 49A

### 40 Doctrine of part performance not affected

Sections 38 and 39 do not affect the operation of the law relating to part performance.

### 41 Writing required for contracts of guarantee

- (1) This section applies to contracts of guarantee coming into operation on or after — 199- [date on which this Act comes into force].
- (2) A contract of guarantee to which this section applies must be made in writing, and be signed by the guarantor; but this subsection does not require the consideration for a contract of guarantee to be in writing or to appear by necessary implication from a writing.

- (3) In this section, **contract of guarantee** means a contract by a person to answer to another person for the debt, default or liability of a third person.

Deinitions: **default, signed**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1956/23 ss 2 and 3

See also: s 4(2)

*Subpart 2—Assignment of things in action*

**42 Deinitions for the purposes of subpart 2**

In this subpart,

**absolute**, in relation to the assignment of a thing in action, means not conditional or by way of charge only;

**assignment** includes an instrument effecting or relating to an assignment;

**debt** includes an obligation to pay money or to deliver or transfer property or to do or refrain from doing any other thing; **debt owing** includes any such obligation that is due to be performed; **payment of a debt** includes the performance of any such obligation; and **debtor** has a corresponding meaning and includes a trustee;

**thing in action** means a right to receive payment of a debt, and includes part of a thing in action.

Deinitions: **instrument, property**, s 3

Origin: 1952/51 s 130

**43 Application and effect of subpart 2**

- (1) This subpart applies to an assignment of a thing in action made on or after — 199- [date on which this Act comes into force].
- (2) Except as provided in section 46, this subpart does not make assignable a thing in action that is not capable of being assigned.
- (3) This subpart does not affect the operation of section 15.
- (4) If an assignment is of part only of a thing in action, the rights and obligations under this subpart of the assignor, the assignee and the debtor relate only to the part assigned.

Deinitions: **assignment, debtor, thing in action**, s 42

Origin: 1952/51 s 130

**44 How a thing in action is assigned**

- (1) Whether or not the assignee has given valuable consideration, the absolute assignment in writing of a legal or equitable thing in action, signed by the assignor, passes to the assignee
  - (a) all the rights of the assignor in respect of the thing in action, and
  - (b) all the remedies of the assignor in respect of the thing in action, and
  - (c) the power to give a good discharge to the debtor, subject, however, to section 45, and to any equities in respect of the thing in action that arise before the debtor has actual notice of the assignment and would, but for this subsection, have priority in relation to the rights of the assignee.
- (2) Notwithstanding any rule of equity to the contrary, but subject to sections 38 and 39, a legal or equitable thing in action is to be treated as having been assigned in equity, whether the assignment is oral or in writing, if
  - (a) the assignee has given valuable consideration, or
  - (b) the assignment is complete.
- (3) An assignment referred to in subsection (2) is complete when the assignor has done everything needing to be done by the assignor to transfer to the assignee (whether absolutely, conditionally, or by way of charge) the rights of the assignor in respect of the thing in action, even though some other thing may remain to be done, without the intervention or assistance of the assignor, in order to confer title to those rights on the assignee.

Definitions: **signed**, s 3; **absolute, assignment, debtor, thing in action**, s 42; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 130

**45 Further consequences of assignment of a thing in action**

- (1) On the assignment of a thing in action, in accordance with section 44(1) or in equity,
  - (a) payment of all or part of the debt to the assignor by a debtor who does not have actual notice of the assignment discharges the debtor to the extent of that payment;
  - (b) the debt owing by a debtor who has actual notice of the assignment is payable to the assignee, but if
    - (i) the debtor, before discharge, receives actual notice of the assignment of the same thing in action to another assignee, and
    - (ii) the rights of that other assignee in respect of the thing in action have priority over the rights of the first-mentioned assignee, the debt is payable to that other assignee;

- (c) a debtor who has actual notice
- (i) that an assignment of a thing in action is disputed by the assignor or anyone claiming under the assignor, or
  - (ii) that there are other opposing or conflicting claims in respect of a thing in action
- may interplead in any proceeding brought against the debtor for the payment of the debt, or apply to a court for an order determining the entitlement to any right in respect of the thing in action.
- (2) The registration of an assignment under an enactment does not, in itself, give actual notice of the assignment to the debtor, notwithstanding anything to the contrary in that enactment.
- (3) Joint debtors have actual notice of the assignment of a thing in action, or of any other matter referred to in subsection (1), if any one of them has actual notice of that assignment or matter.
- (4) The assignor must be joined in any proceeding brought by the assignee against the debtor if
- (a) part only of a thing in action has been assigned in accordance with section 44(1), or
  - (b) there has been an assignment in equity only of all or part of a thing in action.

Definitions: **court, registration**, s 3; **assignment, debt, debt owing, debtor, payment of a debt, thing in action**, s 42

Origin: 1952/51 s 130

#### 46 Assignment of moneys payable in the future

An assignment of money which will or may be payable in the future under a right already possessed by the assignor (whether the right arises before or after this Act comes into force) is to be treated as an assignment of a thing in action.

Definitions: **assignment, thing in action**, s 42

Origin: 1952/51 s 130

### *Subpart 3—Other transactions*

#### 47 Effect of a “no registration” clause

- (1) This section applies to an instrument creating a lease of land, a mortgage over land, an easement or a *profit à prendre* or a contract for the grant of an easement or a *profit à prendre* which
- (a) contains a no registration clause, and,



- (b) in the absence of the no registration clause, would create an equitable interest in land capable of being enforced under the doctrine in *Walsh v Lonsdale*.
- (2) For the avoidance of doubt, an instrument to which this section applies, whether coming into operation before or after this Act comes into force, is to be treated for all purposes as creating an equitable interest in land; but a court cannot order the registration of the lease, mortgage, easement or *profit à prendre* to which the instrument relates.
- (3) In this section, **no registration clause** means a provision that a lessee, mortgagee or grantee of an easement or *profit à prendre* is not to be entitled to a registered lease, mortgage, easement or *profit à prendre*, as the case requires, or a provision to the like effect.

Definitions: **court, instrument, land, lease, lessee, mortgage, mortgagee, registered**, s 3

See also: s 4(2)

#### 48 Tenants in common may declare that they are joint tenants

- (1) Two or more persons beneficially entitled to property as tenants in common may, by deed, declare that they will be joint tenants of that property.
- (2) Persons making a declaration in respect of property in accordance with subsection (1) are beneficially entitled to the property as joint tenants as from the date of the declaration.

Definitions: **deed, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 48

#### 49 Person may make a disposition of property to himself or herself

- (1) A person may make a disposition of an estate or interest in property to himself or herself, alone or jointly with some other person.
- (2) The disposition by a person of an estate or interest in property to himself or herself, alone or jointly with another person, is enforceable in the same manner as a disposition to another person.

Definitions: **disposition, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 49

See also: s 72

**50 Power to reissue redeemed debentures in certain cases**

- (1) Where, either before or after this Act comes into force, a company has redeemed any debentures previously issued, then,
- (a) unless any provision to the contrary, whether express or implied, is contained, in the case of a company under the *Companies Act 1955*, in the articles of the company, or, in the case of a company under the *Companies Act 1993*, in the constitution of the company, as the case requires, or in any contract entered into by the company, or
  - (b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures are cancelled,
- the company has, and is to be taken always to have had, power to reissue the debentures, either by reissuing the same debentures or by issuing other debentures in their place.
- (2) On a reissue of redeemed debentures, the debentures have, and are to be taken always to have had, the same priorities as they would have had if they had never been redeemed.
- (3) Where a company has, either before or after this Act comes into force, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures are not to be taken as having been redeemed by reason only of the account of the company having ceased to be in debit while the debentures remained so deposited.
- (4) The reissue of a debenture or the issue of another debenture in its place under this section, whether the reissue or issue was made before or after this Act comes into force, is to be treated as the issue of a new debenture for the purposes of stamp duty, if any, but it is not to be so treated for the purposes of any provision limiting the amount or number of debentures to be issued.

Definitions: **company, company under the *Companies Act 1955*, company under the *Companies Act 1993*, debenture**, s 3

Origin: 1952/51 s 151c

PART 5  
SALES AND LIKE TRANSACTIONS

*Subpart 1—General provisions*

**51 How vendor of land may regain possession**

- (1) If, under an agreement for the sale and purchase of land, the purchaser has entered into possession of the land, the vendor may exercise any right to cancel the agreement by reason of a breach of the agreement

- by the purchaser only by
- (a) obtaining from a court an order for possession of the land (in which case the agreement for sale and purchase is cancelled as from the date of the order or such later date as the order specifies), or
  - (b) resuming possession of the land peaceably (and without committing forcible entry under section 91 of the *Crimes Act 1961*), and then only after complying with subsection (2).
- (2) The vendor may not, in the exercise of any right to cancel an agreement for the sale and purchase of land, apply to a court for an order for possession of the land or resume possession of the land in the manner provided in subsection (1)(b) unless
- (a) the vendor has served on the purchaser a notice complying with section 52, and
  - (b) at the expiry of the period specified in the notice, the breach complained of has not been remedied.
- (3) This section does not prevent a vendor from claiming damages for the breach of an agreement for the sale and purchase of land, or for breach of any other duty to the vendor which the purchaser may be under independently of the agreement, or affect the amount which the vendor may claim by way of damages.
- (4) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **court, instrument, land**, s 3

Origin: 1952/51 s 50

See also: ss 259 and 260

## 52 Form of vendor's notice

- (1) The notice required by section 51(2) must adequately inform the purchaser
- (a) of the nature and extent of the breach complained of by the vendor;
  - (b) whether the vendor considers that the breach is capable of being remedied in any one or more of the ways referred to in paragraph (c) or (d);
  - (c) if the vendor considers that the breach is capable of being remedied by the payment of moneys owing under the agreement, of the amount which the vendor considers must be paid to remedy the breach;
  - (d) if the vendor considers that the breach is capable of being remedied by the purchaser doing or desisting from doing any thing, or paying reasonable compensation, or both,

- (i) of any thing which the vendor considers the purchaser must do or desist from doing, or
  - (ii) of the amount of compensation which the vendor considers reasonable,  
or both, in order to remedy the breach;
  - (e) whether or not the vendor considers that the breach is capable of being remedied, the period within which the purchaser must remedy the breach (if it is capable of being remedied), being not less than 12 working days after the date of service of the notice;
  - (f) of the consequence that, if at the expiry of the period specified in paragraph (e), the breach has not been, or cannot be, remedied, the vendor may seek to cancel the agreement in a manner specified in section 51;
  - (g) of the effect of subsection (2) of this section and of section 51(3);
  - (h) of the purchaser's right to apply to the court for relief against cancellation of the agreement under section 53 and the advisability of seeking legal advice on the exercise of that right.
- (2) The fact that the vendor
- (a) may not have specified that the breach is capable of being remedied by the payment of reasonable compensation, or
  - (b) may have specified an amount of compensation that is unreasonable, or
  - (c) may have specified that the breach would be capable of being remedied by the payment of reasonable compensation but without specifying the amount that the vendor considers reasonable
- does not invalidate the notice or prevent the purchaser from tendering an amount as reasonable compensation for the breach.

Definitions: **court, working day**, s 3

Origin: 1952/51 s 50

### **53 Relief against cancellation of agreement for the sale of land**

- (1) Relief against the cancellation of an agreement for the sale and purchase of land may be given only if, under the agreement, the purchaser has entered into possession of the land, and then only in exercise of the power conferred by this section.
- (2) If, after serving on the purchaser a notice complying with section 52, the vendor applies to a court for an order for possession of the land, or peaceably resumes possession of the land, the purchaser may apply to a court for relief against cancellation of the agreement
- (a) in the proceeding for an order for possession, or
  - (b) in a proceeding brought by the purchaser

- (i) before an order for possession has been made in the proceeding referred to in paragraph (a), or
- (ii) if the vendor has peaceably resumed possession of the land, within 3 months after the date on which the vendor resumed possession,
- and the court may grant such relief, on such conditions (if any) as it thinks fit.
- (3) The court may grant relief against the cancellation of an agreement for sale and purchase, notwithstanding that the cancellation is for breach of an essential term of the agreement or that the breach is not capable of being remedied.
- (4) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **court, instrument, land**, s 3

Origin: 1952/51 s 50

#### **54 Application for relief not to constitute an admission**

An application for relief under section 53 against the cancellation of an agreement for the sale and purchase of land is not in itself to be taken as an admission by the purchaser

- (a) that there has been a breach of the agreement by the purchaser, or
- (b) that, by reason of a breach, the vendor has the right to cancel the agreement, or
- (c) that a notice has been duly served on the purchaser in accordance with section 51(2), or
- (d) that, at the time when the vendor applied to a court for an order for possession of the land or peaceably resumed possession of the land, the period specified in the notice for the remedying of the breach (if it was capable of being remedied) had expired;

and the court may grant relief against the cancellation of the agreement without determining all or any of those things.

Definitions: **court, land**, s 3

Origin: 1952/51 s 50

#### **55 Purchaser may apply to recover deposit**

- (1) This section applies only to an agreement for the sale and purchase of land coming into operation on or after — 199- [date on which this Act comes into force].

- (2) If
- (a) a court has not ordered, and would not order, the specific performance by the purchaser of an agreement to which this section applies, but
  - (b) the purchaser is not entitled to cancel the agreement, the purchaser may apply to a court for relief under this section.
- (3) On such an application, the court may make all or any of the following:
- (a) an order cancelling the agreement;
  - (b) an order that the vendor must refund the deposit and any other moneys (including interest) paid to the purchaser under the agreement;
  - (c) an order declaring that the purchaser has a lien on the land to which the agreement relates to secure payment by the vendor of any amounts ordered to be refunded to the purchaser under this section.
- (4) The grant of relief under this section does not deprive the vendor of any right to claim damages from the purchaser for the failure to perform the agreement, and, in awarding damages, the court must take into account the relief so granted.
- (5) Any term expressed or implied in an agreement for sale and purchase to which this section applies and conflicting with this section is of no effect.

Definitions: **court, land**, s 3

See also: s 4(2)

#### **56 Waiver of contingent condition**

- (1) Where an agreement for the sale and purchase of property contains a contingent condition which was inserted for the exclusive benefit of a party to the agreement or a number of parties having the same interest, the party or parties for whose exclusive benefit the condition was inserted may waive the condition at any time before the agreement has been cancelled.
- (2) For the purposes of subsection (1), a contingent condition may be for the exclusive benefit of a party or a number of parties having the same interest even if, under the agreement, a party or parties having a different interest are also entitled to cancel the agreement for non-fulfilment of the condition.

Definitions: **property**, s 3

**57 Auction sales**

The provisions of section 59 of the *Sale of Goods Act 1908*, relating to the sale of goods by auction, apply, with all necessary modifications, to the sale by auction of every other kind of property.

Definitions: **goods, property**, s 3

Origin: 1952/51 s 51

**58 Purchaser of lease to assume that lease conditions have been observed**

Unless an agreement for the sale and purchase of a leasehold estate or interest in land provides otherwise, the vendor may satisfy the purchaser

- (a) that the vendor has paid all rent due under the lease and has performed and observed all covenants and conditions of the lease, and,
- (b) if the sale is of an interest under a sublease, that all rent due under every superior lease has been paid and all covenants and conditions of every superior lease have been performed and observed,

by producing a receipt for the payment of the instalment of rent under the lease or sublease last due before the date of settlement; and, on the production of that receipt, the purchaser must assume that those things have been done as at the date of settlement, unless the contrary appears.

Definitions: **covenant, land, lease, superior lease**, s 3

Origin: 1952/51 s 52

**59 Vendor's obligations where the certificate of title is limited**

- (1) Unless the agreement for sale and purchase provides otherwise, the vendor of land comprised in a certificate of title that was issued before the making of the agreement and, under Part XII of the *Land Transfer Act 1952*, is limited as to title must, before the date of settlement,
  - (a) do such acts, prove such matters and comply with such requisitions by the District Land Registrar, as are necessary to cause the certificate to cease to be limited as to title, and
  - (b) meet the expenses of complying with paragraph (a), including payment of any fee prescribed under the *Land Transfer Act 1952*.
- (2) Subsection (1) does not apply to a limitation in a certificate of title as to description of parcels.

Definitions: **land**, s 3

Origin: 1952/51 s 54

**60 Specific performance of contracts to subscribe for debentures**

A court may order the specific performance of a contract with a company to take up and pay for any debentures of the company, and cannot refuse to do so on the ground that the contract is one to lend money.

Definitions: **company, court, debenture**, s 3

Origin: 1952/51 s 151D

**61 Effect of court orders**

The title of a person who acquires property, for valuable consideration and without fraud or notice of fraud, from another person who became entitled to the property under an order of a court is not invalidated by reason of any defect in the jurisdiction or power of the court to make that order, or in the procedure followed in its making, whether or not the first-mentioned person had notice of the defect.

Definitions: **court, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 59

See also: *Land Transfer Act 1952* s 62; *Administration Act 1969* ss 24, 45 and 49

**62 Instrument containing receipt to be authority to pay solicitor**

- (1) This section applies to an instrument
  - (a) which contains a receipt for the payment of money or the giving of other consideration for a contract, or
  - (b) on which such a receipt is endorsed,the instrument or receipt being signed by a person entitled to give a receipt for the payment of that money or the giving of that other consideration.
- (2) On the production by a solicitor of an instrument to which this section applies, the person liable to pay the money or give the other consideration referred to in the receipt may pay that money or give that consideration to the solicitor without further authority than the instrument.

Definitions: **instrument, signed**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 56

See also: *Trustee Act 1956* s 29(3)(a)

*Subpart 2—Prejudicial dispositions***63 Purpose of subpart 2**

The purpose of this subpart is to enable a court to order that property acquired or received under or through certain prejudicial dispositions



of property made by a debtor, or the value of that property, be restored for the benefit of creditors, but no such order has effect so as to increase the value of any security held by a creditor over property of the debtor.

Definitions: **court, creditor, property**, s 3

Origin: 1952/51 s 60

#### 64 Definitions for the purposes of subpart 2 and interpretation

(1) In this subpart,

**disposition** has the same meaning as in section 2 of the *Insolvency Act 1967*;

**property** includes the proceeds of property;

**proceeds of property** means the proceeds of the sale or exchange of the property and, if property or its proceeds is money, includes property bought with that money.

(2) For the purposes of this subpart,

- (a) a disposition of property prejudices a creditor or creditors if it hinders, delays or defeats the creditor or creditors in the exercise of any right of recourse in respect of the property;
- (b) a disposition of property is not made with intent to prejudice a creditor or creditors if it is made with the intention only of preferring one creditor over another;
- (c) a disposition of property by way of gift includes a disposition made at an undervalue with the intention of making a gift of the difference between the value of the consideration for the disposition and the value of the property comprised in the disposition;
- (d) a debtor is to be taken as being insolvent if the debtor is unable to pay all his or her debts, as they fall due, from assets other than the property disposed of.

Definitions: **creditor**, s 3

Origin: 1952/51 s 60

#### 65 Application of subpart 2

This subpart applies to a disposition of property made by a debtor on or after — 199- [date on which this Act comes into force] with intent to prejudice a creditor or creditors, or by way of gift, or without receiving reasonably equivalent value in exchange, if the debtor

- (a) was insolvent at the time or became insolvent as a result of making the disposition, or
- (b) was engaged in, or was about to engage in, a business or transaction

- for which the remaining assets of the debtor were unreasonably small in relation to the nature of the business or transaction, or
- (c) intended to incur, or believed, or reasonably should have believed, that he or she would incur, debts beyond his or her ability to pay.

Definitions: **creditor**, s 3; **disposition, property**, s 64(1)

Origin: 1952/51 s 60

## **66 Dispositions of property with intent to prejudice creditors may be set aside**

A court, if satisfied that an applicant for an order under this section has been prejudiced by a disposition of property to which this subpart applies, may make an order directing any person who acquired or received property under the disposition, or through a person who acquired or received property under the disposition,

- (a) to restore such property as is specified in the order, or
- (b) to pay reasonable compensation,
- subject, however, to section 69.

Definitions: **court**, s 3; **disposition, property**, s 64(1)

Origin: 1952/51 s 60

See also: s 4(1)

## **67 Application for an order under section 66**

- (1) An application for an order under section 66 may be made by
- (a) a creditor who claims to be prejudiced by a disposition of property to which this subpart applies (whether the disposition was made before or after the debtor became indebted to the creditor);
- (b) the Official Assignee, if the debtor is bankrupt;
- (c) the liquidator, if the debtor is a company in liquidation or an overseas company whose assets in New Zealand are being liquidated under Part XVI of the *Companies Act 1993*,
- specifying the disposition claimed to be prejudicial and the property or compensation sought.
- (2) The application for an order under section 66, accompanied by a notice as to the effect of that section and section 69, must be served on the person in whose favour the disposition of property was made and on any other person from whom property or compensation is sought.

Definitions: **bankrupt, company, creditor, Official Assignee, overseas company**, s 3; **disposition, property**, s 64(1); **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 60

**68 Effect of order setting aside a disposition**

- (1) On the making of an order under section 66, property ordered to be restored and the right to compensation ordered to be paid vests
- (a) in the Official Assignee, if the debtor is bankrupt, or
  - (b) in the debtor, if the debtor is a company in liquidation or an overseas company whose assets in New Zealand are being liquidated under Part XVI of the *Companies Act 1993*, or
  - (c) in any other case, as the court directs, in
    - (i) a trustee for the debtor's creditors (in which case the court may make such further orders as it thinks it concerning the administration of the property or moneys paid by way of compensation, proofs of debt and the distribution of assets available to the trustee or any other relevant matter), or
    - (ii) the debtor, but for the purpose only of enabling the carrying out of any execution or similar process against the debtor or the administration of a future bankruptcy or liquidation of the debtor or arrangement with the debtor's creditors.
- (2) This section has effect notwithstanding anything to the contrary in the *Land Transfer Act 1952*.

Definitions: **bankrupt, company, court, creditor, Official Assignee, overseas company**, s 3; **disposition, property**, s 64(1)

Origin: 1952/51 s 60

**69 Protection of persons receiving property under a disposition**

Where a person acquires or receives property in respect of which a court could make an order for restoration or the payment of reasonable compensation under section 66, the court

- (a) may not make an order against that person, if that person proves that he or she
  - (i) acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of such a disposition, or
  - (ii) acquired the property through a person who acquired it in the circumstances described in subparagraph (i);
- (b) may decline to make an order, or may make an order upon such conditions (if any) as it thinks it, or with limited effect, against that person, if that person proves
  - (i) that he or she received the property in good faith and without knowledge of the fact that it had been the subject of such a disposition, and

- (ii) that his or her circumstances have so changed since the receipt of the property that it is unjust to order that the property be restored or reasonable compensation be paid, or be restored or paid in full.

Definitions: **court**, s 3; **disposition, property**, s 64(1); **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 60

See also: s 4(1)

## PART 6 COVENANTS AND POWERS

### 70 **Covenants to be joint and several**

A covenant, whether expressed in an instrument or implied in an instrument under this or any other enactment, made by more than one covenantor binds the covenantors jointly and severally, unless a contrary intention appears in the instrument.

Definitions: **covenant, instrument**, s 3

Origin: 1952/51 s 67

### 71 **Effect of covenant with two or more jointly**

A covenant, whether expressed in an instrument or implied in an instrument under this or any other enactment, for the benefit of more than one covenantee binds the covenantor to perform the obligations under the covenant for the benefit of the survivors or survivor of the covenantees, unless a contrary intention appears in the instrument.

Definitions: **covenant, instrument**, s 3

Origin: 1952/51 s 65

### 72 **Covenant by a person with himself or herself**

A covenant, whether expressed in an instrument or implied in an instrument under this or any other enactment, made by a person with himself or herself, alone or jointly with some other person (and whether or not made in connection with a disposition of property), is enforceable in the same manner as a covenant with another person.

Definitions: **covenant, disposition, instrument, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 66 and 66A

See also: s 49

**73 Construction and variation of implied covenants**

A covenant implied in an instrument under this or any other enactment

- (a) has the same force and effect, and may be enforced in the same manner, as if it had been expressed in that instrument, subject, however, to paragraph (b);
- (b) may be negatived, varied or extended
  - (i) by the express terms of the instrument, or
  - (ii) by a written memorandum executed, as the instrument was required to be executed, by the parties to the instrument, or,
  - (iii) in the case of a short term lease that is not made in writing, by the express or implied agreement of the parties.

Definitions: **covenant, instrument, short term lease**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 68

**74 Covenants implied by this Act or other enactments to be cumulative and exclusive**

- (1) Except as provided in section 77, the covenants implied in an instrument by any provision of this Act apply together with, and not to the exclusion of, the covenants implied in that instrument by any other provision of this Act or any other enactment.
- (2) No covenant is implied as a matter of law in an instrument relating to property coming into operation on or after — 199-[date on which this Act comes into force] unless that covenant is implied in that instrument by this Act or by another enactment.

Definitions: **covenant, instrument, property**, s 3

See also: s 4(2)

## PART 7

## COVENANTS IMPLIED IN CERTAIN INSTRUMENTS

**75 Covenants implied in instruments creating, transferring or assigning an estate or interest in land**

- (1) This section applies to an instrument coming into operation on or after — 199- [date on which this Act comes into force] which, for valuable consideration,
  - (a) creates an estate or interest in land, other than an encumbrance or a leasehold estate or interest, or
  - (b) transfers or assigns (otherwise than by way of encumbrance only) an estate or interest in land.

**199- / PART 7 COVENANTS IMPLIED IN CERTAIN INSTRUMENTS s 77**

- (2) Every instrument to which this section applies contains the implied covenants set out in part 1 of schedule 3, unless a contrary intention is expressed in a manner required by section 73(b), and except as provided in section 77.
- (3) The covenants implied in an instrument by this section relate only to the acts and omissions of
- (a) the person who creates, transfers or assigns the estate or interest, and
  - (b) all persons through whom that person derives title otherwise than by purchase for valuable consideration, and
  - (c) all persons who claim or may claim through, under or in trust for any person referred to in paragraph (a) or paragraph (b).

Definitions: **covenant, encumbrance, instrument, land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 72

See also: ss 4(1), (2) and 77

**76 Covenant implied in instruments transferring or assigning a lease of land**

- (1) This section applies to an instrument coming into operation on or after — 199- [date on which this Act comes into force] which, for valuable consideration, transfers or assigns a leasehold estate or interest in land (otherwise than by way of encumbrance only).
- (2) Every instrument to which this section applies contains the implied covenant set out in part 2 of schedule 3 unless a contrary intention is expressed in a manner required by section 73(b), and except as provided in section 77.

Definitions: **covenant, encumbrance, instrument, land**, s 3

Origin: 1952/51 s 74

See also: ss 4(2) and 201

**77 Covenants implied in instruments by fiduciary or mortgagee**

- (1) This section applies to
- (a) an instrument to which section 75 or 76 applies, whenever any such instrument is executed by a person in a fiduciary capacity or as mortgagee, and
  - (b) a memorandum of discharge of a mortgage over land executed by a mortgagee and coming into operation on or after — 199- [date on which this Act comes into force].
- (2) Every instrument to which this section applies contains the implied covenants set out in part 3 of schedule 3, instead of the implied

covenants set out in part 1 or part 2 of that schedule, as the case requires, unless a contrary intention is expressed in a manner required by section 73(b).

- (3) For the purposes of this section,
- (a) a person executes an instrument in a fiduciary capacity if that person executes the instrument
    - (i) as trustee, or
    - (ii) as administrator, or
    - (iii) as the manager of property of a person under the *Protection of Personal and Property Rights Act 1988*, or
    - (iv) under an order of a court, or
    - (v) in any other fiduciary capacity;
  - (b) an instrument executed by the Public Trustee, except when acting as agent or attorney, is, in the absence of evidence to the contrary, to be taken as having been executed in a fiduciary capacity.
- (4) The covenants implied in an instrument by this section relate only to the acts and omissions of the person executing the instrument.

Definitions: **administrator, court, covenant, instrument, land, mortgage, mortgagee, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 75

See also: s 4(2)

### 78 Covenants implied in encumbrances of property

- (1) This section applies to an instrument creating an encumbrance over property and coming into operation on or after — 199- [date on which this Act comes into force].
- (2) Every instrument to which this section applies contains the implied covenants set out in part 4 of schedule 3, unless a contrary intention is expressed in a manner required by section 73(b).
- (3) The implied covenants set out in part 4 of schedule 3 relate only to the acts and omissions of
- (a) the person who creates the encumbrance, and
  - (b) all persons through whom that person derives title otherwise than by purchase for valuable consideration, and
  - (c) all persons who claim or may claim through, under or in trust for any person referred to in paragraph (a) or paragraph (b).

Definitions: **covenant, encumbrance, instrument, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 72

See also: s 4(1) and (2)

### 79 Covenant implied in transfers or assignments of land subject to an encumbrance

- (1) Every instrument coming into operation on or after — 199- [date on which this Act comes into force] and transferring or assigning land subject to an encumbrance contains the implied covenant for the performance of the obligations under the encumbrance set out in part 5 of schedule 3, unless a contrary intention is expressed in a manner required by section 73(b).
- (2) A transferee or assignee of land subject to an encumbrance who is an administrator or a trustee is liable on the covenant implied under subsection (1) only to the extent of the assets of the estate or trust in the administrator's or the trustee's hands and available for meeting the obligations under the covenant, and not personally, if
- (a) before the execution of the instrument, or,
  - (b) in the case of an instrument for the carrying out of an agreement for the sale and purchase of the land, before the execution of the agreement by the transferor or assignor,
- the transferor or assignor of the land receives notice in writing that the transferee or assignee is acquiring the land in the capacity of administrator or trustee, as the case requires.

Definitions: **administrator, covenant, encumbrance, instrument, land**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 73; 1952/52 s 96

See also: s 4(2)

## PART 8 MORTGAGES

### *Subpart 1—Form and effect of mortgages*

### 80 Mortgage over land to take effect as a charge only

A mortgage over land, whatever its form, coming into operation on or after — 199- [date on which this Act comes into force] takes effect as a charge only and does not operate as a transfer of the estate or interest charged unless the mortgage is created by a registered memorandum of transfer.

Definitions: **land, mortgage, registered**, s 3

See also: s 4(2)

### 81 No mortgage over land by deposit of instruments of title

A mortgage over land is not created by reason only of the deposit of the instruments of title relating to the land, whether or not the deposit



is accompanied by a memorandum of the intent with which the deposit is made.

Definitions: **instrument, land, mortgage**, s 3

Origin: 1952/51 s 77

## 82 Discharge of a mortgage

- (1) A mortgage over property may be wholly or partially discharged by a memorandum which
  - (a) is endorsed on or annexed to the mortgage instrument, and
  - (b) is executed by the mortgagee as a deed is required to be executed, and
  - (c) states that the mortgagee discharges the property from the mortgage, wholly or in part, or words to that effect.
- (2) A duly executed memorandum of discharge operates as a deed and transfers or releases to the current mortgagor the interest of the mortgagee in the mortgaged property to the extent specified in the memorandum.

Definitions: **current mortgagor, deed, instrument, mortgage, mortgagee, property**, s 3

Origin: 1952/51 s 79

See also: *Land Transfer Act 1952* s 102

## 83 Assignment of a mortgage

- (1) The interest of a mortgagee under a mortgage over property may be assigned by a memorandum which
  - (a) is endorsed on or annexed to the mortgage instrument, or the existence of which is recorded on the instrument, and
  - (b) is executed by the mortgagee as a deed is required to be executed, and
  - (c) states that the mortgagee assigns to the assignee all the moneys and all the benefits of any other obligations secured by the mortgage, and all rights, powers and remedies of the mortgagee under the mortgage, and the whole of the mortgagee's interest in the mortgaged property, or words to that effect.
- (2) A duly executed memorandum of assignment operates as a deed and transfers to the assignee the debt and the benefits of any other obligations secured by the mortgage and the interest of the mortgagee in the mortgaged property, together with all rights, powers and remedies of the mortgagee.

Definitions: **deed, instrument, mortgage, mortgagee, property**, s 3

Origin: 1952/51 s 79

**84 Variation of a mortgage**

- (1) The amount secured by a mortgage over property may be reduced or increased by a memorandum which
  - (a) complies with subsection (5), and
  - (b) is executed,
    - (i) in the case of a memorandum of reduction, by the mortgagee, or,
    - (ii) in the case of a memorandum of increase, by the current mortgagor, and
  - (c) states that the principal moneys intended to be secured by the mortgage are reduced or increased, as the case requires, to the amount or in the manner specified in the memorandum, or words to that effect.
- (2) The rate of interest payable under a mortgage over property may be reduced or increased by a memorandum which
  - (a) complies with subsection (5), and
  - (b) is executed,
    - (i) in the case of a memorandum of reduction, by the mortgagee, or,
    - (ii) in the case of a memorandum of increase, by the current mortgagor, and
  - (c) states that the rate of interest payable under the mortgage is reduced or increased, as the case requires, to the rate or sum specified in the memorandum, or words to that effect.
- (3) The term or currency of a mortgage over property may be shortened, extended or renewed by a memorandum which
  - (a) complies with subsection (5), and
  - (b) is executed by the current mortgagor and by the mortgagee, and
  - (c) states that the term or currency of the mortgage is shortened, extended or renewed, as the case requires, to the date or in the manner specified in the memorandum, or words to that effect.
- (4) The covenants, conditions and powers expressed or implied in a mortgage over property may be varied, negatived or added to by a memorandum which
  - (a) complies with subsection (5), and
  - (b) is executed by the current mortgagor and by the mortgagee, and
  - (c) states that the covenants, conditions and powers expressed or implied in the mortgage are varied in the manner specified in the memorandum, or words to that effect.
- (5) A memorandum for the purposes of subsections (1), (2), (3) or (4)
  - (a) must be endorsed on or annexed to the mortgage instrument, and
  - (b) must be executed as a deed is required to be executed, and,

- (c) when duly executed, operates as a deed and varies the mortgage in accordance with the terms of the memorandum.

Definitions: **covenant, current mortgagor, deed, instrument, mortgage, mortgagee, property**, s 3

Origin: 1952/51 s 79

See also: *Land Transfer Act 1952* s 102

## 85 Effect of advance on joint account

- (1) Where
- (a) it appears from an instrument that all or part of the moneys secured by a mortgage over property or owing under an unsecured obligation have been advanced by, or are owing to, two or more persons as money belonging to them on joint account, or
- (b) a mortgage or unsecured obligation is given to or acquired by two or more persons jointly and not in shares, the money or other benefits for the time being due to those persons under the mortgage or obligation belong to them, and continue to belong to them, on joint account.
- (2) Notwithstanding notice to the payer of the severance of the joint account, the written receipt for all money or other benefits for the time being due under the mortgage or obligation is a complete discharge, if it is given by
- (a) the survivors or the last survivor of the persons referred to in subsection (1)(a) or (b), as the case requires, or
- (b) the administrator of the last survivor of those persons, or
- (c) the assigns of the survivors or of the last survivor of those persons.
- (3) The persons referred to in subsection (2)(a), (b) and (c) may exercise all powers conferred by the mortgage or obligation as fully and effectually as the mortgagees or obligees could have done.
- (4) This section has effect subject to any contrary intention expressed in an instrument.

Definitions: **administrator, instrument, mortgage, mortgagee, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 80

See also: *Land Transfer Act 1952* s 61

## 86 Priority of security for moneys advanced after the coming into operation of a subsequent mortgage

- (1) The priority of a mortgage over property, in relation to any subsequent mortgage over that property, does not extend to advances made under

the first-mentioned mortgage after the coming into force of the subsequent mortgage, except as provided in sections 87, 88 and 89.

- (2) Where moneys are advanced under a variation of a mortgage coming into operation on or after — 199- [date on which this Act comes into force], then, for the purposes of this section and sections 87, 88 and 89, the priority of the security for the moneys advanced under the variation is to be determined as if the variation were a separate mortgage.
- (3) Any rule of law permitting the tacking of further advances so as to obtain priority otherwise than in accordance with section 87, 88 or 89 is abolished.

Definitions: **mortgage, property**, s 3

See also: s 4(2)

### **87 Advance of specified principal sum by instalments**

- (1) Where a mortgage over property
  - (a) secures a specified principal sum (whether or not the mortgage also secures further advances, or further advances up to a stated priority limit), and
  - (b) all or any part of that specified principal sum is advanced after the coming into operation of a subsequent mortgage over that property, the priority of the first-mentioned mortgage, in relation to the subsequent mortgage, extends to the whole of the specified principal sum.
- (2) In subsection (1), a specified principal sum does not include any part of that sum which has been repaid to the mortgagee and readvanced.

Definitions: **mortgage, mortgagee, property**, s 3

Origin: 1952/51 s 80A

See also: s 4(2)

### **88 Advances for the protection and realisation of the security**

- (1) A mortgage over property secures all moneys reasonably paid or advanced at any time by the mortgagee or a receiver
  - (a) for the protection, maintenance, preservation or repair of the mortgaged property, or
  - (b) to remedy any default by the mortgagor in respect of any other mortgage or encumbrance over the property, to the extent that it has priority in relation to the mortgagee's mortgage, or
  - (c) for the payment of rates or other outgoings, or
  - (d) to meet the expenses of the mortgagee or receiver in entering into possession, or of doing anything which a mortgagee in possession or a receiver is required or entitled to do, or

- (e) with a view to the realisation of the security, including any additional amount specified in accordance with section 105(3) or 110(3), together with interest on any amount so paid or advanced at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage.
- (2) The priority of a mortgage, in relation to any subsequent mortgage over the property, extends to all moneys paid or advanced for any one or more of the purposes referred to in subsection (1).

Definitions: **default, encumbrance, mortgage, mortgagee, mortgagee in possession, mortgagor, property, receiver**, s 3

### 89 Further advances and tacking under mortgages over land or ships

- (1) Where a mortgage over land or over a ship secures further advances by way of financial accommodation, the priority of that mortgage, in relation to any subsequent mortgage over the land or ship, extends to every such further advance, if, at the time when the further advance was made,
- (a) the mortgagee did not have actual notice of the existence of the subsequent mortgage, or
  - (b) the mortgagee had actual notice of the existence of the subsequent mortgage, but
    - (i) was under an obligation to make the further advance, and
    - (ii) did not, at the time of entering into that obligation, have actual notice of the existence of the subsequent mortgage.
- (2) Where a mortgage over land or over a ship and coming into operation on or after — 199- [date on which this Act comes into force] secures further advances by way of financial accommodation up to a stated priority limit, the priority of that mortgage, in relation to any subsequent mortgage over the land or ship, extends to every such further advance by way of financial accommodation, up to the stated priority limit, whether or not the mortgagee had actual notice of the existence of the subsequent mortgage at the time when the further advance was made.
- (3) In this section,
- (a) **financial accommodation**, in relation to a further advance, means a further advance made
    - (i) to the mortgagor or any other person, or

- (ii) to pay money, provide credit or meet any other indebtedness (actual, future or contingent) secured by the mortgage, whether directly or by way of guarantee, and whether or not advanced under a contractual obligation, and whether advanced to the mortgagor or to some other person, or
  - (iii) under any guarantee, indemnity or bond given by the mortgagee at the request of the mortgagor, whether in respect of the acts or omissions of the mortgagor or of some other person, or
  - (iv) under a contractual obligation by the mortgagee to pay moneys owing under a bill of exchange, promissory note, draft, order or other negotiable instrument or a letter of credit drawn, accepted, paid, endorsed, discounted or established at the request of the mortgagor, whether or not it has arrived at maturity, and whether for the benefit of the mortgagor or some other person, or
  - (v) by way of readvancement of an amount secured by the mortgage and repaid to the mortgagee;
- (b) **stated priority limit** means an amount expressly stated in a relevant mortgage instrument as the maximum amount for which the mortgage has priority, in relation to any subsequent mortgage.
- (4) A stated priority limit may be expressed
- (a) in the currency of any country, and
  - (b) as a sum of money plus interest, or as a sum of money without more, in which case the sum expressed includes interest.
- (5) Unless a stated priority limit expressly includes moneys paid or advanced by the mortgagee for any of the purposes referred to in section 88,
- (a) moneys paid or advanced for any of those purposes must not be taken into account in determining whether or not advances by way of financial accommodation exceed the stated priority limit, and
  - (b) the priority of the mortgage, in relation to any subsequent mortgage, extends to all moneys paid or advanced for any of those purposes, even if the effect of the payment or advance is to take the total moneys secured by the mortgage over the stated priority limit.
- (6) Subsections (2) to (5) do not affect the priority of a mortgage over land or over a ship coming into operation before — 199- [date on which this Act comes into force], so far as it extends to further advances expressly secured by the mortgage, or by any variation of the mortgage coming into operation before that date, whether the further advances are made before or after that date; and the priority of the

security for further advances made on or after — 199- [date on which this Act comes into force] under such a mortgage or variation of mortgage must be determined as if section 80A of the *Property Law Act 1952* had not been repealed by this Act.

Definitions: **land, instrument, mortgage, mortgagee, mortgagor, ship**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 80A

See also: s 4(2)

## 90 Right of mortgagor to bring proceedings against mortgagee

A mortgagor of land may bring a proceeding against the mortgagee without first offering to redeem the mortgaged land, notwithstanding anything to the contrary expressed or implied in the mortgage.

Definitions: **land, mortgage, mortgagee, mortgagor, redeem**, s 3

Origin: 1952/51 s 80B

### *Subpart 2—Covenants, conditions and powers implied in mortgages*

## 91 Covenants implied in mortgages over land

- (1) Every mortgage over land coming into operation on or after — 199- [date on which this Act comes into force] contains the implied covenants, conditions and powers set out in part 1 of schedule 4 so far as they are relevant in the circumstances, unless a contrary intention is expressed in a manner required by section 73(b).
- (2) Every registered mortgage over land under the *Land Transfer Act 1952* coming into operation before — 199- [date on which this Act comes into force] contains an implied power of the mortgagee, upon the mortgagor's default, to enter into possession of the mortgaged land.
- (3) The power under subsection (2) to enter into possession of the mortgaged land may be exercised only
  - (a) after the expiry of the period of notice required by section 105 or with the leave of a court granted under section 109, and
  - (b) in accordance with the provisions of subpart 5.

Definitions: **court, covenant, default, land, land under the Land Transfer Act 1952, mortgage, mortgagee, mortgagor, registered**, s 3

Origin: 1952/51 s 78; 1952/52 s 106

See also: s 4(2), part 1 of schedule 4

**92 Covenants implied in mortgages over goods**

Every mortgage over goods which

- (a) comes into operation on or after — 199- [date on which this Act comes into force], and
- (b) is, and always was, a fixed or specific charge over the goods, contains the implied covenants, conditions and powers set out in part 2 of schedule 4, unless a contrary intention is expressed in a manner required by section 73(b).

Definitions: **covenant, goods, mortgage**, s 3

See also: part 2 of schedule 4

*Subpart 3—Redemption of mortgages***93 Equity of redemption**

- (1) The current mortgagor or any other person entitled to redeem mortgaged property may redeem it in accordance with the provisions of this subpart, at any time before it has been sold, under a power of sale, by the mortgagee or a receiver.
- (2) On payment to the mortgagee of all moneys and the performance of all other obligations secured by the mortgage, the mortgagee must, at the expense of the current mortgagor or other person seeking to redeem the mortgaged property, discharge the property from the mortgage in the manner provided in section 82, unless a request is made to the mortgagee under section 94 for the mortgage to be transferred.
- (3) For the purposes of subsection (2), if
  - (a) the term of a mortgage has not expired, and
  - (b) the mortgagee is not in possession of the mortgaged property or has not appointed a receiver or taken any other steps to realise the security (other than giving notice under section 105 or 110, as the case requires),
 moneys secured by the mortgage include interest on the principal moneys secured by the mortgage for the unexpired portion of the term, subject, however, to the provisions of Part I of the *Credit Contracts Act 1981*.
- (4) The current mortgagor or other person seeking to redeem the mortgaged property after the expiry of the term of the mortgage, or of any further term for which it has been renewed or extended, must, in any case where the mortgagee is not in possession of the mortgaged property or has not appointed a receiver or taken any other steps to realise the security (other than giving notice under section 105 or 110, as the case requires),



- (a) give the mortgagee not less than 60 working days' written notice of the intention to redeem, or
- (b) instead of giving notice in accordance with paragraph (a), pay to the mortgagee 3 months' interest at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage, as well as paying all other moneys secured by the mortgage.
- (5) Any term expressed or implied in an instrument and conflicting with this section is of no effect to the extent that it is less favourable to the current mortgagor or other person entitled to redeem the mortgaged property.

Definitions: **current mortgagor, instrument, mortgage, mortgagee, person entitled to redeem, property, receiver, redeem, working day**, s 3

Origin: 1952/51 s 81

See also: ss 82 and 94

#### 94 Request to mortgagee to transfer mortgage

- (1) The current mortgagor or any other person who is entitled to redeem the mortgaged property may, at any time (other than a time when the mortgagee is in possession of the property), request the mortgagee to transfer the mortgage to a nominated person (other than the current mortgagor).
- (2) A mortgagee under a subsequent mortgage or the holder of any other subsequent encumbrance may make a request under subsection (1) notwithstanding any intermediate interest.
- (3) A request made under subsection (1) by a person other than the current mortgagor prevails over a request made by the current mortgagor, and, if more than one such person makes such a request, that of the person whose interest has priority prevails.
- (4) The mortgagee, on receiving a request made under subsection (1), and on payment to the mortgagee of all moneys which would have been payable if the discharge of the mortgage had been sought under section 93 and the performance of all other obligations secured by the mortgage, must transfer the mortgage to the nominated person.
- (5) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **current mortgagor, encumbrance, instrument, mortgage, mortgagee, property, redeem**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 82 and 83

See also: ss 141 and 142

**95 Perpetual debentures**

Notwithstanding anything to the contrary in section 93 or in any rule of law or equity, a stipulation in a debenture or in a deed securing a debenture, issued or executed by a company, is not invalid by reason only that it provides that the debenture is irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.

Definitions: **company, debenture, deed**, s 3

Origin: 1952/51 s 151B

**96 Right to inspect instruments of title**

- (1) The current mortgagor or other person entitled to redeem the mortgaged property, on request, at a reasonable time, and on payment of any reasonable costs, may inspect and make copies of, or extracts from, the instruments of title relating to the property in the custody or under the control of the mortgagee.
- (2) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **current mortgagor, instrument, mortgagee, person entitled to redeem, property**, s 3

Origin: 1952/51 s 84

**97 Restriction on consolidation**

- (1) The current mortgagor or other person entitled to redeem mortgaged property may redeem it without paying any money owing under any separate mortgage over other property in favour of the same mortgagee, entered into by the current mortgagor or by any former mortgagor.
- (2) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **current mortgagor, former mortgagor, instrument, mortgage, mortgagee, person entitled to redeem, property, redeem**, s 3

Origin: 1952/51 s 85

**98 Sale of mortgaged property by order of the court**

- (1) In any proceeding concerning a mortgage or mortgaged property, or in a proceeding brought for the purpose,
  - (a) the current mortgagor, or
  - (b) any former mortgagor, or

- (c) any covenantor, or  
(d) any other person entitled to redeem the mortgaged property  
may apply to a court for an order directing the sale of the mortgaged property.
- (2) Unless the court orders otherwise, an application made under this section must be served
- (a) on the mortgagee, and
  - (b) on any receiver appointed in respect of the property, and
  - (c) on the mortgagee under every other mortgage and the holder of any other encumbrance over the mortgaged property (whether or not it has priority over the mortgage in question), if any such mortgage or other encumbrance
    - (i) is registered, or
    - (ii) is unregistered, but the person applying to the court under this section has actual notice of it, and,
  - (d) in the case of mortgaged land, on any person who has lodged a caveat under section 137 of the *Land Transfer Act 1952*, or a notice under section 42 of the *Matrimonial Property Act 1976* having the effect of such a caveat, against the title to the land or any part of it, and
  - (e) on every person, other than the applicant, who would have been entitled to apply to the court under subsection (1).
- (3) On an application under this section, the court may make an order directing the sale of the mortgaged property, and may do so
- (a) without allowing time for the redemption of the property in accordance with section 93, and
  - (b) notwithstanding that any person who has an interest in the property or in the mortgage
    - (i) is not before the court, or
    - (ii) opposes the making of the order.
- (4) An order directing the sale of the mortgaged property may be made on such conditions (if any) as the court thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of the sale, or to secure the performance of any other condition of the order.
- (5) The court may order that the sale be conducted by any party to the proceeding or by the Registrar.

- (6) The court may make an order for the sale of the mortgaged property without first determining the priority of encumbrances over the property.

Definitions: **court, covenantor, current mortgagor, encumbrance, former mortgagor, land, mortgage, mortgagee, person entitled to redeem, property, receiver, registered, Registrar, unregistered**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 86

### 99 Redemption when mortgagee cannot be found

- (1) Where a person who is entitled to receive, or has received, payment of moneys secured by a mortgage over property is out of the jurisdiction, cannot be found or is dead, or it is uncertain who is so entitled, the mortgage may be discharged by a court under section 100 or by the Public Trustee under section 101.
- (2) Where a mortgage is discharged under section 100 or 101, any amount eventually shown to be payable to the person entitled to receive payment of the moneys secured by the mortgage, over and above the amount received by that person, continues to be a debt owing by the current mortgagor, any former mortgagor and any covenantor as if it were owing under a deed.
- (3) This section does not relieve any person of the obligation to comply with section 102, in a case where that section applies.

Definitions: **court, covenantor, current mortgagor, deed, former mortgagor, mortgage, property, Public Trustee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 87

See also: ss 100, 101 and 102

### 100 Redemption by order of the court

- (1) In a circumstance referred to in section 99(1), the court may make any one or more of the following orders:
- (a) on the application of the current mortgagor or any other person entitled to redeem the mortgaged property,
- (i) an order for the ascertainment in such manner as the court thinks fit of the moneys secured by the mortgage which would have been payable if the discharge of the mortgage had been sought under section 93;
- (ii) an order that the amount so ascertained be paid into court;

- (iii) an order declaring that all moneys secured by the mortgage have been paid in full;
- (b) on the application of the person entitled to receive payment of the moneys secured by the mortgage, and on being satisfied that the instruments of title relating to the mortgaged property have been delivered to the current mortgagor or other person entitled to redeem it, or have otherwise been satisfactorily accounted for, an order that the amount paid into court be paid to the applicant.
- (2) A certificate by the Registrar that an amount ordered to be ascertained and paid into court was so paid, or a sealed copy of an order of the court declaring that all moneys secured by the mortgage have been paid in full, operates as if it were a duly executed memorandum of discharge of the mortgage under section 82, and,
- (a) if the mortgage is over land and is registered under the *Land Transfer Act 1952*, the District Land Registrar,
- (i) on production of the certificate or order, must enter a memorandum of it in the register, and
- (ii) must endorse on the relevant certificate of title, and also on the memorandum of mortgage, if and when those documents are produced for the purpose, particulars of the entry under subparagraph (i);
- and, when the entry is made in the register under subparagraph (i), the mortgage is discharged;
- (b) if the mortgage is over a ship and is registered, a Registrar of Ships under the *Ship Registration Act 1992*, on production of the certificate or order, must make an entry in Part A of the New Zealand Register of Ships to the effect that the mortgage has been discharged, and, when the entry is made, it has the same effect as an entry made under section 45 of that Act;
- (c) if the mortgage is over personal property and is registered, the certificate or order, on production to the Registrar of Personal Property Securities, has effect as if it were a financing change statement discharging the registration of the financing statement, and had been submitted to the Registrar of Personal Property Securities under section 38 of the *Personal Property Securities Act 1999*.

Definitions: **court**, **current mortgagor**, **mortgage**, **person entitled to redeem**, **property**, **registered**, **Registrar**, **ship**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 87

See also: s 102

## 101 Redemption by payment to the Public Trustee

- (1) In a circumstance referred to in section 99(1), the Public Trustee, on the application of the current mortgagor or any other person entitled to redeem the mortgaged property, and on being satisfied
  - (a) that the applicant has tendered to the Public Trustee the whole of the moneys secured by the mortgage which would have been payable if the discharge of the mortgage had been sought under section 93, or
  - (b) that all moneys secured by the mortgage have been paid in full, must execute a memorandum of discharge of the mortgage in accordance with section 82, and such a memorandum of discharge duly executed by the Public Trustee operates as if it were a discharge duly executed by the mortgagee, and is conclusive proof that all conditions entitling the Public Trustee to execute the memorandum of discharge have been satisfied.
- (2) On the production by the current mortgagor or any other person entitled to redeem the mortgaged property of the Public Trustee's receipt for the whole of the moneys secured by the mortgage which would have been payable if the discharge of the mortgage had been sought under section 93, or the Public Trustee's certificate that all moneys secured by the mortgage have been paid in full, as the case requires, and on payment of all proper charges (if any), any person in possession of the instruments of title relating to the mortgaged property must deliver them to the current mortgagor or other person producing the receipt or certificate.
- (3) If the Public Trustee, in discharging a mortgage under this section, acts reasonably and in good faith, the Public Trustee is not liable to any person for any loss so caused. The onus of proving that the Public Trustee has not acted reasonably and in good faith is on the person alleging it.

Definitions: **current mortgagor, mortgage, person entitled to redeem, property, Public Trustee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 87

See also: s 102

### **102 Court may order discharge of mortgage if periodical payments secured are otherwise provided for**

- (1) Where a mortgage over property secures the payment to any person of a periodical payment, other than interest on moneys secured by the mortgage, the court, on the application of the current mortgagor or any other person entitled to redeem the mortgaged property, may make an order directing or allowing the payment into court of a

specified amount which, in the opinion of the court, is sufficient to constitute a fund which will produce enough income to meet any periodical payment secured by the mortgage as it falls due.

- (2) In determining the amount which will, in the opinion of the court, be sufficient for the purpose specified in subsection (1), the court must
  - (a) assume that the fund will be invested as a trustee is entitled and required to invest trust funds under Part II of the *Trustee Act 1956*, and
  - (b) make reasonable provision, in addition to the amount sufficient for the purpose specified in subsection (1), for the contingency of further costs, expenses, and interest, and any other contingency except the depreciation of any investment.
- (3) A certificate by the Registrar that the amount specified in an order made under subsection (1) has been paid into court operates as if it were a duly executed memorandum of discharge of the mortgage under section 82; and paragraphs (a), (b) and (c) of section 100(2) have effect in relation to that certificate as if it had been given under that section.
- (4) After giving notice to every person who is entitled to receive a periodical payment secured by the mortgage, the court may make further orders directing the application or distribution of the income or the capital of the fund.

Definitions: **court, current mortgagor, income, mortgage, periodical payment, person entitled to redeem, property, Registrar**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 151

See also: ss 100 and 101

*Subpart 4—Restrictions on exercise of mortgagees' powers*

### 103 Foreclosure abolished

Any rule of law entitling a mortgagee to foreclose the equity of redemption in mortgaged property is abolished.

Definitions: **equity of redemption, mortgagee, property**, s 3

Origin: 1952/51 s 89

### 104 Mortgagee accepting interest after expiry of term not to call up without notice

- (1) If

- (a) the term of a mortgage over property, or any period for which the term has been renewed or extended, has expired, and
- (b) the principal moneys secured by the mortgage have not been repaid, and
- (c) the mortgagee has, after the date of expiry, accepted interest on the principal moneys (otherwise than by entering into possession of the property or appointing a receiver) for a period of not less than 3 months after that date, and
- (d) the mortgagor has observed all covenants under the mortgage instrument other than the covenant to repay the principal moneys on the due date,

the mortgagee must not call up the principal moneys unless the mortgagee has served on the current mortgagor a notice of the intention to do so at the expiry of the period specified in the notice, being not less than 60 working days after the date of service of the notice, and that period has expired.

- (2) A notice under subsection (1) may be given in the same document as a notice under section 105 or 110.

Definitions: **covenant, current mortgagor, instrument, mortgage, mortgagee, mortgagor, property, receiver, working day**, s 3

Origin: 1952/51 s 90

See also: ss 259 and 260

### **105 Notice to current mortgagor of mortgaged land of exercise of powers**

- (1) Except as provided in sections 108 and 109, no moneys secured by a mortgage over land are payable by any person under an acceleration clause, no mortgagee may exercise any power to enter into possession of mortgaged land, no receiver appointed in respect of mortgaged land may exercise powers to manage it or demand and recover income from it, and no mortgagee or receiver may sell mortgaged land, by reason of a default, unless
  - (a) a notice complying with subsection (2) has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor, and,
  - (b) on the expiry of the period specified in the notice, the default has not been remedied.
- (2) The notice required by subsection (1) must be in the form prescribed by regulations made under this Act, or in a form to like effect, and must adequately inform the current mortgagor of



- (a) the nature and extent of the default complained of, and
  - (b) the action required to remedy the default (if it is capable of being remedied), and
  - (c) the period within which the current mortgagor must remedy the default or cause it to be remedied, being not less than 20 working days after the date of service of the notice, or any longer period for the remedying of that default specified by any term expressed or implied in any instrument, and
  - (d) the consequence that if, at the expiry of the period specified under paragraph (c), the default has not been, or cannot be, remedied, the moneys secured by the mortgage and specified in the notice will become payable, or may be called up as becoming payable, or the powers of the mortgagee specified in the notice will become exercisable, or such one or more of those things as the case requires.
- (3) A notice under this section may specify that the action required to remedy the default complained of includes the payment (whether to the mortgagee or receiver) of a specified amount, being the reasonable costs and disbursements (whether of the mortgagee or receiver) in preparing and serving the notice.
- (4) A notice under this section may be given in the same document as a notice under section 104.
- (5) A copy of the notice served under subsection (1) must, as soon as possible, be served (whether by the mortgagee or receiver) on
- (a) any former mortgagor, and
  - (b) any covenantor, and
  - (c) any mortgagee under a subsequent mortgage and any holder of any other subsequent encumbrance over the mortgaged land, if
    - (i) the subsequent mortgage or other subsequent encumbrance is registered, or
    - (ii) the subsequent mortgage or other subsequent encumbrance is unregistered, but either the mortgagee or receiver has actual notice of it, and
  - (d) any person who has lodged a caveat under section 137 of the *Land Transfer Act 1952*, or a notice under section 42 of the *Matrimonial Property Act 1976* having the effect of such a caveat, against the title to the mortgaged land or any part of it,
- of whose name and address either the mortgagee or receiver has actual notice; but a failure to comply with this subsection does not of itself prevent any moneys secured by the mortgage from becoming payable, or prevent the exercise of the mortgagee's power to enter into possession of the land, or the receiver's power to manage the land or

demand and recover income from it, or the mortgagee's or receiver's power to sell the land.

- (6) Any term expressed or implied in any instrument and conflicting with this section is of no effect.

Definitions: **acceleration clause, address, covenantor, current mortgagor, default, encumbrance, former mortgagor, instrument, land, mortgage, mortgagee, receiver, registered, unregistered, working day**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 92

See also: ss 259 and 260

### 106 Notice of intention to recover deficiency in respect of mortgage over land

- (1) If, under a mortgage over land,
- (a) the mortgagee or receiver proposes, by reason of a default, to exercise a power to sell the mortgaged land, and
  - (b) the mortgagee proposes to recover any deficiency on the sale from any former mortgagor or any covenantor,
- notice of those intentions must be served on that former mortgagor or covenantor (whether by the mortgagee or receiver and whether or not that former mortgagor or covenantor has been served with a copy of the notice required to be served under section 104 or 105) at least 20 working days before the exercise of the power of sale.
- (2) Failure to serve notice under subsection (1) on a former mortgagor or a covenantor does not prevent the mortgagee or receiver from exercising the power of sale, or prevent the mortgagee from recovering any deficiency from that former mortgagor or covenantor, but a former mortgagor or a covenantor who was prejudiced by the failure is, to the extent of that prejudice, released from liability to the mortgagee in respect of the deficiency.
- (3) Any term expressed or implied in any instrument and conflicting with this section is of no effect.

Definitions: **covenantor, default, deficiency, former mortgagor, instrument, land, mortgage, mortgagee, receiver, working day**, s 3

Origin: 1952/51 s 92

See also: ss 259 and 260

### 107 Conditional sale of land permitted before expiry of notice

For the purposes of section 105, a mortgagee or receiver does not

exercise a power to sell mortgaged land by entering into a contract to sell or granting an option to purchase the land (whether the contract is entered into or the option is granted before or after the service of the notice referred to in either of those sections), if the contract or option is conditional on failure to remedy the default before the expiry of the period specified in a notice served under section 105.

Definitions: **default, land, mortgagee, receiver, working day**, s 3

Origin: 1952/51 s 92

### **108 Notice not required before exercising certain powers under a mortgage debenture**

If a mortgage over land arises under a mortgage debenture, and whether or not there is a collateral mortgage over that land securing the same moneys,

- (a) a receiver may exercise any power, conferred by any term expressed or implied in the mortgage debenture, to manage the mortgaged land or demand and recover income from it, and
- (b) moneys secured by the mortgage debenture may become payable under an acceleration clause,

without a notice being served on the current mortgagor under section 105.

Definitions: **acceleration clause, current mortgagor, land, mortgage, mortgage debenture, receiver**, s 3

### **109 Court may give leave to enter into possession of land**

A court may, on such conditions (if any) as it thinks fit, grant leave to a mortgagee to exercise any power to enter into possession of the mortgaged land, or to a receiver appointed under a mortgage over land to manage the mortgaged land or demand and recover income from it, by reason of a default,

- (a) without a notice having been served on the current mortgagor under section 105, or
- (b) after such a notice has been served on the current mortgagor but before the expiry of the period specified in the notice for the remedying of the default.

Definitions: **court, current mortgagor, default, land, mortgage, mortgagee, receiver**, s 3

Origin: 1952/51 s 92

### **110 Notice to current mortgagor of mortgaged goods of exercise of powers**

- (1) Except as provided in sections 113 and 114, no moneys secured by a mortgage over goods are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise any power to sell the mortgaged goods, by reason of a default, unless
  - (a) a notice complying with subsection (2) has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor, and,
  - (b) on the expiry of the period specified in the notice, the default has not been remedied.
- (2) The notice required by subsection (1) must be in the form prescribed by regulations made under this Act, or in a form to like effect, and must adequately inform the current mortgagor of
  - (a) the nature and extent of the default complained of, and
  - (b) the action required to remedy the default (if it is capable of being remedied), and,
  - (c) the period within which the current mortgagor must remedy the default or cause it to be remedied, being not less than 7 working days after the date of service of the notice, or any longer period for the remedying of that default specified by any term expressed or implied in any instrument, and
  - (d) the consequence that if, at the expiry of the period specified under paragraph (c), the default has not been, or cannot be, remedied, the moneys secured by the mortgage and specified in the notice will become payable, or may be called up as becoming payable, or the power, specified in the notice, of the mortgagee to sell the goods will become exercisable, or both of those things, as the case requires.
- (3) A notice under this section may specify that the action required to remedy the default complained of includes the payment (whether to the mortgagee or receiver) of a specified amount, being the reasonable costs and disbursements (whether of the mortgagee or receiver) in preparing and serving the notice.
- (4) A notice under this section may be given in the same document as a notice under section 104.
- (5) A copy of the notice served under subsection (1) must, as soon as possible, be served (whether by the mortgagee or receiver) on
  - (a) any former mortgagor, and
  - (b) any covenantor, and
  - (c) any mortgagee under a subsequent mortgage and any holder of any other subsequent encumbrance over the mortgaged goods, if the subsequent mortgage or other subsequent encumbrance is registered, or is unregistered, but either the mortgagee or receiver

has actual notice of it, of whose name and address either the mortgagee or receiver has actual notice; but a failure to comply with this subsection does not of itself prevent any moneys secured by the mortgage from becoming payable or prevent the exercise of a power to sell the mortgaged goods.

- (6) Any term expressed or implied in any instrument and conflicting with this section is of no effect.

Definitions: **acceleration clause, address, covenantor, current mortgagor, default, encumbrance, former mortgagor, goods, instrument, mortgage, mortgagee, receiver, registered, unregistered, working day**, s 3; **person**, *Acts Interpretation Act 1924* s 4

See also: ss 259 and 260

### 111 Notice of intention to recover deficiency in respect of mortgage over goods

- (1) If, under a mortgage over goods
- (a) the mortgagee or receiver proposes, by reason of a default, to exercise a power to sell the mortgaged goods, and
  - (b) the mortgagee proposes to recover any deficiency on the sale from any former mortgagor or any covenantor,
- notice of those intentions must be served on that former mortgagor or covenantor (whether by the mortgagee or receiver and whether or not that former mortgagor or covenantor has been served with a copy of the notice required to be served under section 104 or 110) at least 7 working days before the exercise of the power of sale, except as provided in section 113, or where, under section 114, a court has granted leave to the mortgagee or receiver to sell the mortgaged goods in a circumstance referred to in that section.
- (2) Failure to serve notice under subsection (1) on a former mortgagor or a covenantor does not prevent the mortgagee or receiver from exercising the power of sale, or prevent the mortgagee from recovering any deficiency from that former mortgagor or covenantor, but a former mortgagor or a covenantor who was prejudiced by the failure is, to the extent of that prejudice, released from liability to the mortgagee in respect of the deficiency.
- (3) Any term expressed or implied in any instrument and conflicting with this section is of no effect.

Definitions: **court, covenantor, default, deficiency, former mortgagor, goods, instrument, mortgage, mortgagee, receiver, working day**, s 3

See also: ss 259 and 260

### 112 Conditional sale of goods permitted before expiry of notice

For the purposes of section 110, the exercise of a power to sell mortgaged goods does not include the entering into of a contract to sell or the granting of an option to purchase the goods (whether entered into or granted before or after the service of the notice referred to in either of those sections), if the contract or option is conditional on failure to remedy the default before the expiry of the period specified in a notice served under section 110.

Definitions: **default, goods**, s 3

See also: s 107

### 113 Cases where notice not required

Sections 110 and 111 do not apply

- (a) to perishable goods, or
- (b) to goods which will decline substantially in value if not disposed of immediately, or
- (c) to goods the care and storage of which will cost a disproportionately large amount in relation to their value, or
- (d) to stock in trade sold at retail in the ordinary course of business, or
- (e) where the mortgage over goods arises under a mortgage debenture (whether or not there is a collateral mortgage over those goods securing the same moneys), or
- (f) where, after the default, every person entitled to receive notice under sections 110 and 111 consents in writing to the immediate sale of the goods.

Definitions: **default, goods, mortgage, mortgage debenture**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

### 114 Court may give leave to exercise power of sale of goods

A court may, on such conditions (if any) as it thinks fit, grant leave to the mortgagee or receiver under a mortgage over goods to exercise any power under the mortgage to sell the mortgaged goods, by reason of a default,

- (a) without a notice having been served on the current mortgagor as required by section 110, or
- (b) after such a notice has been served on the current mortgagor but before the expiry of the period specified in the notice for the remedying of the default.

Definitions: **court, current mortgagor, default, goods, mortgage, mortgagee, receiver**, s 3

*Subpart 5—Mortgagees in possession*

*Entry into possession***115 Exercise of power to enter into possession**

- (1) If, by reason of a default, a mortgagee becomes entitled under a mortgage, after compliance with the provisions of subpart 4, to exercise a power to enter into possession of mortgaged land or goods, the mortgagee may exercise that power by
- (a) entering into or taking physical possession of the land or goods peaceably (and without committing forcible entry under section 91 of the *Crimes Act 1961*), subject, however, to subsection (3), or
  - (b) asserting management or control over the land or goods by requiring a lessee or occupier of the land, or a lessee or bailee of the goods, as the case requires, to pay to the mortgagee any rent or profits which would otherwise be payable to the current mortgagor, or
  - (c) applying to a court for an order for possession of the land or goods.
- (2) A mortgagee may do all or any of the things referred to in subsection (1) before or after taking any steps to exercise any power to sell the mortgaged land or goods.
- (3) If a mortgagee has consented to a lease of all or part of the mortgaged land or goods (whether the consent was given or the lease was entered into before or after the mortgagee entered into the mortgage, or before or after the default), the mortgagee may not, in accordance with subsection (1)(a), enter into or take physical possession of any land or goods that are subject to such a lease, except in the exercise of a power conferred by section 119.
- (4) A reference in this subpart to land or goods includes a reference to land and goods.

Definitions: **court, current mortgagor, default, goods, land, lease, lessee, mortgage, mortgagee, occupier**, s 3

Origin: 1952/52 s 106

**116 When mortgagee becomes mortgagee in possession**

A mortgagee who exercises a power to enter into possession of mortgaged land or goods in accordance with section 115 becomes a mortgagee in possession of the land or goods

- (a) on the date on which the mortgagee enters into, or takes, physical possession of the land or goods, or
- (b) on the date on which the mortgagee first receives any income from the land or goods as mortgagee in possession, or
- (c) if a court, on the application of the mortgagee, makes an order for possession of the land or goods by the mortgagee, on the date of

the application to the court, whichever first occurs; and any reference to the date or time of entry into possession by a mortgagee in possession has a corresponding meaning.

Definitions: **court, goods, income, land, mortgage, mortgagee, mortgagee in possession**, s 3

Origin: 1952/51 s 104BB

*Powers and obligations of mortgagees in possession*

**117 Mortgagee in possession of leasehold estate or interest**

A mortgagee in possession of a mortgaged leasehold estate or interest in land or goods is liable to the person for the time being entitled to the reversion of the leasehold estate or interest for the observance and performance of all covenants of the lessee, including the payment of rent, but that liability

- (a) arises only in respect of a failure to observe and perform those covenants which occurs while the mortgagee is in possession of the leasehold estate or interest, and
- (b) is limited to the amount of the income received from the leasehold estate or interest by the mortgagee as mortgagee in possession.

Definitions: **covenant, goods, income, land, lessee, mortgagee, mortgagee in possession**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/52 s 110

See also: s 127(2)

**118 Mortgagee in possession of land may enter into a lease**

- (1) A mortgagee in possession of mortgaged land may, as lessor, enter into a lease of all or any part of the land, subject, however, to compliance with this section.
- (2) When entering into a lease of mortgaged land, a mortgagee in possession must
  - (a) have reasonable regard for the interests of the current mortgagor, any former mortgagor, any covenantor and any mortgagee under a subsequent mortgage and the holder of any other subsequent encumbrance, and
  - (b) take reasonable care to obtain the best rent reasonably available at the time of entering into the lease.
- (3) Except with the consent of the current mortgagor or of a court, a lease of land entered into by a mortgagee in possession must



- (a) be for a term not exceeding
    - (i) 2 years, in the case of a tenancy to which the *Residential Tenancies Act 1986* applies, or
    - (ii) 15 years, in any other case;
  - (b) contain such terms and conditions as are reasonable and appropriate, having regard to the interests of the current mortgagor, any former mortgagor, any covenantor and any mortgagee under a subsequent mortgage and the holder of any other subsequent encumbrance, on the one hand, and the mortgagee on the other;
  - (c) provide that it takes effect in possession not later than 6 months after the date on which it is entered into.
- (4) A mortgagee in possession of a leasehold estate or interest in land must not enter into a sublease of that estate or interest for a term longer than the balance of the term of the superior lease.
- (5) A lease or sublease of land entered into by a mortgagee in possession for a term longer than that permitted by subsection (3)(a) or subsection (4), as the case requires, is to be taken as a valid lease or sublease for the maximum term for which that lease could have been entered into under the relevant subsection.
- (6) A lease of land entered into by a mortgagee in possession
- (a) is not binding on a person holding any other encumbrance over the land to the extent that the encumbrance has priority in relation to the mortgagee's mortgage, unless that person has consented to the lease;
  - (b) is binding on a person holding a subsequent encumbrance over the land and, to the extent provided in subsection (7), on the current mortgagor.
- (7) When a mortgagee who has entered into a lease of land has withdrawn from possession of that land, the current mortgagor, or any person to whom the land has been transferred, assigned or transmitted, is bound by the lessor's covenants and is entitled to enforce the lessee's covenants under the lease, subject, however, to the provisions of the *Land Transfer Act 1952*.
- (8) A mortgagee in possession may execute all assurances and do all other things necessary to enter into a lease of land in accordance with this section.
- (9) A District Land Registrar or other person need not enquire whether or not an occasion has arisen authorising a mortgagee to enter into a lease of land in accordance with this section; and no action lies under section 172 of the *Land Transfer Act 1952* in respect of any loss, damage or deprivation caused by the improper exercise by a mortgagee of

a power conferred by this section.

- (10) A mortgagee in possession may enter into a lease, at a single rent, of all or part of the mortgaged land together with other land which is the subject of any collateral security from the current mortgagor or any former mortgagor to the mortgagee; and in such a case the mortgagee must fairly and equitably apportion all expenses and rents between the properties, but any failure by the mortgagee to make the apportionment does not affect the lessee or the lessee's interest.

Definitions: **court, covenant, covenantor, current mortgagor, encumbrance, former mortgagor, land, lease, lessee, lessor, mortgage, mortgagee, mortgagee in possession, superior lease**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 91 and 97

See also: *Receiverships Act 1993* s 19

### 119 Mortgagee in possession of land may exercise powers under a lease

A mortgagee in possession of mortgaged land that is subject to a lease (whether the lease was entered into by the mortgagee or by the current mortgagor or by any other person, and whether it was entered into before or after the mortgagee entered into possession) may

- (a) exercise all the powers of the lessor, and
- (b) enforce by legal proceedings in the name of the mortgagee all rights and remedies of the lessor,

as though the mortgagee were for the time being entitled to the reversion of the land.

Definitions: **current mortgagor, land, lease, lessor, mortgagee, mortgagee in possession**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 91; 1952/52 s 108

### 120 Mortgagee in possession may manage land or goods

A mortgagee in possession of mortgaged land or goods may

- (a) demand and recover, by legal proceedings or otherwise, any income due from the land or goods;
- (b) issue receipts for income recovered;
- (c) manage the land or goods;
- (d) obtain from the current mortgagor at a reasonable time any information or assistance which the current mortgagor is required to give under section 131;
- (e) exercise any right of the current mortgagor to inspect books or documents that relate to the land or goods and are in the posses-

sion or control of a person other than the current mortgagor.

Definitions: **current mortgagor, goods, income, land, mortgagee in possession**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1993/122 s 14

### **121 Mortgagee in possession of land may harvest crops and timber**

- (1) A mortgagee in possession of mortgaged land may
  - (a) harvest and sell any crop growing on the land, and
  - (b) cut and sell timber and other trees on the land which are ready for cutting and were not planted or left standing for shelter or ornament,
 and may for those purposes make a contract with any person.
- (2) A contract made for the purposes of subsection (1) must provide that it is to be performed
  - (a) within not more than 12 months from the date of the contract, or
  - (b) within such longer period as a court may by order approve.

Definitions: **court, land, mortgagee in possession**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 95

### **122 Mortgagee in possession may protect or repair mortgaged land or goods**

A mortgagee in possession of mortgaged land or goods may take such measures for the protection, insurance, maintenance, preservation or repair of the land or goods as are proper and necessary, but is not under any duty to do so, except so far as the cost of those measures can be met from income from the land or goods received as mortgagee in possession, after first making any payments to which income received as mortgagee in possession is required to be applied under section 124(a).

Definitions: **goods, income, land, mortgagee in possession**, s 3

See also: s 88

### **123 Mortgagee in possession of land liable for waste**

A mortgagee in possession of mortgaged land is liable in damages to the current mortgagor, any former mortgagor, any covenantor and any mortgagee under a subsequent mortgage and the holder of any other subsequent encumbrance for loss arising from any act or omission of the mortgagee which would be the tort of voluntary waste if

done or omitted by a lessee.

Definitions: **covenantor, current mortgagor, encumbrance, former mortgagor, land, lessee, mortgage, mortgagee, mortgagee in possession**, s 3

#### 124 Application of income received by mortgagee in possession

Subject to sections 125 and 126, a mortgagee in possession of mortgaged land or goods must apply all income from the land or goods received as mortgagee in possession as follows:

- (a) first, to the payment of rates or other outgoings on the land or goods, including payments (whether of interest or principal moneys) required to be made in respect of any other encumbrance over the land or goods, to the extent that the encumbrance has priority over the mortgagee's mortgage;
  - (b) second, to the payment of the reasonable expenses of entering into possession and of doing anything which a mortgagee in possession is required or entitled to do;
  - (c) third, to the repayment of any moneys paid or advanced by the mortgagee for any of the purposes referred to in paragraphs (a) or (b), together with interest on any amount so paid or advanced at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage;
  - (d) fourth, to the payment of the interest due under the mortgage and repayment of the principal moneys secured by the mortgage so far as repayment is then due;
- and must pay the surplus (if any) to the current mortgagor.

Definitions: **current mortgagor, encumbrance, goods, income, land, mortgage, mortgagee, mortgagee in possession**, s 3

#### 125 Application of income where a company under the *Companies Act 1955* has given a floating charge

- (1) This section applies to income received from mortgaged land or goods by a mortgagee in possession, if
  - (a) the current mortgagor is a company under the *Companies Act 1955*, and
  - (b) the mortgage created, over the land or goods,
    - (i) a floating charge, or
    - (ii) a fixed or specific charge that conferred a floating security at the time it was created, and
  - (c) the income arises from the land or goods subject to that charge, and,
  - (d) at the time when the mortgagee entered into possession, the company was not in liquidation.
- (2) A mortgagee in possession who, after 1 July 1994 (being the date on which the *Receiverships Act 1993* came into force), receives income to

which this section applies, must, after applying that income for any purpose referred to in section 124(a), (b) and (c), but before applying it for any purpose referred to in section 124(d), pay preferential claims to the extent and in the order of priority specified in Schedule 8C (except clauses 1 and 9(b)) to the *Companies Act 1955*.

- (3) In the application of Schedule 8C to the *Companies Act 1955* in accordance with subsection (2),
- (a) references to a liquidator are to be read as references to a mortgagee in possession;
  - (b) references to the commencement of the liquidation are to be read as references to the date on which the mortgagee entered into possession;
  - (c) references to a company being put into or being in liquidation are to be read as references to a mortgagee entering into or being in possession.
- (4) The provisions of section 101 of the *Companies Act 1955* continue to apply to income to which this section applies, received before 1 July 1994 by a mortgagee in possession, as if that section had not been repealed by the *Receiverships Act 1993*.

Definitions: **company, company under the *Companies Act 1955*, current mortgagor, goods, income, land, mortgagee**, s 3

Origin: 1955/63 s 101

See also: ss 156 and 157

### **126 Application of income where a company under the *Companies Act 1993* or an overseas company has given a floating charge**

- (1) This section applies to income from mortgaged land or goods received after 1 July 1994 (being the date on which the *Receiverships Act 1993* came into force) by a mortgagee in possession, if
- (a) the current mortgagor is a company under the *Companies Act 1993* or an overseas company, and
  - (b) the mortgage created, over the land or goods,
    - (i) a floating charge, or
    - (ii) a fixed or specific charge that conferred a floating security at the time it was created, and
  - (c) the income arises from the land or goods subject to that charge, and,
  - (d) at the time when the mortgagee entered into possession,
    - (i) the company was not in liquidation, or
    - (ii) the assets in New Zealand of the overseas company were not being liquidated,
 as the case requires.
- (2) After a mortgagee in possession who receives income to which this section applies has applied that income for any purpose referred to in

section 124(a), (b) and (c), and before applying it for any purpose referred to in section 124(d), the mortgagee must pay preferential claims to the extent and in the order of priority specified in the Seventh Schedule (except clauses 1 and 9(b)) to the *Companies Act 1993*.

- (3) In the application of the Seventh Schedule to the *Companies Act 1993* in accordance with subsection (2),
- (a) references to a liquidator are to be read as references to a mortgagee in possession;
  - (b) references to the commencement of the liquidation are to be read as references to the date on which the mortgagee entered into possession;
  - (c) references to a company being put into or being in liquidation are to be read as references to a mortgagee entering into or being in possession;
  - (d) if the current mortgagor is an overseas company, references to a company are to be taken as references to an overseas company.

Definitions: **company, company under the *Companies Act 1993*, current mortgagor, goods, income, land, mortgagee, mortgagee in possession, overseas company**, s 3

Origin: 1955/63 s 101

See also: ss 156 and 157

### **127 Mortgagee in possession to account to current mortgagor**

- (1) A mortgagee in possession of mortgaged land or goods must account to the current mortgagor and to every person holding a subsequent encumbrance over the land or goods for all income received from the land or goods as mortgagee in possession and for its application or payment under sections 124, 125 and 126.
- (2) The income received from the land or goods by the mortgagee as mortgagee in possession includes
- (a) all income from the land or goods actually received by the mortgagee as mortgagee in possession, and
  - (b) an allowance for the amount of all income which the mortgagee would have received from the land or goods as mortgagee in possession but for the wilful misconduct of the mortgagee, and,
  - (c) if the mortgagee in possession of mortgaged land has the personal occupation of all or part of the land, an allowance for an amount which is a fair occupation rent for that land, as between the current mortgagor and the mortgagee.
- (3) For the purposes of subsection (2)(c), a mortgagee is not to be taken as

having the personal occupation of land by reason only of the fact that the mortgagee entered into or took physical possession of the land with the object of

- (a) doing anything in relation to the land which a mortgagee in possession is required or entitled to do under sections 120, 121 or 122, or
  - (b) facilitating the sale of the land;
- but, in the last-mentioned case, the mortgagee must show that the sale was not unreasonably delayed.
- (4) In an accounting under this section, interest must be calculated with half-yearly rests, or, if rests at a shorter or a longer interval are provided for by the mortgage, then with rests at that interval.

Definitions: **current mortgagor, encumbrance, goods, income, land, mortgagee, mortgagee in possession**, s 3; **person**, *Acts Interpretation Act 1924* s 4

*Duties of mortgagees in possession*

**128 Notice of entry into possession of mortgaged land or goods**

- (1) This section applies to a mortgagee in possession of mortgaged land or goods who enters into possession on or after 1 July 1994 (being the date on which the *Property Law Amendment Act 1993* came into force).
- (2) On entering into possession of the land or goods, a mortgagee in possession to whom this section applies
  - (a) must immediately give written notice of that fact to the current mortgagor, and also give public notice of that fact, and
  - (b) must, within 5 working days after the date of entry into possession, send a copy of the public notice to
    - (i) every former mortgagor, and
    - (ii) every covenantor, and
    - (iii) every mortgagee under a subsequent mortgage and every holder of any other subsequent encumbrance over the mortgaged land or goods, and
    - (iv) every person who has lodged a caveat under section 137 of the *Land Transfer Act 1952*, or a notice under section 42 of the *Matrimonial Property Act 1976* having the effect of such a caveat, against the title to the mortgaged land or any part of it,
      - of whose name and address the mortgagee has actual notice, and,
  - (c) if the current mortgagor is a body corporate registered under an enactment, must, within 5 working days after the date of entry into possession, send a copy of the public notice to the Registrar.
- (3) A notice given under subsection (2) must include

- (a) the mortgagee's full name;
  - (b) the date on which the mortgagee entered into possession of the mortgaged land or goods;
  - (c) a brief description of the mortgaged land or goods;
  - (d) the address of the registered office of the mortgagee if the mortgagee is a body corporate, or the address of the mortgagee if the mortgagee is an individual person, or an address specified by the mortgagee as an address to which communications relating to the mortgaged land or goods may be addressed.
- (4) If a mortgagee fails to comply with this section, the mortgagee, and, if the mortgagee is a body corporate, every director of the mortgagee, commits an offence and is liable on conviction to a fine not exceeding \$10 000.

Definitions: **covenantor, current mortgagor, director, encumbrance, former mortgagor, goods, land, mortgage, mortgagee, mortgagee in possession, working day**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104DD

### 129 Address to which notice to the current mortgagor is to be sent

- (1) If the current mortgagor is not an overseas company, the notice required by section 128 must be sent to that mortgagor at the address of the mortgagor's place of business, or if the mortgagor has more than one place of business, then the mortgagor's principal place of business, or if the mortgagor has no place of business or that place of business is not known, then, in the case of a body corporate registered under an enactment, the mortgagor's registered office, or, in the case of an individual person, the mortgagor's residence.
- (2) If the current mortgagor is an overseas company, the notice required by section 128 must be sent to that mortgagor at the address of the mortgagor's place of business, or, if the mortgagor has more than one place of business, then the mortgagor's principal place of business.

Definitions: **current mortgagor, goods, mortgagor, overseas company**, s 3; **person**, *Acts Interpretation Act 1924* s 4

### 130 Public notice

The public notice required by section 128 must be given by publishing it

- (a) in at least one issue of the *Gazette*, and
- (b) in at least one issue of a newspaper circulating in the following areas of New Zealand:
  - (i) the area in which the mortgaged land or goods are situated, and



- (ii) the area in which is situated the current mortgagor's place of business or residence to which the notice to the current mortgagor required by section 128 must be addressed under section 129.

Definitions: **current mortgagor, goods, land**, s 3

Origin: 1952/51 s 104EE

### **131 Current mortgagor to make information available to mortgagee in possession**

- (1) The current mortgagor of mortgaged land or goods, and, if the current mortgagor is a body corporate, every director of the body corporate, must
- (a) make available to a mortgagee in possession all books, documents and information relating to the mortgaged land or goods;
  - (b) if required to do so by the mortgagee, verify by statutory declaration that the books, documents and information are complete and correct;
  - (c) give the mortgagee such other assistance as the mortgagee may reasonably require;
  - (d) if the current mortgagor is a body corporate that has a common seal, make the common seal available for use by the mortgagee.
- (2) On the application of a mortgagee in possession, a court may make an order requiring the current mortgagor, or, if the current mortgagor is a body corporate, any director of the body corporate, to comply with subsection (1).

Definitions: **court, current mortgagor, director, goods, land, mortgagee, mortgagee in possession**, s 3

Origin: 1952/51 s 104FF

### **132 Accounting records**

- (1) A mortgagee in possession of mortgaged land or goods must at all times keep accounting records that correctly record and explain the receipts, expenditure and other transactions relating to the land or goods.
- (2) The accounting records must be retained for not less than 6 years after the mortgagee has withdrawn from possession of the land or goods.

Definitions: **goods, land, mortgagee, mortgagee in possession**, s 3

Origin: 1952/51 s 104GG

### **133 Duty in relation to money**

A mortgagee in possession of mortgaged land or goods must keep money relating to the land or goods separate from other money held by or under the control of the mortgagee.

Definitions: **goods, land, mortgagee, mortgagee in possession**, s 3

Origin: 1952/51 s 104HH

### 134 First report by mortgagee in possession

- (1) This section applies to a mortgagee in possession who enters into possession of mortgaged land or goods on or after 1 July 1994 (being the date on which the *Property Law Amendment Act 1993* came into force).
- (2) Not later than 2 months after entering into possession of the mortgaged land or goods, a mortgagee in possession to whom this section applies must prepare a report in relation to the land or goods.
- (3) The report required by subsection (2) must include:
  - (a) particulars of the land or goods;
  - (b) particulars of the debts and liabilities to be satisfied from the land or goods;
  - (c) the names and addresses of creditors with an interest in the land or goods;
  - (d) particulars of any other mortgage or encumbrance over the land or goods held by any other creditor (including the date on which it was created);
  - (e) particulars of any failure of the current mortgagor to comply with section 131;
  - (f) such other information as may be prescribed.
- (4) The report must also include details of
  - (a) the events leading up to and giving rise to the right of the mortgagee to enter into possession of the mortgaged land or goods, so far as the mortgagee is aware of them;
  - (b) any land or goods leased by the mortgagee, as lessor, in accordance with section 118 or sold by the mortgagee under subpart 6, and any proposal so to lease or sell the land or goods;
  - (c) any amounts likely to be available for payment to other creditors of the current mortgagor.
- (5) A mortgagee may omit from the report details of any proposal for the sale or lease of the mortgaged land or goods, if the mortgagee considers that their inclusion would materially prejudice the exercise of the mortgagee's rights or powers.
- (6) If a mortgagee fails to comply with this section, the mortgagee, and, if

the mortgagee is a body corporate, every director of the body corporate, commits an offence and is liable on conviction to a fine not exceeding \$10 000.

Definitions: **address, creditor, current mortgagor, director, encumbrance, goods, land, lease, lessor, mortgage, mortgagee, mortgagee in possession**, s 3

Origin: 1952/51 s 104H

### 135 Further reports by mortgagee in possession

- (1) A mortgagee in possession of mortgaged land or goods, or a person who was such a mortgagee in possession, must prepare a report or a further report summarising the state of affairs with respect to the land or goods
  - (a) in the case of a mortgagee who entered into possession before 1 July 1994 (being the date on which the *Property Law Amendment Act 1993* came into force), not later than 2 months
    - (i) after the end of each period of 6 months after that date, and
    - (ii) after the date on which the mortgagee withdraws from possession;
  - (b) in the case of a mortgagee who enters into possession after 1 July 1994, not later than 2 months
    - (i) after the end of each period of 6 months after the date of entry into possession, and
    - (ii) after the date on which the mortgagee withdraws from possession.
- (2) The report or further report required by subsection (1) must include
  - (a) an accounting, as required by section 127,
    - (i) in the case of a mortgagee who entered into possession before 1 July 1994, for the period since the mortgagee entered into possession, or, if the mortgagee has accounted to the current mortgagor for the income from the land or goods since entering into possession, then for the period since the date of the most recent accounting, or the date of the most recent previous report, whichever date is the later;
    - (ii) in the case of a mortgagee who enters into possession after 1 July 1994, for the period since the date of entering into possession or since the most recent report under this section, whichever date is the later;and must also include details of
  - (b) any land or goods leased by the mortgagee, as lessor, in accordance with section 118 or sold by the mortgagee under subpart 6, since the date of entering into possession, or since the date of the most recent previous report, as the case requires, and any proposal

- so to lease or sell the land or goods;
- (c) any amounts likely to be available for payment to other creditors of the current mortgagor;
- (d) such other information as may be prescribed.
- (3) A mortgagee may omit from the report details of any proposal for the sale or lease of the mortgaged land or goods, if the mortgagee considers that their inclusion would materially prejudice the exercise of the mortgagee's rights or powers.
- (4) This section does not apply
- (a) to a person who was a mortgagee in possession of land or goods and withdrew from possession before 1 July 1994, or
- (b) in respect of a period before 1 July 1994, to a person who was a mortgagee in possession of land or goods before that date but withdrew from possession after that date, except as provided to the contrary in subsection (2)(a)(i);
- (5) This subsection does not affect any rule of law which required a mortgagee who withdrew from possession of mortgaged land or goods before 1 July 1994 to account for moneys received and applied or paid while the mortgagee was in possession.
- (6) If a mortgagee or other person fails to comply with this section, the mortgagee or person, and, if the mortgagee or person is a body corporate, every director of the body corporate, commits an offence and is liable on conviction to a fine not exceeding \$10 000.

Definitions: **creditor**, **current mortgagor**, **director**, **goods**, **income**, **land**, **lease**, **lessor**, **mortgagee**, **mortgagee in possession**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104JJ

### 136 Extension of time for preparing reports

On the application of a mortgagee or other person who is required to prepare a report under section 134 or 135, the Registrar may extend the period within which the report is to be prepared.

Definitions: **mortgagee**, **Registrar**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104KK

### 137 Persons entitled to receive reports

- (1) A mortgagee or other person required to prepare a report under section 134 or 135 must send a copy of it
- (a) to the current mortgagor, at the address of the current mort-

gagor's place of business or residence to which the notice to the current mortgagor required by section 128 must be addressed under section 129, and

- (b) to
  - (i) every former mortgagor, and
  - (ii) every covenantor, and
  - (iii) every mortgagee under a subsequent mortgage and every holder of any other subsequent encumbrance over the mortgaged land or goods, and
  - (iv) every person who has lodged a caveat under section 137 of the *Land Transfer Act 1952*, or a notice under section 42 of the *Matrimonial Property Act 1976* having the effect of such a caveat, against the title to the mortgaged land or any part of it of whose name and address the mortgagee has actual notice.
- (2) Not later than 15 working days after receiving a written request for a copy of a report prepared under section 134 or 135 from
  - (a) a creditor, or,
  - (b) if the current mortgagor is a body corporate, a director of the body corporate, or
  - (c) a former mortgagor, or
  - (d) a covenantor, or
  - (e) any other person with an interest in all or part of the land or goods, and on payment of the reasonable costs of making and sending the copy, the person who prepared the report must send a copy of the report to the person requesting it.
- (3) If the current mortgagor is a body corporate registered under an enactment, a person who prepares a report under section 134 or 135 must, within 5 working days, send a copy of the report to the Registrar.
- (4) If a person fails to comply with this section, that person, and, if the person is a body corporate, every director of the body corporate, commits an offence and is liable on conviction to a fine not exceeding \$10 000.

Definitions: **covenantor**, **creditor**, **current mortgagor**, **director**, **encumbrance**, **former mortgagor**, **goods**, **land**, **mortgage**, **mortgagee**, **Registrar**, **working day**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104LL

### 138 Persons entitled to inspect reports

A person to whom a report must be sent upon request under section 137, is entitled to inspect the report during normal business hours at

- (a) the mortgagee's place of business, registered office or residence notified under section 128(3)(d), or
- (b) at any other place of business of the person who prepared the

report, at any time after the expiration of 5 working days after that person receives a request that the report be made available for inspection at that place.

Definitions: **mortgagee, working day**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104MM

### 139 Duty to notify breaches of other Acts

- (1) If the current mortgagor is a company or an overseas company, a person who
- (a) is required to prepare a report under section 134 or 135, and
  - (b) considers that the company or overseas company or any director of the company or overseas company has committed an offence against the *Companies Act 1955*, the *Securities Act 1978* or the *Companies Act 1993*,
- must report that fact to the Registrar.
- (2) If a person fails to comply with this section, that person, and, if the person is a body corporate, every director of the body corporate, commits an offence and is liable on conviction to a fine not exceeding \$10 000.

Definitions: **company, current mortgagor, director, overseas company, Registrar**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104NN

#### *Withdrawal from possession*

### 140 Withdrawal of the mortgagee from possession

- (1) A mortgagee in possession of mortgaged land or goods is to be taken as having withdrawn from possession of all or any part of the land or goods on
- (a) the date on which the mortgagee or a court appoints a receiver in respect of all or that part of the land or goods, or
  - (b) the date on which a mortgagee under any mortgage having priority over the mortgagee's mortgage enters into possession of, or appoints a receiver in respect of, all or that part of the land or goods, or
  - (c) the date of an order of a court under section 141, consenting to the mortgagee's withdrawal from possession, or under section 142, directing that the mortgagee withdraw from possession, or
  - (d) the date on which the mortgagee withdraws from possession of all or that part of the land or goods after their redemption or sale, or with the consent of all persons who have an interest in that land or those goods,
- whichever date first occurs.

- (2) A mortgagee in possession of mortgaged land or goods may not withdraw from possession except as provided in subsection (1); but this subsection does not apply to a mortgagee who withdrew from possession before — 199- [date on which this Act comes into force].
- (3) A mortgagee who has withdrawn from possession is not entitled to receive any income from the mortgaged land or goods which comes in after the date of withdrawal (whether that income has accrued in respect of a period before the date of withdrawal or a period after that date); but if any such income is actually received by a mortgagee who has withdrawn from possession, the mortgagee must account for it under section 127.
- (4) If, in an accounting under section 127, a mortgagee in possession of mortgaged land or goods has given credit for moneys not actually received by the mortgagee, and, after the date of the mortgagee's withdrawal from possession, those moneys are actually received by or for the benefit of the current mortgagor, they are a debt owing by the current mortgagor to the mortgagee.

Definitions: **court, current mortgageor, goods, income, land, mortgage, mortgagee, mortgagee in possession, receiver**, s 3; **person**, *Acts Interpretation Act 1924* s 4

See also: s 116

#### **141 Withdrawal with the consent of the court**

- (1) On the application of a mortgagee in possession, a court may make an order consenting to the mortgagee's withdrawal from possession of all, or any part of, the mortgaged land or goods.
- (2) The court may make an order under subsection (1) if it is satisfied that, as at the date on which the application is heard, the mortgagee has substantially performed all the obligations and carried out all the duties of a mortgagee in possession under this subpart, and that there is no other good reason why the consent should not be given.
- (3) Unless the court orders otherwise, an application made under this section must be served on the current mortgagor.
- (4) An order under subsection (1) may be made on such conditions (if any) as the court thinks fit.

Definitions: **court, current mortgagor, goods, land, mortgagee, mortgagee in possession**, s 3

**142 Withdrawal by direction of the court**

- (1) On the application of the current mortgagor, or any other person who has an interest in the mortgaged land or goods and is entitled to redeem them, a court may make an order directing a mortgagee in possession to withdraw from possession of the whole, or any part of, the land or goods.
- (2) An order may be made under subsection (1) if the court is satisfied that
  - (a) the purpose of the mortgagee's entry into possession of the land or goods has been fulfilled, or
  - (b) circumstances no longer justify the mortgagee remaining in possession of the land or goods.
- (3) Unless the court orders otherwise, a copy of an application made under this section must be served on the mortgagee.
- (4) An order may be made under subsection (1) on such conditions (if any) as the court thinks fit.
- (5) An order made under this section does not affect any other mortgage or encumbrance over the mortgaged land or goods.

Definitions: **court, current mortgagor, encumbrance, goods, land, mortgage, mortgagee, mortgagee in possession, redeem**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104PP

**143 Restriction on re-entry into possession after withdrawal**

A mortgagee who withdraws from possession of mortgaged land or goods in a manner referred to in section 140(1) may not again enter into possession of that land or those goods except where the mortgagee becomes entitled to do so, after compliance with the provisions of subpart 4, by reason of a default occurring after the date on which the mortgagee withdrew from possession.

Definitions: **default, goods, land, mortgagee**, s 3

**144 Notice that mortgagee has withdrawn from possession**

- (1) If the current mortgagor is a body corporate registered under an enactment, a mortgagee who withdraws from possession of all or part of the mortgaged land or goods must, not later than 5 working days after the date of withdrawal, send or deliver notice in writing of the withdrawal to the Registrar.
- (2) Subsection (1) does not apply to a mortgagee who withdrew from possession of the land or goods before 1 July 1994.



- (3) If a person who was a mortgagee in possession fails to comply with this section, that person, and, if the person is a body corporate, every director of the body corporate, commits an offence and is liable on conviction to a fine not exceeding \$10 000.

Definitions: **current mortgagor, director, goods, land, mortgagee, mortgagee in possession, Registrar, working day**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 10400

*Protection for directors*

**145 Defences available to directors in proceedings for offences under this subpart**

It is a defence to a director of a body corporate who is charged with an offence under this subpart if that director proves that

- (a) the body corporate took all reasonable and proper steps to ensure that the relevant requirement was complied with, or
- (b) he or she took all reasonable steps to ensure that the body corporate complied with the relevant requirement, or
- (c) in the circumstances he or she could not reasonably have been expected to take steps to ensure that the body corporate complied with the relevant requirement.

Definitions: **director**, s 3

Origin: 1952/51 s 104QQ

*Subpart 6—Mortgagees' power of sale*

*Exercise of power of sale*

**146 Duty of mortgagee exercising power of sale**

- (1) A mortgagee who exercises a power to sell mortgaged property, including exercise of the power through the Registrar under section 159, or through a court under section 168, owes a duty of reasonable care to the current mortgagor, any former mortgagor, any covenantor, any mortgagee under a subsequent mortgage and any holder of any other subsequent encumbrance to obtain the best price reasonably obtainable as at the time of sale.
- (2) A mortgagee who exercises a power to sell mortgaged property may not become the purchaser of the mortgaged property except
  - (a) in accordance with section 166, at a sale of land or goods through the Registrar, or
  - (b) in accordance with an order of a court made under section 168.

Definitions: **court, covenantor, current mortgagor, encumbrance, former mortgagor, land, goods, mortgage, mortgagee, property, Registrar**, s 3

Origin: 1952/51 s 103A

**147 No defence or indemnity**

Notwithstanding anything to the contrary in any rule of law or in any instrument,

- (a) it is not a defence to a proceeding against a mortgagee for a breach of the duty imposed by section 146 that the mortgagee was acting as the agent of, or under a power of attorney from, the current mortgagor or any former mortgagor;
- (b) a mortgagee is not entitled to compensation or indemnity from the mortgaged property or from the current mortgagor, any former mortgagor or any covenantor in respect of any liability arising from a breach of the duty imposed by section 146.

Definitions: **covenantor, current mortgagor, former mortgagor, instrument, mortgagee, property**, s 3

Origin: 1952/51 s 103B

**148 Powers incidental to power of sale**

- (1) If, under a mortgage and the provisions of subpart 4, a mortgagee or receiver becomes entitled to exercise a power to sell mortgaged property, the sale
  - (a) may relate to the whole or any part of the property;
  - (b) may be subject to, or free of, any mortgage or other encumbrance having priority over the mortgagee's mortgage;
  - (c) may be in one lot or in separate lots, and, in the case of mortgaged land, may be by way of subdivision or otherwise;
  - (d) may, except in the case of a sale of land or goods through the Registrar under section 159, be by public auction or by private contract;
  - (e) may, except in the case of a sale of land or goods through the Registrar under section 159, be with or without reserve;
  - (f) may be for a purchase price payable in one sum or by instalments;
  - (g) may be subject to such other conditions as the mortgagee or receiver thinks fit.
- (2) The mortgagee or receiver may cancel a contract for the sale of the mortgaged property and resell the property without being liable for any loss on resale, subject, however, to section 146(1) or section 19 of the *Receiverships Act 1993*, as the case requires.

Definitions: **encumbrance, goods, land, mortgage, mortgagee, property, receiver, Registrar**, s 3

Origin: *Law of Property Act 1925* (UK) s 101

**149 Mortgagee may adopt agreement for sale and purchase**

- (1) If, at the time when a mortgagee becomes entitled to exercise a power to sell mortgaged property, the whole or any part of the property is subject to an agreement for sale and purchase entered into by the current mortgagor or any former mortgagor, the mortgagee may elect, by notice served on the purchaser, to adopt the agreement for sale and purchase.
- (2) On so electing under subsection (1),
  - (a) the mortgagee has all the rights and powers in relation to the purchaser which the current mortgagor would have had as vendor of the property, and
  - (b) the mortgagee may execute all assurances and do all other things necessary to effect the transfer or assignment of the property, including, in the case of an agreement for the sale and purchase of mortgaged land, the execution of a memorandum of transfer which may be registered under section 105 of the *Land Transfer Act 1952* as if the land had been sold by the mortgagee, and
  - (c) the mortgagee must account for the proceeds of the sale as though the property had been sold by the mortgagee.
- (3) The adoption of an agreement for the sale and purchase of property by a mortgagee does not affect any liability in respect of the agreement of the current mortgagor, or any former mortgagor, who entered into or is otherwise bound by the agreement.

Definitions: **current mortgagor, former mortgagor, land, mortgagee, property, registered**, s 3

**150 Court may authorise land and minerals to be dealt with separately**

If it is convenient to sell mortgaged land separately from mines or minerals but the power of sale conferred by the mortgage does not make adequate provision to that effect, a court, on the application of the mortgagee or receiver, may make an order conferring on the mortgagee or receiver either or both

- (a) a power to sell the land, with an exception or reservation of all or any mines or minerals, and with or without easements, rights or privileges over the land in relation to the working of mines or the getting or carrying away of minerals;
- (b) a power to sell all or any mines or minerals separately from the land, and with or without any easement, right or privilege over the land of the kind referred to in paragraph (a).

Definitions: **court, land, mortgage, mortgagee, receiver**, s 3

Origin: 1952/51 s 93

**151 Powers incidental to power to sell land, mines or minerals**

A power to sell mortgaged land, or mines or minerals separately from the land, includes the power (which may be exercised by the mortgagee or by a receiver)

- (a) to sell the land, mines or minerals subject to an easement, right, privilege or covenant of any kind, and
- (b) to create an easement, right or privilege of any kind over land for the time being remaining unsold, or to enter into a covenant of any kind in respect of such land, and,
- (c) in the case of a subdivision of land, to lay off and make such roads, streets and passage ways and do such other things in connection with the subdivision as circumstances require and the mortgagee or receiver thinks it.

Definitions: **covenant, land, mortgagee, receiver**, s 3

Origin: 1952/51 s 94

**152 Sale together with other property at a single price**

A mortgagee or receiver who is entitled to sell mortgaged property may sell the whole or any part of the property, together with other property which is the subject of any collateral security from the current mortgagor to the mortgagee, at a single price; and in such a case the mortgagee or receiver must fairly and equitably apportion all expenses and purchase money between the properties, but any failure by the mortgagee or receiver to make the apportionment does not affect the purchaser or the purchaser's interest in the property.

Definitions: **current mortgagor, mortgagee, property, receiver**, s 3

Origin: 1952/51 s 97

**153 Mortgagee may transfer or assign mortgaged property to purchaser**

- (1) On the sale of mortgaged property by a mortgagee or a receiver,
  - (a) the mortgagee's written receipt is a sufficient discharge to the purchaser for payment of the purchase money or other consideration, and
  - (b) the mortgagee may execute all assurances and do all other things necessary to effect the transfer or assignment of the property to a purchaser, except where the mortgagee is the purchaser, and in that case the transfer or assignment must be executed by the Registrar under section 166 or in accordance with an order of a court made under section 168.

- (2) Subject to the need for its registration under any enactment, a memorandum of transfer or other instrument executed by the mortgagee in accordance with subsection (1) transfers or assigns the property to which it relates to the transferee or assignee
- (a) free from all liability on account of
    - (i) the mortgage under which the power of sale was exercised, and
    - (ii) any subsequent mortgage or other subsequent encumbrance over the property,
  - (b) but subject to
    - (i) any mortgage or other encumbrance, estate or interest over or in the property that has priority over the mortgagee's mortgage and has not been discharged or otherwise terminated, and
    - (ii) any other estate or interest in the property which is binding on the mortgagee.

Definitions: **court, encumbrance, instrument, mortgage, mortgagee, property, receiver, Registrar, registration**, s 3

Origin: 1952/51 s 98

#### 154 Protection of purchaser at sale by mortgagee

- (1) This section applies to
  - (a) a person who purchases mortgaged property from the mortgagee or a receiver (excluding the mortgagee, where the mortgagee is the purchaser), and
  - (b) a person claiming the property through a person who purchases mortgaged property from the mortgagee or a receiver (including a person claiming through the mortgagee, where the mortgagee is the purchaser).
- (2) A person to whom this section applies
  - (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the property, and
  - (b) is not obliged to see to the application of the purchase money, and
  - (c) need not inquire whether there has been a default, or whether any notice required to be given by this part has been duly given, or whether the sale is otherwise necessary, regular or proper.
- (3) A person to whom this section applies is protected from liability under subsection (2), even if, at the time of purchase or other acquisition of the property, that person has actual notice that there has not been a

default, or that a notice required by this part was not duly given, or that the sale is otherwise unnecessary, irregular or improper, except in the case of fraud of which that person was aware.

Definitions: **default, mortgagee, property, receiver**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 98 and 102

### 155 Application of proceeds of sale of mortgaged property

- (1) Except as provided in subsection (2) and subject to sections 156 and 157, the proceeds arising from the sale by a mortgagee of mortgaged property must be applied
  - (a) first, to payment of all moneys (if any) reasonably paid or advanced at any time by the mortgagee for any of the purposes referred to in section 88, together with interest on any amount so paid or advanced at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage;
  - (b) second, to payment of the interest due under the mortgage and to repayment of the principal moneys secured by the mortgage;
  - (c) third, to payment of moneys secured by any subsequent mortgage or other subsequent encumbrance over the property, if
    - (i) any such mortgage or other encumbrance is registered, or
    - (ii) any such mortgage or other encumbrance is unregistered, but the mortgagee has actual notice of it;
 and if there is more than one such mortgage or other encumbrance, then to payment of moneys secured by each in the order of its priority;
  - (d) fourth, the surplus (if any) must be paid to the current mortgagor.
- (2) Notwithstanding anything to the contrary in subsection (1), if a mortgagee under a subsequent mortgage sells mortgaged property on the express or implied condition that, to the extent that any other mortgage or encumbrance over the property has priority in relation to the mortgagee's mortgage, it will be discharged before title to the property is transferred to the purchaser, the mortgagee under the subsequent mortgage may apply the proceeds or any part of them to the payment of moneys secured by the mortgage or encumbrance required to be discharged.

Definitions: **current mortgagor, encumbrance, mortgage, mortgagee, property, registered, unregistered**, s 3

Origin: 1952/52 s 104

**156 Application of proceeds of sale where a company under the Companies Act 1955 has given a floating charge**

- (1) This section applies to proceeds arising from the sale of mortgaged property by a mortgagee in possession, if,
  - (a) immediately before the sale, the current mortgagor was a company under the *Companies Act 1955*, and
  - (b) the mortgage created, over the mortgaged property,
    - (i) a floating charge, or
    - (ii) a fixed or specific charge that conferred a floating security at the time it was created, and
  - (c) the proceeds arise from the sale of property subject to that charge, and,
  - (d) at the time when the mortgagee entered into possession, the company was not in liquidation.
- (2) After being applied for any purpose referred to in section 155(1)(a), but before being applied for any purpose referred to in section 155(1)(b), (c) or (d), proceeds to which this section applies, arising from the sale of mortgaged property after 1 July 1994 (being the date on which the *Receiverships Act 1993* came into force), must be applied to the payment of preferential claims, to the extent and in the order of priority specified in Schedule 8C (except clauses 1 and 9(b)) to the *Companies Act 1955*.
- (3) In the application of Schedule 8C to the *Companies Act 1955* in accordance with subsection (2),
  - (a) references to a liquidator are to be read as references to a mortgagee who sells mortgaged property;
  - (b) references to the commencement of the liquidation are to be read as references to the date on which the mortgaged property is sold by a mortgagee;
  - (c) references to a company being put into or being in liquidation are to be read as references to a mortgagee selling or having sold mortgaged property.
- (4) This section does not prevent proceeds to which it applies from first being applied for a purpose referred to in section 155(2), before being applied as required by subsection (2).
- (5) The provisions of section 101 of the *Companies Act 1955* continue to apply to proceeds to which this section applies, arising from a sale of mortgaged property before 1 July 1994, as if that section had not been repealed by the *Receiverships Act 1993*.

Definitions: **company, company under the Companies Act 1955, current mortgagor, mortgage, mortgagee, property**, s 3

Origin: 1955/63 s 101

See also: ss 126 and 127

**157 Application of proceeds of sale where a company under the Companies Act 1993 or an overseas company has given a floating charge**

- (1) This section applies to proceeds arising from the sale of mortgaged property after 1 July 1994 (being the date on which the *Receiverships Act 1993* came into force) by a mortgagee in possession, if,
- (a) immediately before the sale, the current mortgagor was a company under the *Companies Act 1993*, or an overseas company, and
  - (b) the mortgage created, over the mortgaged property,
    - (i) a floating charge, or
    - (ii) a fixed or specific charge that conferred a floating security at the time it was created, and
  - (c) the proceeds arise from the sale of property subject to that charge, and,
  - (d) at the time when the mortgagee entered into possession,
    - (i) the company was not in liquidation, or
    - (ii) the assets in New Zealand of the overseas company were not being liquidated,as the case requires.
- (2) After being applied for any purpose referred to in section 155(1)(a), but before being applied for any purpose referred to in section 155(1)(b), (c) or (d), proceeds to which this section applies must be applied to the payment of preferential claims, to the extent and in the order of priority specified in the Seventh Schedule (except clauses 1 and 9(b)) to the *Companies Act 1993*.
- (3) In the application of the Seventh Schedule to the *Companies Act 1993* in accordance with subsection (2),
- (a) references to a liquidator are to be read as references to a mortgagee who sells mortgaged property;
  - (b) references to the commencement of the liquidation are to be read as references to the date on which the mortgaged property is sold by a mortgagee;
  - (c) references to a company being put into or being in liquidation are to be read as references to a mortgagee selling or having sold mortgaged property;
  - (d) if the current mortgagor was an overseas company,
    - (i) references to a company are to be taken as references to an overseas company, and
    - (ii) references to assets are to be taken as references to assets in New Zealand.



- (4) This section does not prevent proceeds to which it applies from first being applied for a purpose referred to in section 155(2), before being applied as required by subsection (2).

Definitions: **company, company under the Companies Act 1993, current mortgagor, mortgage, mortgagee, overseas company, property**, s 3

Origin: 1955/63 s 101

See also: ss 126 and 127

### **158 Payment of surplus to the Crown if current mortgagor cannot be found**

- (1) This section applies whenever
- (a) a mortgagee or a receiver sells mortgaged property, and
  - (b) out of the proceeds of the sale there is a surplus which must be paid to the current mortgagor under section 155 or 173, as the case requires, and,
  - (c) after the mortgagee or receiver has taken reasonable steps to locate the current mortgagor, the current mortgagor cannot be found.
- (2) Whenever this section applies, the mortgagee or receiver, as the case requires,
- (a) must deliver to the Secretary to the Treasury a statutory declaration setting out, to the best of the mortgagee's or receiver's knowledge and belief, particulars of
    - (i) the mortgaged property, and
    - (ii) the current mortgagor, and
    - (iii) the sale, and
    - (iv) the application of the proceeds of the sale, and
    - (v) the information in the possession or control of the mortgagee or receiver as to the persons beneficially entitled to the surplus and the steps taken by the mortgagee or receiver to locate those persons, and
  - (b) must pay the surplus to the Crown by remitting it to the Secretary to the Treasury, and
  - (c) must deliver to the Secretary to the Treasury any further statutory declaration setting out such further and better particulars of any matter referred to in paragraph (a) as the Secretary may require.
- (3) On being satisfied that the particulars required to be supplied by the mortgagee or receiver under subsection (2) are true and complete, the Secretary to the Treasury must give a receipt to the mortgagee or receiver for the money paid to the Crown under this section, and that receipt is a sufficient discharge to the mortgagee or receiver for the proper application of the surplus.

- (4) Money paid to the Crown under this section is trust money for the purposes of Part VII of the *Public Finance Act 1989*.

Definitions: **current mortgagor, mortgagee, property, receiver**, s 3; **statutory declaration**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 102A

See also: *Public Finance Act 1989* Part VII

*Sale by mortgagee through the Registrar or through the court*

### 159 Sale by mortgagee through the Registrar

- (1) The Registrar may conduct the sale by public auction of the whole or any part of mortgaged land or goods, in accordance with the provisions of sections 160 to 167.
- (2) A sale by the Registrar may relate to land or goods, or to both land and goods, and references in this section and in sections 160 to 167 to land or goods include a reference to land and goods.

Definitions: **goods, land, Registrar**, s 3

Origin: 1952/51 s 99

### 160 Application for sale under section 159

- (1) A mortgagee who is entitled to sell mortgaged land or goods may file an application for a sale under section 159 in the office of the High Court nearest, by the most practicable route, to the place where the land or goods proposed to be sold are situated, or if the land or goods are situated in more than one place, then the application may be filed in the office of the High Court nearest to any of those places.
- (2) An application for a sale under section 159
- (a) must be in writing, and
  - (b) must advise the Registrar of the name and address, in any case where the vendor mortgagee has actual notice of it, of
    - (i) the current mortgagor, and
    - (ii) any former mortgagor, and
    - (iii) any covenantor, and
    - (iv) the mortgagee under any other mortgage or encumbrance over the land or goods proposed to be sold (whether or not it has priority in relation to the vendor mortgagee's mortgage), if that other mortgage or encumbrance is registered, or is unregistered but the vendor mortgagee has actual notice of it, and,

- (v) in the case of land proposed to be sold, any person who has lodged a caveat under section 137 of the *Land Transfer Act 1952*, or a notice under section 42 of the *Matrimonial Property Act 1976* having the effect of such a caveat, against the title to the land or any part of it.

Definitions: **address, current mortgagor, encumbrance, former mortgagor, goods, land, mortgage, mortgagee, Registrar, registered, unregistered, vendor mortgagee**, s 3; **High Court, person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 99

### 161 Vendor mortgagee must nominate a discharge sum

- (1) In an application for a sale under section 159, the vendor mortgagee must nominate, in respect of the land or goods proposed to be sold, a sum upon payment of which the vendor mortgagee will become bound to discharge the mortgage over the land or goods; and if the land or goods are to be sold in separate lots, the vendor mortgagee must nominate a discharge sum in respect of each lot separately, as well as of the land or goods as a whole.
- (2) If the land or goods proposed to be sold are subject to a mortgage or other encumbrance having priority in relation to the vendor mortgagee's mortgage, the vendor mortgagee
- (a) must not include in the discharge sum the amount of any moneys secured by that mortgage or other encumbrance to the extent that the security for those moneys has priority, and
  - (b) must state whether the sale to be conducted by the Registrar is to be subject to, or free of, that mortgage or other encumbrance.

Definitions: **discharge sum, encumbrance, goods, land, mortgage, Registrar, vendor mortgagee**, s 3

Origin: 1952/51 s 99

### 162 Registrar to arrange sale

- (1) As soon as practicable after receiving an application for a sale under section 159, the Registrar, if satisfied that, by reason of a default which has not been remedied, the vendor mortgagee has become entitled under the mortgage to exercise a power to sell the mortgaged land or goods proposed to be sold and has complied with all relevant provisions of subpart 4 concerning the exercise of the power of sale, must
- (a) approve the proposed sale;
  - (b) fix a convenient time (being not less than one month after the date of the application) and place for the conduct of the sale;
  - (c) if the vendor mortgagee has supplied their names and addresses

- under section 160(2)(b), give written notice to every person referred to in that subsection, of
- (i) the time and place at which the sale is to be conducted, and
  - (ii) the discharge sum nominated by the vendor mortgagee in respect of the land or goods proposed to be sold;
- (d) approve proper conditions of sale, employ an auctioneer and do all other things necessary for the proper conduct of the sale by public auction, without reserve, of the land or goods proposed to be sold.
- (2) For the purposes of subsection (1)(b), the date of an application for a sale under section 159 is the date on which the completed application is filed in the proper office of the High Court as provided in section 160.
  - (3) The Registrar must give such notice of the sale as the Registrar considers sufficient by advertisement in a newspaper circulating in the locality in which the land or goods proposed to be sold are situated, or, if the Registrar considers that, by reason of the character of the land or goods, advertisement in a newspaper circulating only in that locality is unlikely to enable the vendor mortgagee to discharge the duty of care under section 146(1), then by advertisement also in newspapers circulating in such other localities as the Registrar thinks fit.
  - (4) On the application of the current mortgagor, or any other person who has an interest in the proposed sale, or the vendor mortgagee, the High Court may direct the Registrar to undertake such further or other advertising of the sale, or marketing of the land or goods, as the court thinks fit.
  - (5) Subsections (3) and (4) do not prevent the vendor mortgagee from carrying out more extensive advertising of the sale or marketing of the land or goods proposed to be sold than is undertaken by the Registrar or directed by the court; and the costs reasonably incurred by the vendor mortgagee for that purpose are, for the purposes of section 88, moneys reasonably paid or advanced by the mortgagee with a view to the realisation of the security.
  - (6) At any time before the sale, the Registrar may consent to the correction of any defect or error in an application for a sale under section 159, or in any supporting or consequential document, if satisfied that the correction will not prejudice the current mortgagor or any other person who has an interest in the proposed sale.

Definitions: **address, court, current mortgagor, default, discharge sum, goods, land, mortgage, mortgagee, Registrar, vendor mortgagee**, s 3; **High Court, person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 99

**163 Withdrawal of land or goods from sale**

- (1) The Registrar may approve, under section 162, conditions of sale which include a right on the part of the vendor mortgagee to withdraw from the sale the whole or any part of the land or goods proposed to be sold, at any time before that land or those goods have been sold, and whether or not the bidding has reached the discharge sum nominated in respect of that land or those goods.
- (2) If, in the opinion of the Registrar, the vendor mortgagee unreasonably withdraws from sale the whole or any part of the land or goods proposed to be sold, the Registrar must disallow all or such part of the expenses of and incidental to the sale as the Registrar thinks it, and, for the purposes of section 88, no expense so disallowed by the Registrar is money paid or advanced with a view to the realisation of the security.
- (3) The Registrar may withdraw from sale the land or goods proposed to be sold if the Registrar becomes aware of any irregularity or impropriety in any matter preliminary to their sale under this section.

Definitions: **discharge sum, goods, land, Registrar, vendor mortgagee**, s 3

**164 Registrar's fees, expenses and commission**

A vendor mortgagee who applies for a sale under section 159 must pay to the Registrar

- (a) the prescribed fee payable on the making of the application, and
- (b) the reasonable expenses of and incidental to the conduct of the sale (whether or not the land or goods are in fact sold), and,
- (c) if the land or goods are sold, a further fee of one quarter of one percent of the purchase money (including, in the case of a sale subject to any mortgage or other encumbrance having priority in relation to the vendor mortgagee's mortgage, the moneys secured by that mortgage or other encumbrance to the extent that the security for those moneys has priority at the time of the sale), but that further fee must be not less than the prescribed minimum fee and not more than the prescribed maximum fee payable under this section.

Definitions: **discharge sum, encumbrance, goods, land, mortgage, Registrar, vendor mortgagee**, s 3

Origin: 1952/51 s 103

**165 Current mortgagor or other person may redeem on payment of nominated discharge sum**

- (1) At any time before mortgaged land or goods are sold, or are withdrawn from sale under section 163, the current mortgagor or any other person who is entitled to redeem them may redeem the land or goods, in whole or in part, by paying to the vendor mortgagee either
  - (a) the discharge sum nominated by the vendor mortgagee in accordance with section 161 in respect of the land or goods, or, if the land or goods are to be sold in separate lots, the discharge sum so nominated in respect of any one or more lots, or
  - (b) all moneys secured by the mortgage at the time of payment.
- (2) On payment being made by the current mortgagor or other person in accordance with subsection (1)(a) or (b), the vendor mortgagee must deliver to the current mortgagor
  - (a) a discharge of the mortgage over the whole of the mortgaged land or goods, or, in the case of payment under subsection (1)(a) of the discharge sum nominated by the vendor mortgagee in respect of any one or more lots, a discharge of the mortgage over the land or goods comprised in that lot or lots, and
  - (b) all instruments of title held by the vendor mortgagee for the land or goods discharged from the mortgage,unless, in a case where the payment relates to the whole of the mortgaged land or goods, the current mortgagor or that other person requests the mortgagee to transfer the mortgage to a nominated person (other than the current mortgagor but including that other person); and in that case the provisions of section 94 have effect as if the request had been made under that section.
- (3) If the amount paid by the current mortgagor or other person under subsection (1) is less than the moneys secured by the mortgage, the vendor mortgagee may recover the balance from any person bound by the covenant to repay expressed or implied in the mortgage.

Definitions: **covenant**, **covenantor**, **current mortgagor**, **discharge sum**, **goods**, **land**, **mortgage**, **mortgagee**, **redeem**, **vendor mortgagee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 100

**166 Mortgagee may purchase at sale through the Registrar**

- (1) The vendor mortgagee may be a bidder at a sale by public auction of mortgaged land or goods conducted by the Registrar under section 159.
- (2) If, at the sale, the vendor mortgagee is declared the purchaser of the land or goods, or, where the land or goods are sold as separate lots, the purchaser of any one or more lots, the vendor mortgagee is bound to purchase the land or goods, or the lot or lots, at a purchase price equal to
  - (a) the amount of the vendor mortgagee's successful bid, or
  - (b) the discharge sum nominated by the vendor mortgagee in respect of the land or goods or the lot or lots,  
whichever amount is the greater.
- (3) Where, under this section, the vendor mortgagee becomes the purchaser of mortgaged land or goods, the Registrar, on request, must execute a memorandum of transfer or other instrument which
  - (a) is expressed to be made between the Registrar (described only as the holder of that office) and the vendor mortgagee, with or without the addition of any other party, and
  - (b) recites that the sale has been made under section 159, and,
  - (c) subject to the need for its registration under any enactment, is requisite to transfer or assign the land or goods to the vendor mortgagee or to any other person whom the vendor mortgagee may in writing appoint, and
  - (d) states as the consideration for the transfer or assignment the amount of the purchase price determined in accordance with subsection (2).

Definitions: **discharge sum, goods, instrument, land, mortgage, Registrar, registration, vendor mortgagee**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 101

**167 Effect of transfer executed by the Registrar under section 166**

- (1) Subject to the need for its registration under any enactment, a memorandum of transfer or other instrument, executed by the Registrar under section 166, transfers or assigns the land or goods to which it relates to the transferee or assignee,
  - (a) free from all liability on account of
    - (i) the vendor mortgagee's mortgage, and
    - (ii) any subsequent mortgage or other subsequent encumbrance over the land or goods,
  - (b) but subject to

- (i) any mortgage or other encumbrance, estate or interest over or in the property that has not been discharged or otherwise terminated, to the extent that it has priority in relation to the vendor mortgagee's mortgage, and
  - (ii) any other estate or interest in the land or goods which is binding on the vendor mortgagee.
- (2) A memorandum of transfer of land under the *Land Transfer Act 1952*, executed in accordance with section 166, may be registered, and, on its registration, the District Land Registrar must also make in the register book any entry necessary to show that every registered mortgage or encumbrance over the land referred to in subsection (1)(a) has been discharged.
- (3) Subject to the provisions of the *Ship Registration Act 1992*, a bill of sale of a ship, executed in accordance with section 166, may be registered, and, on its registration, the Registrar of Ships under that Act must also make in Part A of the New Zealand Register of Ships any entry necessary to show that every registered mortgage over the ship referred to in subsection (1)(a) has been discharged.
- (4) On production to the Registrar of Personal Property Securities, an instrument of assignment of goods other than a ship, executed in accordance with section 166, has effect as if
  - (a) it were a financing change statement discharging the registration of every financing statement relating to every mortgage over the goods referred to in subsection (1)(a), and
  - (b) it had been submitted to the Registrar of Personal Property Securities under section 38 of the *Personal Property Securities Act 1999*.

Definitions: **encumbrance, goods, instrument, land, land under the *Land Transfer Act 1952*, mortgage, property, Registrar, registered, registration, ship, vendor mortgagee**, s 3

Origin: 1952/51 s 101

### **168 Sale by mortgagee through the court**

- (1) A mortgagee who is entitled to sell mortgaged property may apply to a court for assistance in exercising the power of sale, or, if the property has already been sold by the mortgagee, assistance in completing the transfer or assignment of the property to the purchaser.
- (2) On being satisfied that there has been a default which has not been remedied, and that the mortgagee has become entitled under the mortgage and the provisions of subpart 4 to exercise a power of sale in



respect of the mortgaged property, the court may make all or any of the following orders:

- (a) an order directing the sale of the whole or any part of the mortgaged property;
  - (b) an order that the sale be conducted by the mortgagee or by the Registrar;
  - (c) an order making stipulations as to any one or more of the following matters:
    - (i) the advertising of the sale;
    - (ii) other marketing of the mortgaged property proposed to be sold;
    - (iii) the conditions of sale;
    - (iv) the manner in which the sale is to be conducted;
  - (d) an order permitting the mortgagee to become the purchaser at the sale, otherwise than under section 166;
  - (e) an order permitting the current mortgagor or any other person entitled to redeem the mortgaged property to redeem it otherwise than under subpart 3 or section 165;
  - (f) an order vesting the property, for such estate or interest as the court thinks fit, in the purchaser (including the mortgagee, where the mortgagee is the purchaser) or discharging any mortgage or other encumbrance;
  - (g) an order directing the Registrar, or, if it is more convenient, appointing a person other than the Registrar, to execute a transfer or assignment of the property to the purchaser (including the mortgagee, where the mortgagee is the purchaser) or a discharge of any mortgage or other encumbrance;
  - (h) an order determining the priority of mortgages or other encumbrances over the property.
- (3) An order made under subsection (2)(f), or a transfer, assignment or discharge executed under subsection (2)(g), has the same effect as a memorandum of transfer or an assignment of the mortgaged property executed by a mortgagee under section 153, or a memorandum of discharge of a mortgage duly executed in accordance with section 82, as the case requires.
- (4) Unless the court orders otherwise, an application made under this section must be served
- (a) on the current mortgagor, and
  - (b) on every former mortgagor, and
  - (c) on every covenantor, and
  - (d) on the mortgagee under any other mortgage and on the holder of any other encumbrance over the mortgaged property (whether or not the mortgage or encumbrance has priority in relation to the

- mortgagee's mortgage), if the mortgage or encumbrance is registered, or is unregistered, but the mortgagee applying to the court under this section has actual notice of it, and,
- (e) in the case of mortgaged land, on any person who has lodged a caveat under section 137 of the *Land Transfer Act 1952*, or a notice under section 42 of the *Matrimonial Property Act 1976* having the effect of such a caveat, against the title to the land or any part of it.
- (5) An order directing the sale of the mortgaged property may be made on such conditions (if any) as the court thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of the sale, or to secure the performance of any other condition of the order.
- (6) The court may make an order under this section
- (a) notwithstanding that any person who has an interest in the property or in the mortgage
    - (i) is not before the court, or
    - (ii) opposes the making of the order, and
  - (b) without first determining the priority of encumbrances over the property.

Definitions: **court, covenantor, current mortgagor, default, encumbrance, former mortgagor, land, mortgage, mortgagee, person entitled to redeem, property, redeem, registered, Registrar, unregistered**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: cf 1952/51 s 86

#### *Subpart 7—Appointment of a receiver in respect of mortgaged land*

### **169 Application of this subpart**

This subpart applies to a receiver appointed in respect of mortgaged land if,

- (a) under the instrument creating it, the mortgage is, and always was, a fixed or specific charge over the land, and
- (b) the receiver is appointed in the exercise of a power expressed or implied in an instrument coming into operation on or after —  
199- [date on which this Act comes into force].

Definitions: **instrument, land, mortgage, receiver**, s 3

See also: s 4(2)

### **170 Remuneration of a receiver**

Subject to anything to the contrary expressed or implied in any instrument, a receiver to whom this subpart applies is entitled, as

reimbursement for the receiver's expenses and as remuneration, to a commission,

- (a) at such rate, not exceeding 6 percent, as is specified in the instrument of appointment on the gross amount of all income received from the mortgaged land while the receiver holds office, or,
- (b) if no rate is specified in the instrument of appointment, at the rate of 6 percent on the gross amount referred to in paragraph (a), subject, however, to any order made by the court under section 34 of the *Receiverships Act 1993*.

Definitions: **court, income, instrument, land, receiver**, s 3

See also: *Receiverships Act 1993* s 34(2)

### 171 Application of income received by a receiver

A receiver to whom this subpart applies must apply all income received from the mortgaged land as follows:

- (a) first, to the payment of rates or other outgoings on the land (including payments required to be made in respect of any encumbrance over the land, to the extent that it has priority in relation to the mortgage under which the receiver was appointed);
- (b) second, to the payment of the receiver's expenses and remuneration;
- (c) third, to the payment of the reasonable expenses of doing anything which a receiver is required or entitled to do in respect of the land, so far as those costs can be met from that income;
- (d) fourth, to the repayment of any moneys paid or advanced by the mortgagee to meet the reasonable expenses of the receiver for any of the purposes referred to in paragraphs (a), (b) or (c), together with interest on any amount so paid or advanced at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage;
- (e) fifth, to the payment of the interest due under the mortgage and, if the mortgagee so directs in writing, to repayment of the principal moneys secured by the mortgage so far as repayment is then due; and must pay the surplus (if any) to the current mortgagor.

Definitions: **current mortgagor, encumbrance, income, land, mortgage, mortgagee, receiver**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

See also: *Receiverships Act 1993* s 30

### 172 Sale of mortgaged land by a receiver to whom this subpart applies

If, under a power expressed or implied in a mortgage, a receiver to whom this subpart applies is authorised (with or without the consent

of the mortgagee) to sell mortgaged land, the receiver, and a purchaser of the land at a sale by such a receiver, or a person claiming through the purchaser have, in relation to the exercise of the power, all the rights, powers and obligations expressly conferred or imposed, in respect of mortgaged land, on a receiver or on a purchaser, or a person claiming through the purchaser,

- (a) by subparts 4 and 6, and
- (b) by the *Receiverships Act 1993*,  
in addition to the rights, powers and obligations conferred or imposed by section 173.

Definitions: **land, mortgage, mortgagee, receiver**, s 3; **person**, *Acts Interpretation Act 1924* s 4

### 173 Application of proceeds of sale of mortgaged land by a receiver

- (1) Except as provided in subsection (2), the proceeds arising from the sale of mortgaged land by a receiver to whom this subpart applies must be applied as follows:
  - (a) first, to payment of the receiver's expenses and remuneration;
  - (b) second, to payment of all moneys (if any) reasonably paid or advanced at any time by the mortgagee for any of the purposes referred to in section 88, together with interest on any amount so paid or advanced at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage;
  - (c) third, to payment of the interest due under the mortgage and to repayment of the principal moneys secured by the mortgage;
  - (d) fourth, to payment of moneys secured by any subsequent mortgage or other subsequent encumbrance over the land, if any such mortgage or other encumbrance
    - (i) is registered, or
    - (ii) is unregistered, but the mortgagee or receiver has actual notice of it;
 and if there is more than one such subsequent mortgage or other encumbrance, then to payment of moneys secured by each in the order of its priority;
  - (e) fifth, the surplus (if any) must be paid to the current mortgagor.
- (2) Notwithstanding anything to the contrary in subsection (1), if a receiver to whom this subpart applies sells mortgaged land on the express or implied condition that, to the extent that any other mortgage or encumbrance over the land has priority in relation to the mortgage under which the receiver was appointed, that mortgage or

encumbrance will be discharged before title to the property is transferred to the purchaser, the receiver may apply the proceeds or any part of them to the payment of moneys secured by the mortgage or encumbrance required to be discharged.

Definitions: **current mortgagor, encumbrance, land, mortgage, mortgagee, property, receiver, registered, unregistered**, s 3

See also: *Receiverships Act 1993* s 30

*Subpart 8—Liability to mortgagee of purchaser of land subject to a mortgage*

**174 Purchaser personally liable to mortgagee**

- (1) Unless a contrary intention appears in a mortgage or other instrument, a person who accepts, subject to a mortgage, a transfer, assignment or transmission of mortgaged land (whether or not that person has signed the memorandum or other instrument of transfer, assignment or transmission) becomes personally liable to the mortgagee
  - (a) for the payment of all moneys and the performance of all obligations secured by the mortgage, and
  - (b) for the observance and performance of all other covenants expressed or implied in the mortgage;and the mortgagee accordingly has all remedies under or in relation to the mortgage directly against that person as if that person were the person who gave the mortgage.
- (2) For the purposes of subsection (1), moneys secured by a mortgage do not include advances made by the mortgagee to a former mortgagor at any time after the date on which the mortgagee had actual notice of the transfer, assignment or transmission of the land to the current mortgagor, or any intermediate former mortgagor, as the case requires, unless
  - (a) at the time when the mortgagee received actual notice of the transfer, assignment or transmission, and
  - (b) at the time when the advance was made, the mortgagee was under an obligation to make the advance.
- (3) This section does not extinguish the liability under the mortgage of any former mortgagor.
- (4) An administrator of the estate of a person or a trustee to whom land is transferred, assigned or transmitted, subject to a mortgage, is liable under this section only to the extent of the assets of the estate or trust

in the administrator's or trustee's hands and available for meeting the obligations under the mortgage.

Definitions: **administrator, covenant, current mortgagor, former mortgagor, instrument, land, mortgage, mortgagee, signed**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104

## PART 9 LEASES OF LAND

### *Subpart 1—General provisions*

#### **175 Definitions for the purposes of part 9 and interpretation**

- (1) In this part, **expire**, in relation to the term of a lease, includes in the case of a periodic tenancy or a lease terminable under section 177, the termination of the lease by notice given by the lessor or the lessee, and **expiry** has a corresponding meaning.
- (2) In sections 180, 203 to 214 and 219, **lease**, in relation to land, includes a licence to occupy land in consideration of rent, or a payment in the nature of rent, and **lessor** and **lessee** include a licensor and licensee under such a licence; but those sections do not confer on a licensee any estate or interest in the land.
- (3) For the purposes of sections 203 to 214, and 219, a condition of a lease includes a provision expressed or implied in the lease under which
  - (a) an act or omission of the lessee or any other person (other than an act or omission which is a breach of a covenant in the lease on the part of the lessee), or
  - (b) a specified event (other than the expiry of the term of the lease), is a ground for the cancellation of the lease; and a breach of a condition includes the commission of that act, or the occurrence of that omission or event.

Definitions: **covenant, land, lease, lessee, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 117 and 120

### *Subpart 2—Duration and effect of leases*

#### **176 Short term leases**

- (1) In this Act, **short term lease** means an unregistered lease of land,
  - (a) the term of which commences not later than 20 working days after the date of the contract to lease, and

- (b) which is
  - (i) a lease for a term of one year or less, or
  - (ii) a periodic tenancy for periods of one year or less, or
  - (iii) a lease terminable under section 177.
- (2) A short term lease may be made orally or in writing.
- (3) A lessee who is in occupation of land under a short term lease has a legal interest in the land, subject, however, to the provisions of the *Land Transfer Act 1952*.
- (4) The legal interest in the land of a lessee under a short term lease who has given valuable consideration has priority in relation to:
  - (a) any unregistered interest in the land which was created before the lessee entered into occupation of the land, if
    - (i) the lessee entered into occupation of the land in good faith and without actual notice of the unregistered interest, and
    - (ii) no caveat in respect of the unregistered interest was lodged against the title to the land at the time when the lessee entered into occupation;
  - (b) any unregistered interest in the land which is created after the lessee has entered into occupation.

Definitions: **land, lease, lessee, unregistered, working day**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

#### **177 Implied term of lease where no other term agreed**

- (1) Whenever, under a lease of land, the lessee is in possession but there is no agreement, express or implied, between the lessor and the lessee as to the duration of the term,
  - (a) the lease is terminable at the will of either the lessor or the lessee by not less than 20 working days' written notice, and
  - (b) the notice of termination may be given at any time.
- (2) If a lessee remains in possession of land with the consent of the lessor after the term of a lease has expired, then,
  - (a) unless the lessor and the lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, that possession is terminable at the will of either the lessor or the lessee in the manner provided in subsection (1), and
  - (b) all the obligations of the lessee under the lease that are consistent with the provisions of paragraph (a) continue in force until such time as the lease is terminated under subsection (1).

Definitions: **land, lease, lessee, lessor, working day**, s 3; **expire**, s 175(1)

Origin: 1952/51 s 105

**178 Lease terminating on the occurrence of a future event**

- (1) A lease coming into operation on or after — 199- [date on which this Act comes into force] that provides for its termination or permits notice of its termination to be given upon the occurrence of a future event is not invalid by reason only of that fact if the event is sufficiently defined in the lease as to be identifiable when it occurs, subject, however, to subsection (2).
- (2) If a lease provides for its termination or permits notice of its termination to be given upon the occurrence of a future event, and that event has not occurred before the tenth anniversary of the date on which the term of the lease began, the lease terminates on that tenth anniversary, unless the lease provides, in the alternative, for its termination on a later fixed date or for the giving of notice of its termination on or before a later fixed date.

Definitions: **lease**, s 3

See also: s 4(2)

**179 Lessee remaining in possession after termination of lease without consent of lessor**

- (1) If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land.
- (2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired is not, by reason only of that fact, to be taken as having given consent to the lessee remaining in possession of the land or as having given up any of the lessor's rights or remedies against the lessee for breach of a covenant or condition of the lease.

Definitions: **covenant, land, lease, lessee, lessor**, s 3; **expire**, s 175(1)

Origin: 1986/120 s 60

See also: s 206(2)

**180 Notice by joint tenants**

If a lease of land is entered into

- (a) by two or more lessors as joint tenants, or
- (b) by two or more lessees as joint tenants,

and the lease is terminable by notice, the notice may be given by any one or more of the joint tenants, on behalf of all the joint tenants,



unless all the parties to the lease have agreed otherwise, expressly or by implication.

Definitions: **joint tenants**, **land**, s 3; **lease**, **lessee**, **lessor**, s 175(2)

**181 Sublease for term the same as, or longer than, term of superior lease**

- (1) This section applies to a sublease coming into operation on or after — 199- [date on which this Act comes into force], under which a lessee of land enters or purports to enter into a sublease for a term which will expire at the same time as, or later than, the expiry of the term of the superior lease.
- (2) A sublease to which this section applies does not operate as an assignment of the superior lease to the sublessee, unless a contrary intention appears.
- (3) If the term of a sublease to which this section applies will expire after the expiry of the term of the superior lease, then,
  - (a) subject to paragraph (b), the term of the sublease is reduced, so as to expire at the same time as the term of the superior lease, but without prejudice to any remedy which the sublessee may have in respect of the reduction;
  - (b) if the term of the superior lease is extended or the superior lease is renewed, the term of the sublease is extended, so as to expire
    - (i) at the same time as the extended term of the superior lease, or the term of the superior lease as renewed, as the case requires, or
    - (ii) at the time at which the term of the sublease is expressed to expire, whichever time is the earlier.
- (4) Notwithstanding that the term of a sublease to which this section applies, as expressed, or as reduced or extended by the operation of this section, expires at the same time as the term of the superior lease, the sublessor is to be taken as having a reversion expectant upon the sublease.

Definitions: **land**, **lease**, **lessee**, **superior lease**, s 3; **expire**, s 175(1)

See also: s 4(2)

**182 Surrender to enable new superior lease to be entered into not to affect sublease**

- (1) The surrender of a lease for the purpose of enabling a new lease to the same lessee to be entered into does not require the surrender of any

- sublease in respect of the surrendered lease, if, on or before the date on which the term of the new superior lease will expire,
- (a) the term of the sublease, as expressed, will expire, or,
  - (b) in the case of a sublease which is a periodic tenancy, the sublease may be terminated by the giving of the specified period of notice of termination and the expiry of that period.
- (2) A sublease preserved under subsection (1)
- (a) continues in force as though it had been entered into in respect of the new superior lease, and
  - (b) all rights and obligations under the sublease, including those which relate to any period before the surrender of the superior lease, continue to be enforceable, except to the extent that any such obligation is, by reason of the fact that a new superior lease has been entered into, more onerous than it would have been had the original superior lease not been surrendered.
- (3) For the purposes of this section, a sublease entered into in respect of a surrendered lease includes any sublease entered into by a person deriving title through the lessee under the surrendered lease.

Definitions: **lease, lessee, superior lease**, s 3; **expire**, s 175(1); **person**, *Acts Interpretation Act 1924* s 4

Origin: *Landlord Tenant Act 1730* s 6

*Subpart 3—Covenants, conditions and powers implied in leases*

**183 Covenants, conditions and powers implied in all leases of land**

- (1) Every lease of land coming into operation on or after — 199- [date on which this Act comes into force] contains the implied covenants, conditions and powers set out in part 1 of schedule 5, unless a contrary intention is expressed in a manner required by section 73(b).
- (2) The covenant for quiet enjoyment set out in clause 6 of that part and implied in a lease by this section relates only to the acts and omissions of
  - (a) the lessor, and
  - (b) all persons through whom the lessor derives title otherwise than by purchase for valuable consideration, and
  - (c) all persons who claim or may claim through, under or in trust for any person referred to in paragraph (a) or paragraph (b).

Definitions: **covenant, land, lease, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 106 and 107

See also: ss 4(2) and 73(b)

**184 Covenant implied in all leases of land other than short term leases**

Every lease of land, other than a short term lease, coming into operation on or after — 199- [date on which this Act comes into force], contains the implied covenant set out in part 2 of schedule 5, unless a contrary intention is expressed in a manner required by section 73(b).

Definitions: **covenant, land, lease, short term lease**, s 3

Origin: 1952/51 s 106

See also: ss 4(2) and 73(b)

**185 Covenant implied in short term leases**

Every short term lease coming into operation on or after — 199- [date on which this Act comes into force] contains the implied covenant set out in part 3 of schedule 5, unless a contrary intention is expressed in a manner required by section 73(b).

Definitions: **covenant, short term lease**, s 3

Origin: 1952/51 s 106

See also: ss 4(2) and 73(b)

**186 Meaning of reference to “usual covenants”**

In a lease of land coming into operation on or after — 199- [date on which this Act comes into force], unless the context otherwise requires, a reference to “usual covenants” is to be taken as a reference to the covenants implied in that lease

- (a) by section 183, and
- (b) by
  - (i) section 184, in the case of a lease other than a short term lease, or
  - (ii) section 185, in the case of a short term lease.

Definitions: **covenant, land, lease, short term lease**, s 3

See also: s 4(2)

**187 Time for payment of rent**

Unless otherwise agreed between the lessor and the lessee, the rent payable under a lease of land coming into operation on or after — 199- [date on which this Act comes into force] is payable monthly in advance, whether or not the rent is expressed as an annual sum.

Definitions: **land, lease, lessee, lessor**, s 3

See also: s 4(2)

**188 Effect of covenant to keep premises in good condition**

In a lease of land coming into operation on or after — 199- [date on which this Act comes into force], a covenant to keep the leased premises in good condition (or words to that effect) does not require the lessee to put the premises into good condition if they are not in good condition when the term of the lease begins.

Definitions: **covenant, land, lease, lessee**, s 3

See also: s 4(2)

**189 Consent not to be unreasonably withheld**

- (1) In a lease of land coming into operation on or after — 199- [date on which this Act comes into force], unless the context otherwise requires, a covenant by the lessee not to do a thing without the consent of the lessor is to be construed as requiring the lessor not unreasonably to withhold consent to the doing of that thing by the lessee.
- (2) This section does not affect the operation of a covenant referred to in section 190(1).

Definitions: **covenant, land, lease, lessee, lessor**, s 3

See also: s 4(2)

**190 Consent to assignment etc or change of use**

- (1) This section applies to an application made by a lessee of land on or after — 199- [date on which this Act comes into force] (whether the lease came into operation before or after that date), for the consent of the lessor where,
  - (a) there is a covenant in the lease that the lessee will not, without the consent of the lessor, do any one or more of the following things:
    - (i) transfer or assign the lease;
    - (ii) enter into a sublease;
    - (iii) part with possession of the leased premises;
    - (iv) change the use of the leased premises from a use which is permitted under the lease;
    - (v) create a mortgage over the leasehold estate or interest;
    - (vi) do any of the things referred to in subparagraphs (i), (ii), (iii), (iv) or (v) in relation to any part of the leased premises, or for any part of the term of the lease; and
  - (b) the application relates to the doing by the lessee of one or more of those things.
- (2) On receiving an application to which this section applies, the lessor
  - (a) must not unreasonably withhold consent to the doing of the thing

- or things specified in the application (whether or not the covenant makes express provision to the effect that consent must not unreasonably be withheld), and
- (b) must, within a reasonable time,
    - (i) give such consent, or
    - (ii) notify the lessee in writing that such consent is withheld.
  - (3) Without limiting the generality of the lessor's obligation under subsection (2)(a), consent is unreasonably withheld
    - (a) if, as a condition of, or in relation to, the giving of consent, the lessor
      - (i) requires the payment of any money (whether by way of additional rent, or by way of premium or fine) or other consideration, or
      - (ii) imposes upon the lessee any unreasonable condition or precondition, or
    - (b) if consent is withheld by reason of the bankruptcy of the lessee, or, where the lessee is a company, by reason of the fact that it is in receivership or liquidation, or where the lessee is an overseas company, by reason of the fact that it is in receivership or that its assets in New Zealand are being liquidated under Part XVI of the *Companies Act 1993*, or
    - (c) if, in the case of request for consent to the transfer or assignment of a lease, consent is withheld by reason of the fact that the transferor or assignor will be released from liability under section 199.
  - (4) Subsection (3) does not prevent the lessor from requiring the lessee to pay the reasonable legal or other expenses of the lessor in giving consent.
  - (5) A lessor who
    - (a) refuses consent, or
    - (b) gives consent subject to any condition or precondition,must, if the lessee so requests in writing, immediately inform the lessee in writing of the reasons for the refusal or for the imposition of the condition or precondition, as the case requires.
  - (6) A lessee or any assignee, sublessee, mortgagee, or person in possession of the leased premises who suffers loss by reason of any failure to comply with subsection (2) may recover from the lessor
    - (a) any payment required to be made or other consideration required to be given in breach of subsection (3)(a), and
    - (b) damages for any loss suffered by reason of any other failure to comply with subsection (2).

- (7) Any term expressed or implied in an instrument and conflicting with this section is of no effect.
- (8) This section does not prevent the inclusion in a lease of land of a covenant binding the lessee absolutely not to do any of the things referred to in subsection (1)(a).

Definitions: **bankruptcy, company, covenant, instrument, land, lease, lessee, lessor, mortgage, mortgagee, overseas company**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 109, 110

*Subpart 4—Effect on leases of transactions concerning the reversion*

**191 Merger of reversion not to affect remedies**

Where the reversion expectant on a lease of land is merged in a remainder or other reversion or future estate or interest in the land, the person entitled to the estate or interest into which the first-mentioned reversion has merged

- (a) has the same remedies for non-performance or non-observance of the covenants or conditions expressed or implied in the lease, and
- (b) has the same rights to give notice to the lessee of termination of the lease,

as the person who would for the time being have been entitled to the reversion, but for the merger, would have had.

Definitions: **covenant, land, lease, lessee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 111

**192 Burden of lessor's covenants to run with the reversion**

- (1) Where the reversion expectant on a lease of land ceases to be held by the lessor (whether by transfer, assignment, grant, operation of law or otherwise), then, unless a contrary intention appears from the lease or other circumstance, the obligations imposed by every covenant of the lease on the part of the lessor run with the reversion and may be enforced by the person who is from time to time entitled to the leasehold estate or interest against the person who is from time to time entitled to the reversion.
- (2) In subsection (1), the reference to every covenant of the lease on the part of the lessor,
- (a) in the case of a lease coming into operation before — 199- [the date on which this Act comes into force], is a reference to every covenant on the part of the lessor which has reference to the subject matter of the lease, and,

- (b) in the case of a lease coming into operation on or after — 199- [the date on which this Act comes into force], is a reference to every covenant on the part of the lessor, whether or not the covenant has reference to the subject matter of the lease.

Definitions: **covenant, land, lease, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Grantees of Reversions Act 1540*; 1952/51 s 113

See also: s 4(2)

### 193 Benefit of lessee's covenants to run with the reversion

- (1) This section applies to:
- (a) the right to receive the rent payable under a lease;
  - (b) the right to enforce every covenant of a lease on the part of the lessee, including a covenant relating to a subject-matter not in existence when the covenant was made;
  - (c) all rights and remedies of the lessor under a lease, including the right to give any notice or to take advantage of any condition or to re-enter or apply for an order for possession, and by so doing to cancel the lease;
  - (d) the right to enforce any guarantee of the performance of all or any of the covenants of a lease on the part of the lessee.
- (2) For the purposes of subsection (1)(b), the reference to every covenant of a lease on the part of the lessee,
- (a) in the case of a lease coming into operation before — 199- [date on which this Act comes into force], is a reference to every covenant on the part of the lessee which has reference to the subject-matter of the lease, and,
  - (b) in the case of a lease coming into operation on or after — 199- [date on which this Act comes into force], is a reference to every covenant on the part of the lessee, whether or not the covenant has reference to the subject-matter of the lease.
- (3) If the reversion expectant on a lease of land ceases to be held by the lessor (whether by transfer, assignment, grant, operation of law or otherwise), then, unless a contrary intention appears from the lease or other circumstance, the rights to which this section applies run with the reversion and may be exercised by the person who is from time to time entitled to the income of the land, whether or not the lessee has acknowledged as lessor the person so entitled (with or without attornment by the lessee).
- (4) A person who becomes entitled under subsection (3) to exercise a right to which this section applies
- (a) may exercise that right even if it first became exercisable or

- accrued before the time at which that person became so entitled, unless, before that time, the right was waived or the lessee was released from the obligation to which the right relates, and
- (b) is exclusively entitled to exercise that right, unless that person has agreed to the exercise of the right by some other person; and in that case, the right is exercisable by the last-mentioned person to the extent so agreed.

Definitions: **covenant, land, lease, lessee, lessor, income**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Grantees of Reversions Act 1540*; 1952/51 s 112

See also: s 4(2)

### 194 Rights and obligations under lease after severance

- (1) If, in respect of a lease of land, there has been
- (a) a division of the reversion expectant upon the lease into different parts, and different persons are entitled to the income of those parts (severance of the reversion as regards the land), or
- (b) the lease has terminated as to part only of the land comprised in the lease (severance of the reversion as regards the estate),
- the obligations referred to in section 192 and the rights and remedies to which section 193 applies must be apportioned, and, to the extent required by that apportionment, remain attached to each part of the reversion or to that part of the land in respect of which the lease has not been terminated, as the case requires, and may to that extent be enforced by the person entitled to enforce those obligations under section 192 or exercised by the person entitled to exercise those rights and remedies under section 193.
- (2) If a notice of termination of a lease is given to the lessee after a division of the reversion expectant upon the lease into different parts, so that the notice terminates the lease in respect of part only of the land comprised in the lease, the lessee may, not more than 20 working days after the date of receipt of the notice, terminate the lease in respect of the residue of the land comprised in the lease, by notice given to the person entitled to the reversion of the residue.
- (3) A notice given by the lessee under subsection (2) takes effect on the same date as the original notice of termination given to the lessee.

Definitions: **income, land, lease, lessee, working day**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Law of Property Act 1925* (UK) s 140(2); 1952/51 s 114



**195 Effect of payment by lessee to assignor of the reversion**

- (1) If a lessor has transferred or assigned the reversion expectant on a lease of land, payment of all or part of the rent or other moneys due under the lease to the transferor or assignor by a lessee who does not have actual notice of the transfer or assignment discharges the lessee to the extent of that payment.
- (2) For the purposes of subsection (1), registration of a transfer of the reversion is not, in itself, actual notice to the lessee of the transfer, notwithstanding anything to the contrary in any other enactment.
- (3) If a lessee acknowledges as lessor (attorns to) a person who is not entitled to the reversion expectant on the lease, that acknowledgement is of no effect as against the person who is so entitled, unless it is made with the consent of the person so entitled or under an order of a court.

Definitions: **court, land, lease, lessee, lessor, registration**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Administration of Justice Act 1705* ss 9 and 10; *Distress for Rent Act 1737* s 11

*Subpart 5—Effect of transfer or assignment of leases of land***196 Application of this subpart**

- (1) This subpart applies to a transfer or assignment of a leasehold estate or interest in land coming into operation on or after — 199- [date on which this Act comes into force] (whether the lease came into operation before or after that date).
- (2) If a transfer or assignment to which this subpart applies relates to part only of the land comprised in a lease, the provisions of this subpart apply only in relation to the part transferred or assigned.

Definitions: **land, lease, lessor**, s 3

See also: s 4(2)

**197 Transferee or assignee becomes lessee**

- (1) A person who accepts a transfer or assignment to which this subpart applies becomes the lessee of the land without any need for that person
  - (a) to acknowledge the lessor as such (attornment by the lessee), or
  - (b) to take possession of the land.
- (2) If there is a covenant in a lease that the lessee will not, or will not without the consent of the lessor, transfer or assign the lease, a transfer or assignment to which this subpart applies has effect whether or not

the lessor has consented to the transfer or assignment, and whether or not the transfer or assignment is in breach of that covenant, but this section does not prevent the lessor from making a claim for any such breach.

- (3) A person who becomes the lessee of the land under this section
- (a) is bound to pay to the lessor the rent payable under the lease and to observe and perform all other covenants on the part of the lessee expressed or implied in the lease, and
  - (b) may enforce all covenants on the part of the lessor expressed or implied in the lease,
- subject, however, to subsection (5).
- (4) Subsection (3) has effect, whether or not any covenant referred to in that subsection relates to a subject-matter not in existence when the covenant was made, or has reference to the subject matter of the lease.
- (5) Subsection (3) does not apply to a covenant which, immediately before the transfer or assignment, was not binding on the lessee, or on the lessor, as the case requires.

Definitions: **covenant, land, lease, lessee, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

#### **198 Transferor or assignor remains liable unless released**

- (1) Where there has been a transfer or assignment to which this subpart applies, the transferor or assignor remains liable to the lessor for the payment of the rent payable under the lease and for the observance and performance of all covenants on the part of the lessee expressed or implied in the lease, subject, however, to subsection (2), and unless that liability is released under section 199 or 200.
- (2) Subsection (1) does not apply to a covenant which, immediately before the transfer or assignment, was not binding on the transferor or assignor.

Definitions: **covenant, land, lease, lessee, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

#### **199 Release after 5 years**

- (1) On the fifth anniversary of the date of a transfer or assignment to which this subpart applies, the transferor or assignor is released from all liability arising after that date under section 198 or under any instrument, in respect of the payment of the rent payable under the lease and the observance and performance of any covenant on the part of the lessee expressed or implied in the lease.

- (2) Any term expressed or implied in an instrument and conflicting with subsection (1) is of no effect to the extent that it is less favourable to the transferor or assignor, but this subsection does not prevent the release, under a contract or a deed, of a transferor or assignor at a date earlier than that provided for in this section.

Definitions: **covenant, deed, instrument, lease, lessee, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

See also: s 190(3)(c)

### 200 Release where lease is subsequently varied

- (1) If, after the date of a transfer or assignment to which this subpart applies, the rent payable under the lease or any covenant on the part of the lessee expressed or implied in the lease, in respect of which the transferor or assignor remains liable under section 198 or under any instrument is varied,
- (a) without the consent of the transferor or assignor, and
  - (b) in a manner which would release from liability a person liable solely as a guarantor of the payment of that rent or the observance or performance of that covenant,
- the transferor or assignor is released from liability under section 198 and under that instrument in respect of the payment of that rent or the observance or performance of that covenant, as the case requires.
- (2) For the purposes of subsection (1), a covenant on the part of the lessee expressed or implied in a lease is not varied solely by reason of the fact that the term of the lease is extended or the lease is renewed, under a right of extension or renewal contained in the lease at the date of the transfer or assignment.
- (3) For the purposes of subsection (1), the rent payable under a lease is not varied solely by reason of an increase in the rent
- (a) under a provision for such an increase, in connection with the exercise of a right of renewal or extension of the kind referred to in subsection (2), contained in the lease at the date of the transfer or assignment, or
  - (b) following a review of the rent under a provision for such a review contained in the lease at the date of the transfer or assignment,
    - (i) if the increase is determined in a manner provided for in connection with the review, or
    - (ii) if, without any such determination, the lessor and the person becoming the lessee of the land under the transfer or assignment, or a successor in title of that person, agree in good faith to that increase.

- (4) If, after a transfer or assignment to which this subpart applies,
- (a) there is a division of the reversion of the land immediately expectant upon the lease into different parts, and different persons are entitled to the income of those parts (severance of the reversion as regards the land), and
  - (b) an obligation or covenant contained in the lease is varied in relation to part only of the land comprised in the lease, any release of the transferor or assignor from liability in respect of that obligation or covenant consequent upon that variation relates only to the part of the land affected by the variation.
- (5) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **covenant, income, instrument, land, lease, lessee, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

### 201 Covenant implied in transfer or assignment of lease of land

- (1) This section applies to a transfer or assignment of a lease of land coming into operation on or after — 199- [date on which this Act comes into force] (whether the lease came into operation before or after that date).
- (2) Every transfer or assignment to which this section applies contains an implied covenant by the transferee or assignee with the transferor or assignor that, as from the date of the transfer or assignment, the transferee or assignee
- (a) will pay the rent payable under the lease as and when it falls due and will observe every other covenant on the part of the lessee expressed or implied in the lease, and
  - (b) will indemnify
    - (i) the transferor or assignor and anyone claiming through the transferor or assignor, and
    - (ii) any previous transferor or assignor (whether the transfer or assignment by that previous transferor or assignor came into operation before or after — 199- [date on which this Act comes into force]),
 against all claims and expenses in respect of the non-payment of that rent, or the breach of any other such covenant, whether that non-payment or breach results from an act or omission of the transferee or assignee, or a successor in title of the transferee or assignee.

Definitions: **covenant, land, lease, lessee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

See also: ss 4(2), 76 and 199

**202 Administrator not personally liable**

An administrator of the estate of a person who, at the date of that person's death, was liable for the payment of the rent payable under a lease or for the observance or performance of any covenant on the part of the lessee expressed or implied in a lease is liable for those things only to the extent of the assets of the estate in the administrator's hands and available for paying that rent or for observing or performing that covenant.

Definitions: **administrator, covenant, lease, lessee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 116

*Subpart 6—Remedies and relief***203 Cancellation of leases or licences for breach of covenant or condition**

- (1) A lessor may exercise any right to cancel a lease of land, by reason of a breach by the lessee of a covenant or condition of the lease, only by
  - (a) applying to a court for an order for possession of the land, or
  - (b) re-entering the land peaceably (and without committing forcible entry under section 91 of the *Crimes Act 1961*),
 and then only after complying with section 204 or 205, as the case requires.
- (2) If, for the purpose of cancelling a lease of land, the lessor applies to a court for an order for possession of the land, the cancellation takes effect
  - (a) on the making of an order for possession, or
  - (b) on such later date as is specified in the order.

Definitions: **court, covenant, land**, s 3; **lease, lessee, lessor**, s 175(2); **condition**, s 175(3)

Origin: *Landlord and Tenant Act 1730* s 2; 1952/51 s 118

**204 Notice of intention to cancel for breach of the covenant to pay the rent**

- (1) Where there has been a breach of the covenant to pay the rent payable under the lease, the lessor may not exercise any right to cancel the lease by reason of that breach in a manner provided for in section 203 unless the rent has been in arrears for not less than 15 working days, and, either
  - (a) the lessor has served on the lessee a notice complying with subsection (2), and

- (b) at the expiry of the period specified in the notice, the breach has not been remedied,  
or, if the lessor believes on reasonable grounds that the lessee has given up possession of the leased premises (whether or not the lessee has in fact done so),
- (c) the lessor, without making any formal demand on the lessee, has served on any mortgagee of the leasehold estate or interest and on any sublessee, of whose names and addresses the lessor has actual notice, a notice complying with subsection (2), and
- (d) at the expiry of the period specified in the notice, the breach has not been remedied.
- (2) The notice required by subsection (1) must adequately inform the recipient of all of the following matters:
- (a) the nature and extent of the breach complained of;
- (b) the amount which must be paid to remedy the breach;
- (c) the period within which the breach must be so remedied, being not less than 5 working days after the date of service of the notice;
- (d) the consequence that, if the breach is not remedied at the expiry of the period specified in the notice, the lessor may seek to cancel the lease in a manner provided for in section 203;
- (e) the right, under section 208, to apply to a court for relief against cancellation of the lease, and the advisability of seeking legal advice on the exercise of that right.
- (3) The period for remedying the breach stipulated under subsection (2)(c) may run concurrently with the period of not less than 15 working days for which, under subsection (1), the rent must be in arrears before the lessor may exercise any right to cancel the lease.

Definitions: **address, court, covenant, mortgagee, working day**, s 3; **lease, lessee, lessor**, s 175(2)

Origin: *Landlord and Tenant Act 1730* s 2; 1952/51 s 118

See also: ss 259 and 260

### **205 Notice of intention to cancel for breach of other covenants**

- (1) Where there has been a breach of a covenant or condition of the lease, other than the covenant to pay the rent payable under the lease, the lessor may not exercise any right to cancel the lease by reason of that breach in a manner provided for in section 203 unless
- (a) the lessor has served on the lessee a notice complying with subsection (2), and,
- (b) at the expiry of a period that is reasonable in the circumstances, the breach has not been remedied.

- (2) The notice required by subsection (1) must adequately inform the recipient of all of the following matters:
- (a) the nature and extent of the breach complained of;
  - (b) if the lessor considers that the breach is capable of being remedied by the lessee doing or desisting from doing a particular thing, or by the payment of reasonable compensation, including reimbursement of the lessor's reasonable expenses in giving the notice and in doing anything else that the lessor has reasonably done in relation to the breach, or both,
    - (i) the thing which the lessee must do or desist from doing, or
    - (ii) the amount of compensation which the lessor considers reasonable,or both, so to remedy the breach, and
  - (c) the consequence that, if the breach is not remedied at the expiry of a period that is reasonable in the circumstances, the lessor may seek to cancel the lease in a manner provided for in section 203;
  - (d) the effect of subsection (3);
  - (e) the right, under section 208, to apply to a court for relief against cancellation of the lease, and the advisability of seeking legal advice on the exercise of that right.
- (3) The fact that the lessor
- (a) may not have specified that the breach is capable of being remedied by the payment of reasonable compensation, or
  - (b) may have specified an amount of compensation that is unreasonable, or
  - (c) may have specified that the breach would be capable of being remedied by the payment of reasonable compensation but without specifying the amount that the lessor considers reasonable
- does not invalidate the notice or prevent the lessee from tendering an amount as reasonable compensation for the breach.
- (4) If, in a case where notice was required to be given under this section,
- (a) an application is made to a court for an order for possession of the land comprised in the lease, and
  - (b) the court finds that the application was made before the expiry of a period for the remedying of the breach that was reasonable in the circumstances,
- then, notwithstanding the provisions of subsection (1), the court may make such an order if it is satisfied that, at the time when the order is

made, a period that is reasonable in the circumstances has expired and the breach has not been remedied.

Definitions: **court, covenant, land**, s 3; **lease, lessee, lessor**, s 175(2); **condition**, s 175(3)

Origin: *Landlord and Tenant Act 1730* s 2; 1952/51 s 118

See also: ss 259 and 260

### **206 Consequences of notice under section 204 or 205**

- (1) If the lessor has served a notice on the lessee in accordance with section 204 or 205, as the case requires, the lessor must, as soon as possible, serve a copy of the notice on
  - (a) any mortgagee or receiver of the leasehold estate or interest, and
  - (b) any sublessee, and
  - (c) any mortgagee or receiver of the estate or interest of a sublessee, of whose names and addresses the lessor has actual notice; but the lessor's failure to comply with this subsection does not, in itself, prevent the lessor from exercising any right to cancel the lease.
- (2) The lessor's acceptance of any rent after the service of a notice on the lessee in accordance with section 204 or 205, as the case requires, does not operate as a waiver of the lessor's right to re-enter the land or apply for an order for possession of the land on the ground of a breach of a covenant or condition of the lease, unless, in accepting that rent, the lessor causes the lessee reasonably to believe that the lessor no longer intends to pursue the right to re-enter or to apply for an order for possession.

Definitions: **address, covenant, land, mortgagee, receiver**, s 3; **lease, lessee, lessor**, s 175(2); **condition**, s 175(3)

Origin: *Landlord and Tenant Act 1730* s 2; 1952/51 s 118

See also: ss 179, 259 and 260

### **207 Powers of court in making order for possession**

- (1) On an application to a court for an order for possession of the land comprised in a lease, made after compliance with section 204 or 205, as the case requires, the court, in making such an order and by so doing cancelling the lease,
  - (a) may order the lessee to pay the rent up to the date of cancellation, or such later date as the lessee yields up possession;



- (b) may order the lessee to pay reasonable compensation for the breach, including the reimbursement of the lessor's reasonable expenses in giving notice under this section and in doing anything else that the lessor has reasonably done in relation to the breach;
  - (c) may impose on the lessee or the lessor such other conditions (if any) as the court thinks it.
- (2) Sections 203 to 206 and this section do not prevent a lessor from claiming damages for the breach of a lease, or for breach of any other duty to the lessor which the lessee may be under independently of the lease, or affect the amount which the lessor may claim by way of damages.

Definitions: **court, land**, s 3; **lease, lessee, lessor**, s 175(2)

Origin: *Landlord and Tenant Act 1730* s 2; 1952/51 s 118

### **208 Relief against cancellation of leases or licences for breach of covenant or condition**

- (1) Any person referred to in section 209(1) may apply to a court for relief against the cancellation or proposed cancellation of a lease of land, on the ground of a breach of a covenant or condition of the lease
- (a) in a proceeding brought by the lessor for an order for possession of the land, or
  - (b) in a proceeding brought for the purpose
    - (i) before an order for possession has been made in a proceeding referred to in paragraph (a), and
    - (ii) if the lessor has peaceably re-entered the land, not later than 3 months after the date on which the lessor re-entered,
- subject, however, to section 209(3); and the court may grant such relief, on such conditions (if any) as to expenses, damages, compensation, or any other relevant matter, as it thinks it, and may grant an injunction restraining any like breach in the future.
- (2) The court may grant relief against the cancellation of a lease, notwithstanding that the cancellation is for breach of an essential term of the lease or that the breach is not capable of being remedied.

Definitions: **court, land**, s 3; **lease, lessor**, s 175(2); **condition**, s 175(3); **person**, *Acts Interpretation Act 1924* s 4

Origin: *Landlord and Tenant Act 1730* s 4; 1952/51 s 118

### **209 Application for relief under section 208**

- (1) An application for relief under section 208 against the cancellation of a lease may be made
- (a) by the lessee;

- (b) by a mortgagee of the leasehold estate or interest;
  - (c) by a receiver appointed in respect of the leasehold estate or interest;
  - (d) if two or more persons are entitled to the leasehold estate or interest as joint tenants, by any one or more of them on their own behalves.
- (2) If an application made in accordance with subsection (1)(d) is not made by all of the joint tenants, then, unless the court orders otherwise, it must be served on every joint tenant who is not already a party.
- (3) A mortgagee of the leasehold estate or interest, or a receiver appointed in respect of that estate or interest, who has been prejudiced by not being served under section 206 with a copy of a notice required to be given under section 204 or 205, as the case requires, or by not being so served at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with the relevant section), may apply to the court
- (a) for an extension of the time specified in section 208(1)(b) for the bringing of a proceeding for relief against cancellation of the lease, or
  - (b) for an extension of the time within which to make an application for relief in the lessor's proceeding for an order for possession; and the court may grant the application for an extension of time on such conditions (if any) as it thinks fit.

Definitions: **court**, **joint tenants**, **mortgagee**, **receiver**, s 3; **lease**, **lessee**, **lessor**, s 175(2); **person**, *Acts Interpretation Act 1924* s 4

Origin: *Landlord and Tenant Act 1730* s 4; 1952/51 s 118

### 210 Application for relief not to constitute an admission

An application for relief against the cancellation of a lease is not in itself to be taken as an admission by the person making the application

- (a) that there has been a breach of a covenant or condition of the lease by the lessee, or
- (b) that, by reason of such a breach, the lessor has the right to cancel the lease, or
- (c) that a notice has been duly served on the applicant in accordance with section 204 or 205, as the case requires, or
- (d) that, at the time when the lessor applied to the court for an order for possession of the land or peaceably re-entered the land, the following periods had expired:
  - (i) the period for the remedying of the breach specified in a notice served under section 204, where notice was served under that section;

(ii) a period for the remedying of the breach that was reasonable in the circumstances, where notice was served under section 205;  
and the court may grant relief against the cancellation of the lease without determining all or any of those things.

Definitions: **court, covenant, land**, s 3; **lease, lessee, lessor**, s 175(2); **condition**, s 175(3); **person**, *Acts Interpretation Act 1924* s 4

Origin: *Landlord and Tenant Act 1730* s 4; 1952/51 s 118

### 211 Effect of an order granting relief against cancellation of a lease

- (1) An order of a court under section 208 granting relief to the lessee against the cancellation of a lease may be registered as an instrument under the *Land Transfer Act 1952* or the *Deeds Registration Act 1908*.
- (2) On the making of an order granting relief to the lessee against the cancellation of a lease, then, subject to subsection (3), but notwithstanding anything to the contrary in section 121 of the *Land Transfer Act 1952*,
  - (a) the lessee and any sublessee continue to hold the land under the terms of the lease, without any need for a new lease or sublease to be entered into; and
  - (b) any right or interest deriving from any sublease is reinstated.
- (3) If the District Land Registrar has, under section 121 of the *Land Transfer Act 1952*, notified the re-entry of the lessor upon the register, subsection (2) has effect only from the time at which the order granting relief is registered.

Definitions: **court, instrument, land, registered**, s 3; **lease, lessee, lessor**, s 175(2)

Origin: *Landlord and Tenant Act 1730* s 4; 1952/51 s 118

### 212 Protection of sublessee or sublicensee on cancellation of superior lease or licence

- (1) Where a lessor exercises or is proposing to exercise any right to cancel a lease of land, by reason of a breach by the lessee of a covenant or condition of the lease, any sublessee, or mortgagee of the estate or interest of a sublessee, or receiver appointed in respect of that estate or interest may apply to the court for relief
  - (a) in a proceeding brought by the lessor for an order for possession of the land, or
  - (b) in a proceeding brought for the purpose
    - (i) before an order for possession has been made in a proceeding referred to in paragraph (a), and

- (ii) if the lessor has peaceably re-entered the land, not later than 3 months after the date on which the lessor re-entered, subject, however, to subsection (2).
- (2) A sublessee, or mortgagee of the estate or interest of a sublessee, or receiver appointed in respect of that estate or interest, who has been prejudiced by not being served under section 206 with a copy of a notice required to be given under section 204 or 205, as the case requires, or by not being so served at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with that section), may apply to the court
- (a) for an extension of the time specified in subsection (1)(b) for the bringing of a proceeding for relief under that subsection, or
- (b) for an extension of the time within which to make an application for relief in the lessor's proceeding for an order for possession; and the court may grant the application for an extension of time on such conditions (if any) as it thinks it.
- (3) On an application for relief made under subsection (1), the court may order the lessor to enter into a lease of the whole or any part of the land to the sublessee or mortgagee.
- (4) An order under subsection (3)
- (a) may be for the entering into of a lease for a term
- (i) beginning on a date not earlier than the date on which the lessor re-entered the land or the date on which the cancellation of the lease took effect under an order for possession of the land in favour of the lessor, and
- (ii) expiring on a date not later than the date on which the original sublease would have expired, or for any shorter term, and
- (b) may be on such conditions (if any) as to the execution of any instrument, payment of rent, expenses, damages, compensation, or the giving of security, or any other relevant matter, as the court thinks it.
- (5) An order for the entering into of a lease to a sublessee or mortgagee may be made under subsection (3), notwithstanding that the lessee is not a party to the proceeding.

Definitions: **court, covenant, instrument, land, mortgagee, receiver, superior lease**, s 3; **expire**, s 175(1); **lease, lessee, lessor**, s 175(2); **condition**, s 175(3)

Origin: 1952/51 s 119

**213 Relief against refusal of lessor to enter into a renewal or sell the reversion to the lessee or licensee**

- (1) If, in relation to a lease of land,
  - (a) the lessor has covenanted in writing with the lessee that,
    - (i) on the expiry of the term of the lease, the lessor will extend the term of the lease, renew the lease, or enter into a new lease of all or part of the premises to the lessee, or
    - (ii) on the expiry of the term of the lease, or at some earlier time, the lessor will transfer or assign to the lessee all or part of the reversion expectant on the lease, and
  - (b) the obligation of the lessor referred to in paragraph (a) is conditional upon
    - (i) the fulfilment of any condition or the performance of any covenant or agreement on the part of the lessee, or
    - (ii) the giving of notice by the lessee within a specified time or in a specified manner of the intention to exercise the right to require an extension or a renewal of the lease or the entering into of a new lease or the transfer or assignment of the reversion, and
  - (c) the lessee is in breach of any such condition, covenant or agreement, or has failed to give the notice within the specified time or in the specified manner, and
  - (d) the lessor has refused to extend or renew the lease, or enter into a new lease, or transfer or assign the reversion, as the case may be, any person referred to in subsection (2) may apply to a court for relief, within the time and in the manner provided in subsection (3).
- (2) An application for relief may be made under subsection (1)
  - (a) by the lessee;
  - (b) by a mortgagee of the leasehold estate or interest;
  - (c) by a receiver appointed in respect of the leasehold estate or interest;
  - (d) if two or more persons are entitled to the leasehold estate or interest as joint tenants, by any one or more of them on their own behalves.
- (3) An application for relief under subsection (1) may be made to the court in any proceeding brought by the lessor for an order for possession of the land or in a proceeding brought by the lessee or mortgagee for the purpose, and must be so made not later than 3 months after the date on which the lessor serves on the lessee, and on any mortgagee of the leasehold estate or interest of which the lessor has actual notice, a notice which adequately and expressly informs the lessee
  - (a) that the lessor refuses to extend or renew the lease, or enter into a new lease, or transfer or assign the reversion, as the case may be, and
  - (b) that the lessee or mortgagee may apply to a court for relief against the refusal, and

- (c) that the right to apply for such relief lapses if the application is not made to the court within 3 months of the date of service of the notice, and
- (d) that it is advisable for the lessee or mortgagee to seek legal advice on the exercise of the right to apply to a court for relief against the refusal.
- (5) The court may grant relief against the refusal of the lessor to extend or renew the lease, or enter into a new lease, or transfer or assign the reversion, as the case may be, and, without limiting the generality of that power, may
- (a) order the lessor to extend or renew the lease or enter into a new lease to the lessee or mortgagee, or
- (b) order the lessor specifically to perform the lessor's covenant or agreement to transfer or assign the reversion, and to execute all necessary assurances for that purpose,
- and may grant that relief on such conditions (if any) as to expenses, damages, compensation, or any other relevant matter, as the court thinks it.
- (6) The fact that the lessor may have made a disposition to a person other than the lessee or mortgagee of an estate or interest which would be prejudicially affected by the grant of relief to the lessee or mortgagee under this section does not affect the power of the court to grant that relief, but, in any such case, the court may do all or any of the following:
- (a) cancel or postpone any such estate or interest;
- (b) assess the damages or compensation to be paid to any person prejudicially affected by that cancellation or postponement;
- (c) order any such damages or compensation to be paid by the lessor or by the lessee or mortgagee, or partly by the lessor and partly by the lessee or mortgagee in such proportions as the court determines.
- (7) If, under this section, an order is made in respect of Maori land for the extension or renewal of a lease, or the entering into of a new lease to the lessee or mortgagee, or the specific performance of the lessor's covenant or agreement to transfer or assign the reversion, the extension, renewal, entering into of a new lease, transfer or assignment must be confirmed as of right under *Tē Ture Whenua Māori Act 1993*.

Definitions: **court, covenant, disposition, joint tenants, land, mortgagee, receiver**, s 3; **expiry**, s 175(1); **lease, lessee, lessor**, s 175(2); **condition**, s 175(3); **person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 120 and 121

See also: subpart 1 of part 5, ss 259 and 260

**214 Sections 203 to 213 to be a code**

- (1) A lease may be cancelled only in accordance with the provisions of sections 203 to 207, and relief against the actual or proposed cancellation of a lease or the refusal to extend or renew a lease, or enter into a new lease, or transfer or assign the reversion, may be given only in exercise of the powers conferred by sections 208 to 213.
- (2) Any term expressed or implied in a lease of land or in any other instrument
  - (a) providing that the lease is automatically cancelled by breach of a covenant or condition of the lease, or
  - (b) otherwise conflicting with sections 203 to 213 or with this section, or
  - (c) having the purpose or effect of avoiding the need for compliance with sections 203 to 213 or with this section
 is of no effect.

Definitions: **covenant, instrument, land**, s 3; **lease**, s 175(2); **condition**, s 175(3)

Origin: 1952/51 s 118

**215 Right to distrain abolished**

- (1) The right to distrain for rent or other moneys payable under a lease of land or for a rentcharge is abolished.
- (2) To the extent that a provision in a lease of land or in an encumbrance securing a rentcharge purports to give any person the right to levy distress for rent or other moneys payable under the lease or for the rentcharge, it is of no effect.
- (3) This section does not affect the manner in which a person may enforce a judgment debt, or prevent a lessee or a person by whom a rentcharge is payable from creating an encumbrance over goods to secure payment of the rent or other moneys payable under the lease or for the rentcharge.
- (4) The levying of any distress, for rent or other moneys payable under a lease of land or for a rentcharge, which has lawfully been commenced but has not been completed before — 199- [date on which this Act comes into force] may be completed after that date, and as though this Act had not repealed the *Distress and Replevin Act 1908* or any other enactment concerning the levying of such distress.

Definitions: **encumbrance, instrument, goods, land, lease, lessee, rentcharge**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Distress Act 1689*; 1952/51 s 107A

**216 Removal of fixtures by lessee**

- (1) Unless, in relation to a lease of land, the lessor and the lessee otherwise agree, any trade, ornamental or agricultural fixture (other than a lessor's fixture) which has been affixed to the leased premises by the lessee may be removed by the lessee at any time
  - (a) while the lessee is in lawful possession of the premises, or
  - (b) during a reasonable period after the lessee ceases to be in lawful possession of the premises or that part of the premises to which the fixture is affixed.
  
- (2) A lessee who exercises a right to remove a fixture
  - (a) must cause as little damage as possible to the leased premises, and
  - (b) must immediately make good any damage so caused, and
  - (c) must compensate the lessor for any damage so caused and not made good, and
  - (d) must compensate the lessor for any other loss so caused to the lessor, including indemnification in respect of all claims and expenses in respect of the removal or damage, made or incurred by the lessor under any superior lease.
  
- (3) A lessee who has ceased to be in lawful possession of the premises is entitled, during the reasonable period referred to in subsection (1)(b), to have such access to the premises as is reasonable and necessary for the purpose of exercising any right to remove a fixture or of carrying out any duty to make good any damage so caused.
  
- (4) In this section, **lessor's fixture** means a chattel which has been affixed to the premises by
  - (a) the lessee, or
  - (b) a former lessee of the premises whose leasehold estate or interest was acquired by the lessee, or
  - (c) a sublessee whose right to remove the fixture has expired, in such a manner as to have become part of the structure of a building or otherwise to be integral to the land, and includes any fence erected on the land.

Definitions: **land, lessee, lessor, superior lease**, s 3

Origin: *Landlord and Tenant Act 1851* s 3

**217 Effect of unlawful eviction upon lessee's obligations**

- (1) A lessee under a lease of land who, contrary to the express or implied terms of the lease, is evicted from the whole of the premises comprised in the lease is not bound, in respect of the period of the eviction, to pay the rent or any other moneys payable under the lease or perform any



- other covenant on the part of the lessee expressed or implied in the lease.
- (2) If a lessee is so evicted from part only of the premises comprised in the lease, then in respect of the period of the eviction,
- (a) the rent and any other moneys payable under the lease are reduced in the proportion that the value to the lessee of the part of the premises from which the lessee has been evicted bears to the value to the lessee of the whole of the premises, and
  - (b) the lessee is not bound to observe or perform any other covenant on the part of the lessee expressed or implied in the lease, so far as it relates to the part of the premises from which the lessee has been evicted.
- (3) For the purposes of this section, a lessee who, contrary to the express or implied terms of the lease, is, on the commencement of the term of the lease, unable to obtain possession of the whole or any part of the premises, is to be taken as having been evicted from the whole, or that part, of the premises, as the case requires.
- (4) If, under this section, a lessee is wholly or partly released from the obligation to pay the rent or other moneys payable under the lease, or to observe or perform any other covenant on the part of the lessee expressed or implied in the lease, any other person who is directly or contingently liable for that payment, observance or performance is released to the same extent.
- (5) This section does not limit the right of a lessee who is evicted from the whole or any part of the premises to cancel the lease in accordance with any right expressed or implied in the lease, or provided for in the *Contractual Remedies Act 1979*, and to claim damages for breach of the lease; but any assessment of damages must take into account the value of any release, in whole or in part, from the obligation to pay the rent or other moneys payable under the lease, or to observe or perform any other covenant on the part of the lessee expressed or implied in the lease.

Definitions: **covenant**, **land**, **lease**, **lessee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

### 218 Exoneration of lessee if lessor is insured

- (1) This section applies
- (a) to premises leased under a lease of land coming into operation on or after — 199- [date on which this Act comes into force], and
  - (b) to any one or more of the following events:
    - (i) fire, flood, explosion, lightning, storm, earthquake or volcanic activity;

- (ii) the occurrence of any other peril against the risk of which a lessor under a lease of land is insured, or has covenanted with the lessee to insure.
- (2) If premises to which this section applies, or the whole or any part of the land on which the premises are situated, are damaged or destroyed by an event to which this section applies, then, subject to subsection (4), the lessor
  - (a) is not entitled to require the lessee
    - (i) to meet the cost of making good the destruction or damage, or
    - (ii) to indemnify the lessor against the cost of making good the destruction or damage, or
    - (iii) to pay damages in respect of the destruction or damage, and
  - (b) if the lessee is obliged by the terms of any agreement to carry out any works to make good the destruction or damage, the lessor must indemnify the lessee against the cost of those works.
- (3) Subsection (2) does not excuse the lessee from any liability to which the lessee would otherwise be subject, if, and to the extent that,
  - (a) the destruction or damage was intentionally done or caused by the lessee or by a person for whose acts or omissions the lessee is responsible, or
  - (b) any insurance moneys which would otherwise have been payable to the lessor in respect of the destruction or damage are irrecoverable by reason of an act or omission of the lessee or of a person for whose acts or omissions the lessee is responsible.
- (4) Notwithstanding the provisions of subsection (2),
  - (a) the lessee may expressly acknowledge in an instrument that the lessor has not insured, or has not fully insured, the premises or the land on which the premises are situated against destruction or damage arising from any one or more of the events to which this section applies as specified in the instrument, and, if so,
  - (b) the lessor and the lessee may expressly agree in that instrument that the lessee will meet the cost of making good any such destruction or damage, or will indemnify the lessor against the cost of making good any such destruction or damage, to the extent, but only to the extent, that
    - (i) the destruction or damage arises from an event specified in accordance with paragraph (a), and,
    - (ii) at the time when the destruction or damage occurs, the lessor is not, in fact, entitled to be indemnified under a policy of insurance in respect of the whole, or that part of, the destruction or damage, and

- (iii) the absence of insurance cover in respect of the whole, or that part of, the destruction or damage has been acknowledged by the lessee in accordance with paragraph (a).
- (5) This section has effect notwithstanding that an event which gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee, or of a person for whose acts or omissions the lessee is responsible.
- (6) Any term expressed or implied in an instrument and conflicting with this section is of no effect.

Definitions: **instrument, land, lease, lessee, lessor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

See also: s 4(2)

### 219 Effect of waiver

A waiver by a lessor of the benefit of any covenant or condition in a lease extends only to the instance or breach to which the waiver particularly relates and is not to be construed as a general waiver, unless a contrary intention appears.

Definitions: **covenant**, s 3; **lease, lessor**, s 175(2); **condition**, s 175(3)

Origin: 1952/51 s 115

## PART 10 EASEMENTS AND PROFITS AND COVENANTS

### *Subpart 1—Easements and profits*

### 220 Easements in gross permitted

- (1) An easement over land may be created in gross for the benefit of any person, without being attached to and benefiting any other land.
- (2) An easement in gross over land
- (a) burdens the land of the covenantor, and
  - (b) binds the covenantor and the covenantor's successors in title, and anyone claiming through the covenantor or the covenantor's successors in title, including an occupier for the time being of the burdened land.
- (3) The benefit of an easement in gross is capable of being assigned.

Definitions: **land, occupier**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 122

**221 Benefit or burden of easements or profits granted for a term of years**

- (1) The benefits to the grantor of an easement, profit, or other incorporeal hereditament, granted for a term of years, and any right of the grantor to terminate the grant,
  - (a) are attached to the estate in the land out of which the easement, profit or hereditament was granted, and
  - (b) may be exercised or enforced by the person for the time being entitled to the income of that land.
- (2) A person who becomes entitled under subsection (1) to exercise or enforce a benefit or a right referred to in that subsection may exercise or enforce it even if it first became exercisable or accrued before the time at which that person became so entitled, unless, before that time, the benefit or right was waived, or the person against whom it was exercisable or enforceable was released from the obligation giving rise to the benefit or right.
- (3) The obligations of the grantor under any easement, profit, or other incorporeal hereditament, granted for a term of years, burden the estate in the land out of which it was granted, and may be enforced against the holder of that estate for the time being by the person for the time being entitled to the easement, profit, or other incorporeal hereditament.
- (4) If, in respect of an easement, profit, or other incorporeal hereditament, granted for a term of years, there has been
  - (a) a division of the estate in the land out of which it was granted, and different persons are entitled to the income of those parts (severance of the reversion as regards the land), or
  - (b) the easement, profit, or other incorporeal hereditament has terminated as to part only of the land over which it was granted (severance of the reversion as regards the estate),the benefits and rights referred to in subsection (1) and the obligations referred to in subsection (3) must be apportioned, and, to the extent (if any) required by that apportionment, remain attached to and benefit or burden each part of the land, as the case requires, and may to that extent be exercised or enforced by the person entitled to exercise or enforce them under subsection (1) or subsection (3).

Definitions: **income, land, person entitled**, s 3; **person**, *Acts Interpretation Act 1924* s 4

See also: *Grantees of Reversion Act 1540*

**222 Easements or profits may not be acquired by prescription**

- (1) After — 199- [date on which this Act comes into force], no period of time shall run or continue to run in favour of any person who, but for this subsection, would, at the expiry of that period, acquire, by reason of continuous use or enjoyment throughout that period,
- (a) a prescriptive right to an easement, profit or other incorporeal hereditament, or
  - (b) a right to become registered as the proprietor of an easement, profit or other incorporeal hereditament.
- (2) The rule of law permitting a court to act upon the fiction of the lost modern grant is abolished.
- (3) This section
- (a) does not affect
    - (i) a prescriptive right to an easement, profit or other incorporeal hereditament, or
    - (ii) a right to become registered as the proprietor of an easement, profit or other incorporeal hereditament, which exists or has accrued immediately before — 199- [the date on which this Act comes into force], and
  - (b) does not prevent any person from continuing to use, enjoy or have the right to exercise, on or after — 199- [the date on which this Act comes into force], a right referred to in paragraph (a).
- (4) Notwithstanding anything to the contrary in the *Limitation Act 1950*, an action may be brought at any time for the possession of land free of any easement, profit or other incorporeal hereditament if the purported easement, profit or other incorporeal hereditament was used or enjoyed in circumstances amounting to trespass.

Definitions: **court**, **land**, **registered**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Prescription Act 1832* ss 1, 2 and 4-8

*Vehicular rights of way***223 Covenants implied in a grant of a vehicular right of way**

- (1) Every grant of a vehicular right of way contains the implied covenants set out in schedule 6, unless any such covenant is negatived, varied or extended,
- (a) in the case of a vehicular right of way granted on or after — 199- [the date on which this Act comes into force],
    - (i) in a manner required by section 73(b), or,
    - (ii) by an easement certificate registered under section 90A of the *Land Transfer Act 1952*, or,

- (b) in the case of a vehicular right of way granted before — 199- [the date on which this Act comes into force], by the instrument, contract or arrangement creating the vehicular right of way.
- (2) As between any person entitled to enforce the covenants referred to in subsection (1) and any person bound by those covenants, a provision of an instrument, contract or arrangement coming into operation before 6 November 1986 (being the date on which the *Property Law Amendment Act 1986* came into force) is to be taken as negating, varying or extending a covenant implied by subsection (1) only so long as that provision remains enforceable by the person so entitled against the person so bound.
- (3) The provisions of this section are in addition to, and not in derogation of, the provisions of section 90D of the *Land Transfer Act 1952* and section 27(3) of the *Housing Act 1955*.

Definitions: **covenant, instrument, person bound, person entitled, registered, vehicular right of way**, s 3

Origin: 1952/51 s 126B

See also: s 4(2)

#### *Light and air*

### **224 Grant of easement of light or air**

- (1) An easement granting the right to the access of light or air to any land or building from or over the burdened land is enforceable if
- (a) the easement is granted on or after 24 November 1927 (being the date on which the *Property Law Amendment Act 1927* came into force), and
  - (b) the grant is made by deed or by instrument registrable under the *Land Transfer Act 1915* or the *Land Transfer Act 1952*, as the case requires, and
  - (c) the deed or other instrument
    - (i) accurately defines the area on and over the burdened land in respect of which the right to access of light or air is intended to be provided, and,
    - (ii) in the case of an instrument registrable under the *Land Transfer Act 1915* or the *Land Transfer Act 1952*, is duly registered under the relevant Act within 12 months after the date on which it is executed by the grantor.
- (2) A right to the access of light or air purporting to have been granted or acquired otherwise than in accordance with subsection (1) is not enforceable, except as provided in subsection (3).

- (3) This section does not prejudice or affect any easement or right of access to or use of light or air existing or acquired, by prescription or otherwise, before 27 July 1894 (being the date on which the *Light and Air Act 1894* came into force).
- (4) For the purposes of this section and of section 225, a reference to a right of access to or use of light or air includes a right of access to or use of light and air.

Definitions: **deed, instrument, land, registered, registrable**, s 3; *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 123-125

### 225 Effect of easement of light or air

- (1) An easement that is enforceable under section 224(1)
- (a) confers on the person entitled the rights to the access of light or air described in the grant, in respect of the area on and over the burdened land defined in the deed or other instrument, and,
  - (b) unless otherwise provided, enures for the benefit of the person entitled, notwithstanding that any buildings erected on the benefited land may be altered, or may be destroyed and replaced by other buildings.
- (2) The erection on the burdened land of buildings of any height is not an infringement of any right conferred by the easement in respect of the defined area on and over the burdened land if no part of any such building encroaches on that area.

Definitions: **deed, land, person entitled**, s 3

Origin: 1952/51 s 125

### Subpart 2—Covenants

### 226 Construction of covenants relating to land—benefits

- (1) A covenant, whether expressed in an instrument or implied in an instrument under this or any other Act, and whether a positive covenant or a restrictive covenant, benefiting land of the covenantee is enforceable by the covenantee, the covenantee's successors in title and persons claiming through the covenantee or the covenantee's successors in title, unless a contrary intention appears in the instrument.
- (2) For the purposes of this section, the covenantee's successors in title include an occupier for the time being of the benefited land.

Definitions: **covenant, instrument, land, occupier, positive covenant, restrictive covenant**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 63

**227 Construction of covenants relating to land—burdens**

- (1) A covenant, whether expressed in an instrument or implied in an instrument under this or any other Act, and whether a positive covenant or a restrictive covenant, burdening land of the covenantor binds the covenantor, the covenantor's successors in title and persons claiming through the covenantor or the covenantor's successors in title, unless a contrary intention appears in the instrument.
- (2) For the purposes of this section,
- (a) the covenantor's successors in title include an occupier for the time being of the burdened land;
  - (b) a restrictive covenant may relate to a subject-matter not in existence when the covenant is made.

Definitions: **covenant, instrument, land, occupier, positive covenant, restrictive covenant**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 64

**228 Legal effect of covenants running with land**

- (1) This section applies to a positive covenant coming into operation on or after 1 January 1987 (being the date on which section 3 of the *Property Law Amendment Act 1986* came into force) and to a restrictive covenant, whether expressed in an instrument or implied in an instrument under this or any other enactment, if
- (a) the covenant burdens land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land, and
  - (b) there is no privity of estate between the covenantor and the covenantee.
- (2) Notwithstanding anything to the contrary in any other rule of law or equity, but subject to subsections (3), (4) and (5), every covenant to which this section applies, unless a contrary intention appears,
- (a) is binding in equity on
    - (i) every person who becomes the owner of the burdened land (whether by acquisition from the covenantor or from any of the covenantor's successors in title, and whether or not for valuable consideration, and whether by operation of law or otherwise), and
    - (ii) every person who is for the time being the occupier of the burdened land, and
  - (b) ceases to be binding on any person referred to in paragraph (a) when that person ceases to be the owner or the occupier of the burdened land, as the case requires, but without prejudice to that



person's liability for any breach of the covenant arising before that person ceased to be the owner or occupier of the land.

- (3) An administrator of the estate of a person who, at the date of that person's death, was bound by a positive covenant to which this section applies is bound by that covenant only to the extent of the assets of the estate in the administrator's hands and available for meeting the obligations under the covenant.
- (4) The rights under a covenant to which this section applies rank, in relation to all other unregistered interests affecting the same land, as if the covenant were an equitable and not a legal interest, but subject to the effect of notification of the covenant under section 229 in the register kept under the *Land Transfer Act 1952*.
- (5) This section does not limit or affect
  - (a) the duty owed by any person holding any interest in land (other than the occupier of the land) to observe the terms of any restrictive covenant burdening the land, or
  - (b) the law relating to restrictive covenants in gross.

Definitions: **administrator, covenant, instrument, land, occupier, owner, positive covenant, restrictive covenant, unregistered**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 64A

## 229 Notification of covenants

- (1) This section applies to a positive covenant or a restrictive covenant burdening land under the *Land Transfer Act 1952*, and benefiting any other land (whether or not under that Act), if the covenant is expressed in an instrument coming into operation,
  - (a) in the case of a restrictive covenant, on or after 1 January 1953 (being the date on which the *Property Law Act 1952* came into force), and,
  - (b) in the case of a positive covenant, on or after 1 January 1987 (being the date specified in section 64A of the *Property Law Act 1952*, as inserted by section 3 of the *Property Law Amendment Act 1986*).
- (2) The District Land Registrar has power to enter in the register relating to the burdened land a notification of
  - (a) a covenant to which this section applies, and
  - (b) any instrument purporting to affect the operation of a covenant notified under paragraph (a), and
  - (c) any modification or revocation of a covenant notified under paragraph (a).

- (3) A covenant notified under subsection (2) is an interest in land for the purposes of section 62 of the *Land Transfer Act 1952*.
- (4) Subject to subsection (3), the notification of a covenant under subsection (2) does not give the covenant any greater operation than it would otherwise have.

Definitions: **covenant, instrument, land, land under the *Land Transfer Act 1952*, positive covenant, restrictive covenant**, s 3

Origin: 1952/51 s 126A

See also: s 4(2)

### 230 Person entitled may give notice of work required

- (1) If land is benefited by a positive covenant, the person entitled may serve on the person bound a notice calling on the person bound to undertake, or contribute to the cost of undertaking, any work required to be done under the terms of the covenant.
- (2) A notice served under subsection (1) must
- (a) specify the work required to be undertaken, with sufficient details to enable the person bound to understand the nature of the work and to estimate its cost, and
  - (b) identify the instrument or other source of the positive covenant under which the person entitled claims that the work is required to be done, and that the person bound is obliged to undertake the work or contribute to its cost, and,
  - (c) if the person entitled proposes that the cost of the work be shared among two or more persons (whether or not including the person entitled), identify those persons and the shares to be borne by each, and,
  - (d) if the person entitled considers that it will be necessary to enter upon the land of the person bound (other than, in the case of a vehicular right of way, land actually comprised in the right of way) for the purpose of undertaking any part of the work, contain details of the intended purpose, extent and duration of the proposed entry, and
  - (e) set out the consequences of the failure of the person bound either
    - (i) to comply with the notice, or
    - (ii) to serve a cross-notice on the person entitled within the time specified in section 231.

Definitions: **covenant, instrument, land, person bound, person entitled, positive covenant, vehicular right of way**, s 3

Origin: 1952/51 s 126C

**231 Person bound who does not agree may serve cross-notice**

- (1) The person bound on whom a notice is served under section 230 is to be taken as agreeing with the proposals in the notice about
  - (a) the requirement to undertake or contribute to the cost of the work, and
  - (b) the nature or extent of the work, and
  - (c) the shares in which the cost of the work is to be borne, and
  - (d) the need for entry on to the land of the person bound, unless, within 15 working days after the date of service of the notice, the person bound serves on the person entitled a cross-notice specifying the proposals to which the person bound objects.
- (2) The person bound may set out in a cross-notice served under subsection (1) any counter-proposals of the person bound, in the same detail as is required in the case of a notice.

Definitions: **land, person bound, person entitled, working day**, s 3

Origin: 1952/51 s 126D

**232 Circumstances in which person bound is not liable**

- (1) The person bound is not liable to contribute to the cost of any part of the proposed work if that work is carried out
  - (a) after the date on which the person bound has been duly served with a notice under section 230 and before
    - (i) the date on which the person bound has duly served a cross-notice under section 231 on the person entitled, or
    - (ii) the expiry of 15 working days from the date on which the notice under section 230 was served on the person bound, whichever date is the earlier, or
  - (b) in any period, after a notice and a cross-notice has been duly served, during which differences between the parties remain to be settled, either by agreement or by a court.
- (2) Subsection (1) does not prevent the person bound from agreeing, in the particular case, before the arrival of a date referred to in that subsection, to contribute to the cost of the proposed work.

Definitions: **court, person entitled, working day**, s 3

Origin: 1952/51 s 126C

**233 Person entitled or person bound ceasing to be owner or occupier**

- (1) If, after the service of a notice under section 230, but before the question of undertaking or contributing to the cost of the proposed work

is settled (whether by agreement or by order of a court), the person serving the notice or the person on whom it was served ceases to be the owner or the occupier of the benefited land or of the burdened land, as the case may be, the notice and any cross-notice cease to have effect.

- (2) After the question of undertaking and contributing to the cost of the proposed work is settled (whether by agreement or by order of the court), any owner or occupier for the time being of the benefited land may proceed with the proposed work and recover from the person on whom the notice was served under section 230 the share of the cost of the work which that person agreed or was ordered by the court to contribute, even if that person has ceased to be an owner or occupier of the burdened land.
- (3) No settlement referred to in this section binds an owner or occupier for the time being of the burdened or the benefited land who was not a party to the settlement, whether or not that person became, or ceased to be, an owner or an occupier of that land before or after the date of the settlement.

Definitions: **court, land, occupier, owner**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 126E

### **234 Court may enforce easements and positive or restrictive covenants**

- (1) In determining any question or dispute concerning the existence or effect of an easement, a positive covenant or a restrictive covenant, a court may make an order, on such conditions (if any) as it thinks fit, concerning all or any of the following matters:
  - (a) the existence of an easement, a positive covenant or a restrictive covenant benefiting or burdening any land;
  - (b) the enforceability of an easement, a positive covenant or a restrictive covenant by or against any person, whether under this Act or otherwise;
  - (c) the question whether any work is required to be done under the terms of an easement, positive covenant or a restrictive covenant, and, if so, the nature and extent of the work required to be undertaken at the time in question;
  - (d) the reasonable and proper cost of any such work, including interest on outlay, expenses of survey and reasonable remuneration for the superintendence or work of a person entitled or person bound who is or has been personally engaged on the work;
  - (e) the person or persons by whom the cost of any such work is to be borne, and, if the cost is to be shared among two or more persons, the shares to be borne by each;

- (f) the date on or before which, and the manner in which, any such work is to be undertaken;
  - (g) the entry on to any land (whether or not land over which a vehicular right of way is granted) for the purpose of doing any such work, and the use on or over that land of vehicles, aircraft, or any other means of transport, and any plant, machinery, crane or other equipment for the purpose of carrying out the work;
  - (h) any other matter arising in relation to a question or dispute concerning the existence or effect of an easement, a positive covenant or a restrictive covenant.
- (2) In making an order under subsection (1)(e), in relation to the sharing of the cost of work required to be undertaken under the terms of a vehicular right of way, the court must
- (a) assume, in the absence of evidence to the contrary, that every person entitled makes full and reasonable use of the right of way, but
  - (b) take into account any disproportionate (though still reasonable) use of the right of way by any person entitled.

Definitions: **court, land, person bound, person entitled, positive covenant, restrictive covenant, vehicular right of way**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 126F

See also: s 262(1)(a)

### 235 Court may modify or extinguish easements or covenants

- (1) This section applies to every easement, positive covenant and restrictive covenant, including a covenant expressed or implied in an easement.
- (2) In a proceeding brought by any person in relation to an easement or covenant to which this section applies, or to land burdened by any such easement or covenant, or in a proceeding brought for the purpose, a person bound by such an easement or covenant may apply to a court for an order under this section.
- (3) On an application made under subsection (2), the court may, by order, modify or wholly or partly extinguish the easement or covenant, on being satisfied
  - (a) that, by reason of any change since the creation of the easement or covenant
    - (i) in the nature or the extent of the use being made of the benefited or the burdened land, or
    - (ii) in the character of the neighbourhood, or
    - (iii) in any other circumstance that the court considers relevant

- the easement or covenant ought to be modified or wholly or partly extinguished, or
- (b) that the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation, or
  - (c) that every person entitled who is of full age and capacity
    - (i) has agreed that the easement or covenant should be modified or wholly or partly extinguished, or
    - (ii) may reasonably be considered, by his or her acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part, or
  - (d) that the proposed modification or extinguishment will not substantially injure any person entitled.
- (4) An application under this section must be served on
- (a) the territorial authority, unless the court orders otherwise, and
  - (b) such other persons as the court directs.
- (5) The District Land Registrar must enter in the register relating to the burdened land all amendments or entries necessary to give effect to an order made under this section in respect of an easement or covenant registered under the *Land Transfer Act 1952*, or a covenant notified under section 229 of this Act; and when so entered the amendments and entries are binding on every person entitled, or subsequently becoming entitled, whether or not that person
- (a) was of full age and capacity at the time of the making of the order, or
  - (b) was a party to the proceeding.
- (6) A memorandum of an order made under this section in respect of any easement or covenant other than those referred to in subsection (5) must be endorsed on such of the instruments of title relating to the burdened or the benefited land as the court directs.

Definitions: **court, covenant, instrument, land, person bound, person entitled, positive covenant, registered, restrictive covenant, territorial authority**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 126G204

See also: s 262(1)(b)

PART 11  
SPECIAL POWERS OF THE COURT RELATING TO LAND

*Subpart 1—Entry on neighbouring land*

**236 Court may authorise entry for purpose of erecting or repairing buildings etc**

- (1) The owner or occupier of any land may apply to a court for an order authorising entry on or over any neighbouring land for the purpose of erecting, repairing, adding to, painting or demolishing the whole or any part of any structure on the applicant's land, or doing any other necessary or desirable thing in relation to that land.
- (2) The applicant must give not less than 5 working days' notice in writing of the intention to apply for an order under this section to the owner or occupier of the neighbouring land in respect of which the order is sought.
- (3) On an application under subsection (1), the court may make an order authorising the applicant to do all or any of the following things:
  - (a) to enter on or over the neighbouring land, either personally, or through the applicant's employees, agents or contractors, for any purpose referred to in subsection (1) specified in the order;
  - (b) to use for that purpose, on or over the neighbouring land, such vehicles, aircraft or other means of transport, and such plant, machinery, cranes or other equipment as are specified in the order;
  - (c) to store on the neighbouring land such materials required for the purposes of the work, and in such quantities, as are specified in the order.
- (4) An order under subsection (3) may be made on such conditions (if any) as the court thinks it concerning
  - (a) the period of time during which the entry on or over the neighbouring land is authorised;
  - (b) the hours of the day or night during which the work may be done;
  - (c) the preservation of the safety of persons or property on the neighbouring land;
  - (d) the maintenance of adequate access to the neighbouring land;
  - (e) the restoration of the neighbouring land to its former condition;
  - (f) the provision of security or indemnity to secure the performance of any condition of the order, the making good of any damage caused by the entry on or over the neighbouring land or the reimbursement of the owner or occupier of the neighbouring

land for any costs, expenses or loss arising from the entry;  
 (g) any other relevant matter.

- (5) In this section **neighbouring land** means any land in respect of which an order is sought under this section, whether or not it adjoins the land owned or occupied by the applicant.

Definitions: **court, land, occupier, owner, property, working day**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 128

See also: s 262(1)(c)

#### *Subpart 2—Wrongly placed structures*

### **237 Definitions for the purposes of subpart 2**

In this subpart,

**land affected** means any piece of land on which, or in the airspace over which, a structure is in fact situated;

**land intended** means any piece of land on which, or in the airspace over which, a structure was intended to be, or has appeared to be, situated, but is not in fact situated;

**site** means land or airspace actually occupied by a wrongly placed structure, together with any land reasonably required as curtilage and for access to the structure;

**structure** includes a partially built structure and any part of a structure;

**wrongly placed structure** means a structure that

- (a) is situated on or over the land affected, not being the land intended as the site of the structure (whether or not the land intended adjoins the land affected), or
- (b) is situated on or over the land affected but was not placed there
  - (i) by, on behalf of, or in the interest of a person who was, at the time, the owner of the land affected, or
  - (ii) under a contract made with, or by way of a gift made to, a person who was, at the time, the owner of the land affected.

Definitions: **land, owner**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 129 and 129A

See also: s 262(1)(d)

### **238 Court may grant relief where structure is on wrong land or**



**there is an encroachment**

- (1) A court may grant relief in respect of a wrongly placed structure
  - (a) to a person who applies, under section 239, for relief under this section, or
  - (b) to any other party to the proceeding,
 if, in the opinion of the court, it is just and equitable in the circumstances that relief should be granted, subject, however, to subsection (2) and section 240.
- (2) A court cannot grant relief under subsection (1) in any case where the only wrongly placed structure in respect of which relief is sought is a fence and all questions or disputes concerning it can be resolved by an exercise of the jurisdiction conferred by section 24 of the *Fencing Act 1978*.
- (3) The grant of relief under this section does not deprive any person of any claim for damages which that person would otherwise have against any other person for any deliberate or negligent act or omission in relation to the placing of a wrongly placed structure, or the fixing or ascertaining of any boundary, but in making any award of damages the court must take into account any relief granted under this section.

Definitions: **court**, s 3; **wrongly placed structure**, s 237; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 129 and 129A

See also: s 262(1)(d)

**239 Application for relief under section 238**

- (1) An application for relief under section 238 may be made by
  - (a) the owner, occupier or mortgagee of, or the holder of any other encumbrance over, the land affected by a wrongly placed structure or the land intended as the site of a wrongly placed structure, or
  - (b) any person by whom, or on whose behalf, or in whose interest a wrongly placed structure was placed on or over the land affected, or
  - (c) any person who has an interest in the wrongly placed structure, or
  - (d) the territorial authority.
- (2) An application for relief under section 238 may be made, whether the wrongly placed structure was placed on or over the land affected
  - (a) before or after the fixing of any boundary of the land affected by the structure or the land intended as the site of the structure, or
  - (b) before or after this Act comes into force.
- (3) Unless the court directs otherwise, the application must be served on

every other person who would have been entitled to make an application under this section.

Definitions: **court**, **encumbrance**, **mortgagee**, **occupier**, **owner**, **territorial authority**, s 3; **land affected**, **land intended**, **site**, **wrongly placed structure**, s 237; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 129 and 129A

#### 240 Relevant considerations

Without limiting the generality of the court's discretion under section 238, the court, in exercising its power under that section, may have regard, in particular, to

- (a) the reasons why the wrongly placed structure was placed on or over the land affected, and
- (b) the conduct of the parties, and
- (c) the extent to which any person has been unjustifiably enriched at the expense of the person seeking relief, by reason of the fact that the owner of the land affected has become the owner of the wrongly placed structure;

but it is not a bar to relief under that section that the person seeking relief knew of the true boundaries or ownership of the land affected at the time that the structure was placed there, or at the time when that person became the owner of, or acquired an estate or interest in, the land affected or the structure.

Definitions: **court**, **owner**, s 3; **land affected**, **wrongly placed structure**, s 237; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 129 and 129A

#### 241 Orders which may be made

- (1) In granting relief under section 238, the court may make any one or more of the following orders:
  - (a) an order that any site specified in the order be vested in the owner of the land affected by, or the land intended as the site of, the wrongly placed structure, or in any other person with an estate or interest in either of those pieces of land;
  - (b) an order granting an easement over any site specified in the order for the benefit of the land affected by, or the land intended as the site of, the wrongly placed structure;
  - (c) an order giving the owner of the land affected by, or the land intended as the site of, the wrongly placed structure, or any other person with an estate or interest in either of those pieces of land, the right to possession of any site specified in the order for such

- period and on such conditions as the court may specify;
- (d) an order giving the owner of the land affected by the wrongly placed structure, or any other person having an estate or interest in that piece of land, the right to possession of the whole or such part of the structure as is specified in the order;
  - (e) an order allowing or directing any person or persons specified in the order to remove the whole or any specified part of a wrongly placed structure and any specified fixtures or chattels from any site specified in the order;
  - (f) an order that any person to whom relief is granted by any other order made under this subsection must pay to any person specified in the order reasonable compensation as determined by the court.
- (2) In an order made under subsection (1)(a), the court may declare any land to be vested in any person to be so vested free from any mortgage or other encumbrance over that land, or may vary, to the extent that the court considers necessary, any mortgage, lease or contract relating to that land.
  - (3) An order made under subsection (1) may be made on such conditions (if any) as the court thinks fit concerning the execution of any instrument or the doing of any other thing necessary to give effect to the order.
  - (4) An order made under subsection (1) may be registered as an instrument under the *Land Transfer Act 1952* or the *Deeds Registration Act 1908* or Part I of the *Crown Minerals Act 1991*, as the case requires.

Definitions: **court, encumbrance, instrument, land, lease, mortgage, owner, registered**, s 3; **land affected, land intended, site, wrongly placed structure**, s 237; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 129 and 129A

See also: s 262(1)(d)

### *Subpart 3—Landlocked land*

#### **242 Definitions for the purposes of subpart 3**

In this subpart,

**landlocked land** means a piece of land to which there is no reasonable access;

**reasonable access** means physical access of a nature and quality that is reasonably necessary to enable the owner or occupier of landlocked land to use and enjoy the land for any purpose for which it may be used in accordance with any right, permission, authority, approval or

dispensation enjoyed or granted under the *Resource Management Act 1991*.

Definitions: **land, occupier, owner**, s 3

Origin: 1952/51 s 129B

### 243 Court may grant reasonable access to landlocked land

- (1) Where a person applies under section 244 for reasonable access to landlocked land, and the court is of the opinion that such access should be granted, it may for that purpose make, in respect of any other piece of land (whether or not adjoining the landlocked land), an order
  - (a) that that piece of land be vested in the owner of the landlocked land, or
  - (b) that an easement burdening that piece of land be granted for the benefit of the landlocked land.
- (2) This section does not authorise the court to grant reasonable access to landlocked land over
  - (a) land that is part of a National Park within the meaning of the *National Parks Act 1980*, or
  - (b) land that is a public reserve or part of a public reserve within the meaning of the *Reserves Act 1977*, or
  - (c) a railway line within the meaning of the *New Zealand Railways Corporation Act 1981*.
- (3) The court may decline to make an order under this section if it is of the opinion that the applicant is entitled, and should be required, to seek relief under sections 315 or 316 of *Te Ture Whenua Maori Act 1993*, or any of the provisions of the *Local Government Act 1974* or any other enactment.

Definitions: **court, land, owner**, s 3; **landlocked land, reasonable access**, s 242; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129B

### 244 Application for an order under section 243

- (1) The owner or occupier of landlocked land may apply to a court for an order under section 243 granting reasonable access to that land.
- (2) Unless the court orders otherwise, an application made under subsection (1) must be served on
  - (a) the owner of each piece of land adjoining the landlocked land, and
  - (b) every person

- (i) having an estate or interest in the landlocked land or in any other piece of land (whether or not adjoining the landlocked land) that may be affected by the granting of the application, or
- (ii) claiming to be a party to or entitled to a benefit under any instrument relating to any such land, and
- (c) the territorial authority.

Definitions: **court, instrument, land, occupier, owner, territorial authority**, s 3; **landlocked land, reasonable access**, s 242; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129B

### 245 Relevant considerations

In considering an application for an order under section 243, the court must have regard to:

- (a) the nature and quality of the access (if any) to the landlocked land at the time when the applicant purchased or otherwise acquired the land;
- (b) the circumstances in which the land became landlocked;
- (c) the conduct of the parties, including any attempts they have made to negotiate reasonable access to the landlocked land;
- (d) the hardship that would be caused to the applicant by the refusal of an order, in comparison with the hardship that would be caused to any other person by the making of an order;
- (e) any other relevant matter.

Definitions: **court, land**, s 3; **landlocked land, reasonable access**, s 242

Origin: 1952/51 s 129B

### 246 Effect of an order under section 243

- (1) An order may be made under section 243 on such conditions (if any) as the court thinks fit concerning
  - (a) the payment of reasonable compensation by the applicant to any other person;
  - (b) the exchange of any pieces of land by the applicant and any other person;
  - (c) the fencing of any land and the upkeep and maintenance of any fence;
  - (d) the upkeep and maintenance of any land over which an easement is to be granted;
  - (e) the carrying out of a survey of any land;
  - (f) the time within which any work necessary to give effect to the order is to be carried out;
  - (g) the execution of any instrument or the doing of any other thing

- necessary to give effect to the order;
- (h) any other matter that the court considers relevant, including any question arising under subsection (2).
- (2) The reasonable cost of any work necessary to give effect to an order made under this section must be borne by the applicant, unless the court is satisfied, having regard to the matters specified in subsection (1)(b) and (c), that it is just and equitable to require any other person to pay the whole or any specified share of the cost of the work, and so directs as a condition of the order.
- (3) In an order made under this section, the court may
- (a) declare any land to be vested in any person to be so vested free of any mortgage or other encumbrance over that land, or vary, to the extent that the court considers necessary, any mortgage, lease or contract relating to that land;
- (b) declare that any land so vested is to become subject to the terms, conditions, liabilities and encumbrances on and subject to which the owner of the landlocked land holds that land, and accordingly that every instrument affecting the owner's rights and obligations in respect of the landlocked land is to apply to the vested land as if that land had been expressly referred to in that instrument.
- (4) Part X of the *Resource Management Act 1991* does not apply to a transfer, exchange or other disposition of land giving effect to an order of the court made under this section.
- (5) An order made under this section may be registered as an instrument under the *Land Transfer Act 1952* or the *Deeds Registration Act 1908* or Part I of the *Crown Minerals Act 1991*, as the case requires.

Definitions: **court, encumbrance, disposition, instrument, land, lease, mortgage, owner, registered**, s 3; **landlocked land**, s 242; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129B

*Subpart 4—Trees and unauthorised improvements on neighbouring land*

**247 Application of subpart 4 and definition**

- (1) This subpart applies to
- (a) any structure erected on any land
- (i) unless the structure was erected in accordance with a building permit or building consent issued by the territorial authority, or,
- (ii) if the structure was erected by the Crown, unless a building permit or building consent from the territorial authority was not necessary, but would have been necessary if the structure

had been erected by a person other than the Crown, and  
(b) any tree growing or standing on any land.

- (2) In this subpart, **tree** includes any shrub or plant.

Definitions: **territorial authority**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129C

#### **248 Court may order removal or trimming of trees or removal or alteration of structures**

- (1) On an application under section 249 for an order in respect of any structure or tree to which this subpart applies, a court may order the owner or the occupier of the land on which the structure is erected or the tree is growing or standing to remove, repair or alter the structure or to remove or trim the tree.
- (2) An order may be made under this section whether or not the risk, obstruction or interference being caused by the structure or tree constitutes a legal nuisance, and whether or not it could be the subject of a proceeding otherwise than under this section.
- (3) If the applicant's land may be used for residential purposes under rules in the relevant proposed or operative district plan, and the application is made in relation to its use or enjoyment for that purpose, but no building intended for residential purposes has been erected on the land, the court may not make an order under this section unless satisfied that such a building will be erected on the land within a reasonable time; and where, in any such case, the court makes an order under this section, then, unless the court otherwise determines,
- (a) the order does not take effect unless and until such a building is erected, and,
- (b) if no such building is erected within a reasonable time, the order may be vacated on the application of any interested person.

Definitions: **court**, **land**, **occupier**, **owner**, s 3; **tree**, s 247; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129C

See also: s 262(1)(e)

#### **249 Application for an order under section 248**

- (1) The owner or occupier of any land, other than the land in respect of which an order under section 248 is sought, may apply for an order under that section.
- (2) If an order is sought against the occupier of land, the owner of the

land must be joined as defendant.

Definitions: **land, occupier, owner**, s 3

Origin: 1952/51 s 129C

### **250 Relevant considerations**

- (1) On an application for an order under section 248, the court may make such order as it thinks fit, if satisfied, having regard to all the relevant circumstances, including Maori cultural values, and, where required, to the matters specified in subsection (2) and section 251, that the order
  - (a) is fair and reasonable, and
  - (b) is necessary to remove or prevent, or prevent the recurrence of,
    - (i) an actual or potential risk to the applicant's life or health or property, or the life or health or property of any other person lawfully on the applicant's land, or
    - (ii) an undue obstruction of a view which would otherwise be enjoyed from the applicant's land, if that land may be used for residential purposes under rules in the relevant proposed or operative district plan, or from any building erected on that land and used for residential purposes, or
    - (iii) an undue interference with the use of the applicant's land for the purpose of growing any trees or crops, or
    - (iv) an undue interference with the use or enjoyment of the applicant's land by reason of the fall of leaves, flowers, fruit or branches, or shade, or interference with access to light, or
    - (v) an undue interference with any drain or gutter on the applicant's land, by reason of its obstruction by fallen leaves, flowers, fruit or branches, or by the root-system of a tree, or
    - (vi) any other undue interference with the reasonable use or enjoyment of the applicant's land for any purpose for which it may be used under rules in the relevant proposed or operative district plan, and
  - (c) that the hardship that would be caused to the applicant or to any other person lawfully on the applicant's land by a refusal to make the order is greater than the hardship that would be caused to the defendant or any other person by the making of the order.
- (2) In determining whether or not to make an order under this section, the court must, where applicable, take into account the fact that the risk, obstruction or interference complained of was already in existence when the applicant became the owner or occupier of the land, but an order may be made under this section notwithstanding that



fact, if, in all the circumstances, the court thinks fit.

Definitions: **court**, **land**, **occupier**, **owner**, **property**, s 3; **tree**, s 247; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129C

### 251 Further considerations relating to trees

- (1) If the applicant seeks an order for the removal or trimming of a tree, the court must have regard to the following matters:
  - (a) the interests of the public in the maintenance of an aesthetically pleasing environment;
  - (b) the desirability of protecting public reserves containing trees;
  - (c) the value of the tree as a public amenity;
  - (d) the historical, cultural, or scientific significance (if any) of the tree;
  - (e) the likely effect (if any) of the removal or trimming of the tree on ground stability, the water table or run-off.
- (2) Except for a purpose referred to in section 250(1)(b)(i), the court may not make an order under section 248 relating to any tree which is the subject of a requirement lawfully made by a heritage protection authority under the provisions of Part VIII of the *Resource Management Act 1991*.

Definitions: **court**, s 3; **tree**, s 242

Origin: 1952/51 s 129C

### 252 Effect of an order under section 248

- (1) An order may be made under section 248 on such conditions (if any) as the court thinks fit, including a condition
  - (a) that the defendant must make good, or pay compensation to the applicant for, any damage caused to the land of the applicant, or any property on that land, in the course of removing or trimming any tree ordered to be removed or trimmed, or the doing of any other work required to be done to eliminate or reduce the risk, obstruction or interference complained of;
  - (b) that the applicant or the defendant or both of them must give security in respect of any expenses or damage.
- (2) Subject to section 253(4), the reasonable cost of any work necessary to give effect to an order made under section 248 must be borne by the applicant, unless the court is satisfied, having regard to the conduct of the defendant, that it is just and equitable to require the defendant to pay the whole or any specified share of the cost of the work, and so

directs as a condition of the order.

Definitions: **court, land, property**, s 3; **tree**, s 242; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129C

### 253 Completion of work required by an order under section 248

- (1) Subject to subsection (2), the work necessary to carry out an order made under section 248 must be completed not later than 20 working days after the making of the order, unless, in the order, the court specifies a longer time, or subsequently allows a longer time, for the completion of the work.
- (2) An order made under section 248 may specify that a tree must be kept trimmed, or a structure to which this section applies must be kept in good repair, or that any other work required to be done to eliminate or reduce the risk, obstruction or interference complained of must be done as often as is necessary, or at such intervals as may be specified in the order.
- (3) If an order made under this section is not duly complied with within the time specified in this section or in the order, or subsequently allowed by the court, the applicant, with the agreement of the defendant or with the leave of the court, may, in person, or through the applicant's employees, agents or contractors, enter on the defendant's land and carry out any work necessary to give effect to the order.
- (4) If any work is done by or through the applicant under subsection (3), then, unless the parties otherwise agree or the court otherwise orders, the applicant is entitled to recover from the defendant the whole of the reasonable cost of the work necessary to give effect to the order.
- (5) In granting leave to an applicant under subsection (3), the court may impose such conditions (if any) as it thinks fit, as to security or indemnity against any expenses or damage, the avoidance or making good of any injury or damage, the disposal of all or part of any tree or structure, or any other relevant matter.

Definitions: **court, land, working day**, s 3; **tree**, s 242; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 129C

See also: s 262(1)(e)

## PART 12

## DIVISION OF PROPERTY AND APPORTIONMENT

**254 Court may order division of property**

- (1) Where property is owned by co-owners, a court, on an application made under section 255 and after taking into account the matters specified in section 256, may make an order
  - (a) for the sale of the property and the division of the proceeds among the co-owners, or
  - (b) for the division of the property in kind among the co-owners, or
  - (c) requiring one or more co-owners to purchase the share in the property of one or more other co-owners at a fair and reasonable price.
- (2) Unless the court orders otherwise, every co-owner of the property (whether or not a party to the proceeding) is bound by any order made under this section.
- (3) An order may be made under this section, notwithstanding anything to the contrary in the *Land Transfer Act 1952*.
- (4) An order made under subsection (1)(b) may be registered as an instrument under the *Land Transfer Act 1952* or the *Deeds Registration Act 1908* or Part I of the *Crown Minerals Act 1991*, as the case requires.

Definitions: **co-owner, court, instrument, property, registered**, s 3

Origin: *Partition Act 1539*; *Partition Act 1540*; 1952/51 ss 140-143

**255 Application for an order under section 254**

- (1) An application for an order under section 254 may be made by
  - (a) a co-owner of any property, or
  - (b) a mortgagee of any property of a co-owner or co-owners if, under the mortgage and the provisions of subpart 4 of part 8, the mortgagee has become entitled to exercise a power of sale, or
  - (c) a person with a charging order over any property of a co-owner or co-owners.
- (2) Unless the court orders otherwise, every co-owner of the property and every person
  - (a) having an estate or interest in the property that may be affected by the granting of the application, or
  - (b) claiming to be a party to, or entitled to a benefit under, any instrument relating to any such property, must be served with the application if not already a party.
- (3) Before determining whether or not to make an order under section

254, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.

Definitions: **co-owner, court, instrument, mortgage, mortgagee, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Partition Act 1539; Partition Act 1540; 1952/51* ss 140-143

### 256 Relevant considerations

In considering whether to make an order under section 254, the court must have regard to

- (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application was made;
- (b) the nature and location of the property;
- (c) the number of other co-owners and the extent of their shares;
- (d) any legal requirements or restrictions relating to the division of the property in kind;
- (e) the hardship that would be caused to the applicant by the refusal of an order, in comparison with the hardship that would be caused to any other person by the making of an order;
- (f) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property;
- (g) any other matter that the court considers relevant.

Definitions: **co-owner, court, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Partition Act 1539; Partition Act 1540; 1952/51* ss 140-143

### 257 Further powers of the court

If the court makes an order under section 254, it may, in addition, make an order for all or any of the following:

- (a) the payment of compensation by one or more co-owners of the property to one or more other co-owners;
- (b) fixing a reserve price on any sale of the property;
- (c) directing how the expenses of any sale or division of the property are to be borne;
- (d) directing how the proceeds of any sale of the property, and any interest on the purchase moneys, are to be divided or applied;
- (e) allowing any co-owner, upon any sale of the property, to make an offer for it, upon such terms as the court considers reasonable concerning the non-payment of a deposit, or the setting-off or accounting for all or part of the purchase price instead of paying it in cash;
- (f) for the payment by any person of a fair occupation rent for all or

- any part of the property;
- (g) for any other matter which the court considers necessary or desirable as a consequence of making an order under section 254.

Definitions: **co-owner, court, instrument, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: *Partition Act 1539; Partition Act 1540; 1952/51* ss 140–143

### 258 Apportionments in respect of time

- (1) Every periodical payment in respect of a fixed or ascertainable period (whether or not reserved or made payable under an instrument) is to be considered as accruing from day to day, and, unless a contrary intention is expressed, is apportionable in respect of time accordingly, as to both the liability to make the payment and the right to receive it.
- (2) An apportioned part of a periodical payment is payable and recoverable,
  - (a) in the case of a continuing right to a payment, only when the entire payment becomes payable and recoverable, and,
  - (b) in the case of a payment the continuing right to which has ceased by reason of death, re-entry or any other cause, only when the entire payment would have become payable and recoverable if the continuing right to the payment had not ceased.
- (3) Rent from property which is payable in advance, in respect of any period, is apportionable as between the parties to a transfer or assignment of the property or of the right to occupy or use the property.
- (4) Except as provided in subsection (5), a person entitled to an apportioned part of a periodical payment has, when the entire payment becomes payable and recoverable, the same remedies for recovering the apportioned part as would have been available in respect of the entire payment (but must bear a proportionate part of any allowance which should properly be made in respect of the entire payment).
- (5) A proceeding for the recovery of rent reserved out of, or charged upon, land may be brought only by the person who, if the rent had not been apportioned, would have been entitled to the entire rent, but that person is liable for the apportioned part to the person entitled to it under the apportionment.
- (6) In this section, **rent** includes a rentcharge, and any payment in the nature of rent under any lease or any licence to occupy or use any property.

Definitions: **instrument, land, lease, periodical payment, property, rentcharge**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 144–148

PART 13  
SERVICE OF NOTICES

**259 Service of notices**

- (1) Notwithstanding anything to the contrary in any other enactment or any stipulation to the contrary in any other instrument, a notice, cross-notice or other document required or authorised to be given to, or served on, any person by sections 51, 104, 105, 106, 110, 111, 204, 205 or 213 is adequately given or served when, and only when, it is given to, or served on,
- (a) an individual person in a manner provided for in section 260;
  - (b) a company under the *Companies Act 1955* in a manner provided for in section 460(1) (excluding paragraph (e)) or section 460A of that Act;
  - (c) a company under the *Companies Act 1993* in a manner provided for in section 387(1) (excluding paragraph (e)) or section 388 of that Act;
  - (d) an overseas company in a manner provided for in section 389(1) (excluding paragraph (e)) or section 390 of the *Companies Act 1993*;
  - (e) any other body corporate in a manner in which it could be given or served if the body corporate were a company;
  - (f) the Crown, by delivery to, or receipt by, the Chief Executive of the relevant government department or office, or an agent of the Chief Executive, at the head office of the department or office, in a manner provided for in section 260,
- subject, however, to subsection (3).
- (2) A notice or other document which is required or authorised to be given to or served on any person by any other provision of this Act is adequately given or served when it is given to, or served on, that person in accordance with subsection (1), unless it has been agreed that the notice must be given or the document must be served in some other manner.
- (3) Notwithstanding anything to the contrary in any other enactment or any stipulation to the contrary in any other instrument or any agreement, the following provisions have effect, in relation to the service of a notice, cross-notice or other document which is required or authorised to be given to, or served on, any person by a provision of this Act:
- (a) if the person is out of New Zealand, it may be given to, or served on, an agent in New Zealand of that person;
  - (b) if the person has died, it must be given to, or served on, the administrator;

- (c) if the person is bankrupt, it must be given to, or served on, the Official Assignee;
  - (d) if a property order under the *Protection of Personal and Property Rights Act 1988* has been made in respect of the person, it must be given to, or served on, a person appointed to act as manager of the property;
  - (e) if the person is a company in liquidation, or is an overseas company whose assets in New Zealand are being liquidated under section 342 of the *Companies Act 1993*, it must be given to, or served on, the liquidator;
  - (f) if the person is a company which has been removed from the New Zealand register or an overseas company which has been removed from the overseas register or is a body corporate which has otherwise ceased to exist, it must be given to, or served on, the Secretary to the Treasury or an agent of the Secretary to the Treasury;
  - (g) if the property in respect of which a notice, cross-notice or other document which is required or authorised to be given or served belongs to the Crown as *bona vacantia*, it must be given to, or served on, the Secretary to the Treasury or an agent of the Secretary to the Treasury;
- and the notice, cross-notice or other document is adequately given or served when, and only when, it is given to, or served on, a person referred to in this subsection in accordance with the relevant paragraph of subsection (1).
- (4) In any case referred to in subsections (1), (2) or (3), and notwithstanding the provisions of those subsections or any other provision of this Act or anything to the contrary in any other enactment, or in any other instrument,
    - (a) a court may make an order
      - (i) dispensing with service, or
      - (ii) directing that a notice, cross-notice or other document is to be given or served in a manner other than that provided for in any relevant provision or instrument, and,
    - (b) if the court makes an order under paragraph (a)(ii), the notice, cross-notice or other document is adequately given or served if it is given or served in accordance with the order.
  - (5) In this section, **agent**, in relation to a person who is overseas or to the Secretary to the Treasury or to any other Chief Executive of any government department or office, means a person who has actual or ostensible authority to receive, on behalf of that person or of the Secretary to the Treasury or other Chief Executive, a notice, cross-

notice or other document required or authorised to be given or served by a provision of this Act.

- (6) This section does not apply to the service of a document in a legal proceeding, whether the proceeding is brought under this Act or otherwise.

Definitions: **administrator, bankrupt, company, company under the Companies Act 1955, company under the Companies Act 1993, court, instrument, Official Assignee, overseas company, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 152

See also: s 262(1)(f)

### 260 Manner of giving or serving notices

- (1) A notice, cross-notice or other document is given to or served on an individual person (including an individual person referred to in section 259(3)) when
- (a) it is delivered, in New Zealand or elsewhere, by acknowledged delivery in accordance with subsection (2), or
  - (b) it is received by that person, whether in New Zealand or elsewhere.
- (2) A notice, cross-notice or other document is delivered by acknowledged delivery if and when
- (a) it is contained in an envelope or package directed by name to the person to whom it is to be delivered, at that person's address, and
  - (b) the delivery of the envelope or package is made by a person or an employee of a person who
    - (i) carries on the business of delivering letters and packages, and
    - (ii) does so independently of the person required or authorised to give or serve the notice, cross-notice or other document, and
  - (c) the person making the delivery of the envelope or package
    - (i) delivers it to the person to whom it is to be delivered or to that person's agent, and
    - (ii) obtains from the person to whom it is to be delivered or that person's agent a written acknowledgment of its delivery and of the date on which it is so delivered.
- (3) In this section, **agent**, in relation to a person to whom an envelope or package is to be delivered, means a person who has actual or ostensible authority to take delivery, on behalf of that person, of an envelope or package directed to that person by name and purporting to contain a document.
- (4) A notice, cross-notice or other document is received by a person when
- (a) it is handed to, and accepted by, that person, or,



- (b) if that person does not accept it when it is handed to him or her, it is put down in that person's presence and brought to his or her attention, or
- (c) it is otherwise received by that person, however receipt occurs.

Definitions: **address**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 152

### **261 Time of service when more than one person required to be served**

If, under a provision of this Act,

- (a) time runs from the date of the giving or service of a notice, cross-notice or other document, and
- (b) the notice, cross-notice or other document is required or authorised to be given to, or served on, more than one person, or on a class or classes of persons,

then time runs from the date on which the notice, cross-notice or other document is given to, or served on, the last of the persons concerned, or the last member of the relevant class or classes, as the case requires.

Definitions: **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 152

## PART 14 GENERAL

### **262 Jurisdiction of a District Court**

- (1) Notwithstanding anything to the contrary in the *District Courts Act 1947*, a District Court has jurisdiction to hear and determine the following matters or to make the following orders:
  - (a) a question or dispute concerning the existence or effect of an easement or a covenant, so far as it can be resolved by the making of an order under section 234;
  - (b) an order under section 235 modifying or extinguishing an easement or covenant;
  - (c) an order under section 236 authorising entry on or over neighbouring land;
  - (d) an order under section 238 granting relief in respect of a wrongly placed structure, where the value of any piece of land on which the wrongly placed structure is in fact situated (excluding the value of the wrongly placed structure) does not exceed the

- amount to which the jurisdiction of the District Court is limited by section 31 of the *District Courts Act 1947*;
- (e) an order under section 248 for the removal or trimming of a tree or the removal or alteration of a structure;
  - (f) an order under section 259(4) dispensing with service or directing the manner of service.
- (2) The *District Courts Act 1947* applies to the jurisdiction of a District Court under this section as if that jurisdiction had been conferred by that Act.
  - (3) This section does not affect any jurisdiction which a District Court has otherwise than under this section to exercise any power conferred on a court by this Act.

Definitions: **court, covenant, land**, s 3; **District Court, person**, *Acts Interpretation Act 1924* s 4

### 263 Regulations

The Governor-General may, by Order in Council, make regulations

- (a) prescribing the forms of notice required by sections 105 and 110;
- (b) prescribing the information to be included in the reports required by sections 134 and 135;
- (c) prescribing conditions of sale to apply in respect of sales under section 159, and providing for the variation of any such conditions by the Registrar, whether on the application of the mortgagee or of the Registrar's own motion;
- (d) prescribing the application fee payable under section 164(a) and the minimum and maximum fees payable under section 164(c);
- (e) providing for such other matters as are contemplated by or necessary for giving effect to the provisions of this Act and for its due administration.

Definitions: **mortgagee, Registrar**, s 3; **Governor-General, Order in Council, regulations**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 104AA

### 264 Repeals and savings

- (1) The Imperial enactments specified in schedule 7 cease to be part of the law of New Zealand.
- (2) The enactments specified in schedule 8 are repealed.
- (3) Except as otherwise expressly provided, all matters and proceedings commenced under any enactment referred to in subsection (1) or (2) and pending or in progress immediately before this Act came into

force may be continued, completed and enforced under this Act; and, for that purpose, any period of time within which a thing is required to be done which, immediately before — 199- [date on which this Act came into force], was running for the purposes of that enactment continues to run for the purposes of this Act as though that thing were required to be done under this Act, but not so as to extend or reduce any period of time that began to run before this Act came into force.

- (4) Except as otherwise expressly provided, no alteration in the law made by this Act affects
- (a) any right accrued or obligation incurred, under the law so altered, before this Act came into force, or
  - (b) the validity or invalidity, or the operation, effect or consequence, of any instrument to which this Act applies that came into operation before — 199- [date on which this Act came into force], or of anything done or suffered before that date.
- (5) To the extent necessary for the purpose of giving effect to subsection (4), all instruments to which this Act applies, that came into operation before — 199- [date on which this Act came into force], must be read and construed as if the law existing immediately before that date remained in full force and effect and must be given only the effect and consequences which they would have had under that law.

Definitions: **instrument**, s 3

Origin: 1952/51 s 155

### 265 Consequential amendments

The enactments specified in schedule 9 are amended in the manner specified in that schedule.

SCHEDULE 1  
PROVISIONS APPLYING TO LAND NOT UNDER  
THE *LAND TRANSFER ACT 1952*

See section 8

**1 Partitions, exchanges etc required to be made by deed**

No partition, exchange, lease (other than a short term lease), assignment or surrender (otherwise than by operation of law) of land to which this schedule applies is valid unless it is made by deed.

Definitions: **deed, land, lease, short term lease**, s 3

Origin: 1952/51 s 10

**2 Fee to pass without words of limitation**

Where land to which this schedule applies is conveyed to a person without words of limitation, the conveyance passes the fee simple or other whole estate that the party conveying had power to dispose of.

Definitions: **conveyance, land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 43

**3 Form of conveyance in fee simple**

A deed according to the following form is effectual to pass the title to, and possession of, any land to which this schedule applies:

This deed, made the                      day of [month], [year], between [name of conveying party or parties] of [place of residence], [occupation], of the one part and [name of assignee or assignees] of [place of residence], [occupation], of the other part

[Recitals, if any]: [Now this deed]

witnesses that, in consideration of the sum of [amount] paid by the said [name of assignee or assignees] to the said [name of conveying party or parties] (the receipt whereof is hereby acknowledged), the said [name of conveying party or parties] hereby conveys to the said [name of assignee or assignees] all that piece of land [referring to the marks and numbers in the Surveyor-General's map or other official record map, and describing particularly the situation, boundaries and measurements, and specifying any variation in any of the above particulars since the date of the last conveyance]: as the same is delineated on the plan drawn hereon, it being thereon coloured [referring to plan coloured as the circumstances may require].

[Special provisions, if any.]

Signed at \_\_\_\_\_, this \_\_\_\_\_ day of [month], [year]

.....  
[signature or signatures]

.....  
[name of conveying party  
or parties]

Signed by the said [name of conveying party or parties] in the presence  
of:

.....  
[signature of witness]

.....  
[place of residence]

.....  
[occupation]

.....  
Definitions: **convey, deed, land, signed**, s 3

Origin: 1952/51 s 44, Second Schedule

#### 4 What a conveyance of land includes

- (1) A conveyance of land to which this schedule applies is to be taken to include, and to convey with the land, all rights, easements and appurtenances belonging to the land or usually held or enjoyed with the land.
- (2) This clause has effect only in so far as a contrary intention is not expressed in the conveyance and subject to its terms.
- (3) This clause does not
  - (a) give a person a better title to any property, right or thing referred to in subsection (1) than the title which the conveyance gives that person to the land expressed to be conveyed, or
  - (b) convey to that person any such property, right or thing further or otherwise than it could have been conveyed to that person by the conveying party or parties.

.....  
Definitions: **convey, conveyance, land, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 47

#### 5 Application of stated conditions of sale

In the completion of a contract for the sale of land to which this schedule applies, but subject to any stipulation in the contract to the contrary,

- (a) 30 years is substituted for 60 years as the period of commencement of title which a purchaser may require; but earlier title than 30

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years may be required in cases similar to those in which, immediately before 1 January 1953 (being the date on which the *Property Law Act 1952* came into force), earlier title than 60 years might have been required;

- (b) the obligations and rights of vendor and purchaser are regulated by the following rules:
- (i) recitals, statements and descriptions of facts, matters and parties contained in instruments or statutory declarations 20 years old at the date of the contract, except so far as they are proved to be inaccurate, are to be taken to be sufficient evidence of the truth of those facts, matters and descriptions;
  - (ii) the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title is not an objection to title if the purchaser, on the completion of the contract, has an equitable right to the production of the documents;
  - (iii) such covenant for production as the purchaser can and does require must be furnished at the purchaser's expense, and the vendor must bear the expense of perusal and execution on behalf of himself or herself and any necessary parties other than the purchaser;
  - (iv) where the vendor retains any part of an estate to which any documents of title relate, he or she is entitled to retain those documents of title.

Definitions: **covenant, instrument, land**, s 3

Origin: 1952/51 s 52

## 6 Sale by administrator

On a sale by an administrator of land to which this schedule applies, the vendor's receipt in writing is a sufficient discharge to the purchaser for the purchase money expressed to have been received, and neither the purchaser nor any person claiming through the purchaser need be concerned to see to the application of the purchase money, or to inquire whether the sale was irregular or improper.

Definitions: **administrator, land**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 57

## 7 Restriction on constructive notice

- (1) A purchaser of land to which this schedule applies is not prejudicially affected by notice of any instrument, fact or thing, unless
- (a) it is within that person's knowledge, or would have come to that

- person's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by that person, or
- (b) it has, in the transaction as to which a question of notice arises, come to the knowledge of that person's counsel as such, or that person's solicitor or other agent as such, or would have come to the knowledge of the solicitor or agent as such if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
- (2) This clause does not exempt a purchaser from any liability under, or from any obligation to perform or observe, any covenant, condition, provision or restriction contained in any instrument under which the purchaser's title is derived, mediately or immediately; and that liability or obligation may be enforced in the same manner and to the same extent as if this clause had not been enacted.
- (3) A purchaser is not, by reason of anything in this clause, affected by notice in any case where he or she would not have been so affected if this clause had not been enacted.

Definitions: **covenant, instrument, land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 58

## 8 Covenants for the production of title deeds

- (1) In every conveyance by way of sale, mortgage, marriage settlement or lease, and in every other conveyance for valuable consideration, of land to which this schedule applies, there is implied a covenant for production of title deeds in the terms set out in subclause (2).
- (2) The conveying party covenants with the grantee that, unless prevented by fire or other inevitable accident,
- (a) at the request and cost of the grantee, the conveying party will produce to the grantee, as the grantee may direct, within New Zealand, all registered deeds and instruments or evidences of title in the possession of the conveying party relating to the land conveyed (whether or not they relate also to other land), and
- (b) in the meantime the conveying party will keep those deeds, instruments and evidences of title safe, whole and uncancelled.
- (3) The covenant for production of title deeds runs with the land, so as to bind only the person for the time being entitled to the possession of the deeds, instruments or evidences of title.
- (4) In this clause,  
**conveying party** includes that party's assigns;

**grantee** includes the grantee's assigns.

Definitions: **covenant, conveyance, land, lease, mortgage**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 72

## 9 Form of mortgage

- (1) Mortgages of land to which this schedule applies may be made by an ordinary conveyance by way of mortgage or in the following form:
- (a) Mortgagor: [full name, place of residence and occupation of mortgagor or mortgagors]
  - (b) Estate: ["freehold in fee simple" or "leasehold", as the case requires]
  - (c) Land: [full description, with plan, of the land to be mortgaged]
  - (d) Mortgagee: [full name, place of residence and occupation of mortgagee or mortgagees]
  - (e) Principal sum: [amount]
  - (f) Date of advance: [date]
  - (g) Rate of interest: [rate (if any) agreed upon]
  - (h) How payable: ["yearly", "half-yearly", "quarterly", and date or dates for payment, or otherwise, as the case requires]
  - (i) How and when principal sum to be repaid: [date and mode of payment agreed upon].

And for the better securing to the mortgagee the payment of the said principal sum, interest and other money, I [or we] hereby mortgage to the mortgagee all my [or our] estate and interest in the said land above-described.

Signed at \_\_\_\_\_, this \_\_\_\_\_ day of [month], [year]

.....  
[signature or signatures]

Mortgagor or Mortgagors

Signed by the said [name of mortgagor or mortgagors] as mortgagor[s], in the presence of:

.....  
[signature of witness]

.....  
[place of residence]

.....  
[occupation]



- (2) Every mortgage in the form set out in subclause (1) is to be taken as a conveyance of land by way of mortgage, and may be registered accordingly.

Definitions: **conveyance, land, mortgage, mortgagee, mortgagor, signed**, s 3

Origin: 1952/51 s 76 and Third Schedule

### 10 Recovery of annual sums charged on land

- (1) This clause applies where
- (a) a person is entitled to receive out of any land to which this schedule applies, or out of the income of any such land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, and
  - (b) the instrument under which the annual sum is payable comes into operation on or after 1 January 1906.
- (2) Where this clause applies, then, subject and without prejudice to all estates, interests and rights having priority to that annual sum, the person entitled to receive the annual sum has the remedies for recovering and compelling payment of it described in subclause (3),
- (a) so far as those remedies might have been conferred by the instrument under which the annual sum is payable, but not further, and
  - (b) so far as a contrary intention is not expressed in the instrument and subject to its terms.
- (3) If at any time the annual sum or any part of it is unpaid for 40 days after the time appointed for payment, then, although no legal demand for that payment has been made, the person entitled to receive the annual sum may do either or both of the following:
- (a) may enter into possession of and hold the land charged, or any part of it, and take the income of the land, or any part of it, without impeachment of waste, until the annual sum and all arrears due at the time of entry or afterwards becoming due while that person continues in possession, and all costs arising from the non-payment of the annual sum, are fully paid;
  - (b) may by deed convey the land charged or any part of it to a trustee for a term of years, with or without impeachment of waste, on trust, by all or any of the following means:
    - (i) mortgage, or
    - (ii) sale, or
    - (iii) demise for all or any part of the term, or
    - (iv) receipt of the income of the land or any part of it, or

- (v) any other reasonable means in respect of the land charged or any part of it, to raise and pay the annual sum and all arrears due or becoming due, and all costs arising from the non-payment of the annual sum, or incurred in compelling or obtaining payment of the annual sum, including the costs of the preparation and execution of any instrument and the costs of execution of the trust thereby created. The surplus, if any, of the money raised or the income received under the trust must be paid to the person for the time being entitled to the land comprised in the trust, in reversion immediately expectant on the term of the trust.
- (4) The rule against perpetuities as modified by the *Perpetuities Act 1964* does not apply to any powers or remedies conferred by this section nor to the same or like powers or remedies conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of this clause.

Definitions: **convey, deed, income, instrument, land, mortgage, rentcharge**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 150

SCHEDULE 2  
CERTIFICATE OF NON-REVOCATION OF  
POWER OF ATTORNEY

See section 17

I, [full name] of [place and country of residence], [occupation], certify:

- \*1 That by deed dated [date of instrument creating the power of attorney], [full name of donor of power of attorney] of [place and country of residence of donor\*\*] appointed me his/her/its\* attorney.

(Alternative to be used if attorney is a body corporate)

- \*1 That by deed dated [date of instrument creating the power of attorney] [full name of donor of power of attorney] of [place and country of residence of donor\*\*] appointed as attorney [full name of body corporate holding power of attorney] a body corporate having its registered office [or principal place of business] at [address of registered office or principal place of business] and I am authorised to give this certificate on its behalf. The capacity in which I give this certificate for the attorney is [director, officer or other capacity].

sch 2

## PROPERTY LAW ACT

2 That I have not received notice of any event revoking the power of attorney [\*\*\*and to the best of my knowledge and belief no such notice has been received by the [full name of body corporate holding power of attorney] or by any servant or agent of that body corporate].

Signed at ..... this ..... day of ..... [year].

\* Delete as appropriate

\*\* If donor is a body corporate, state place of registered office or principal place of business of donor and, if that is not in New Zealand, state the country in which the principal place of business is situated.

\*\*\* Include if donor is a body corporate.

Definitions: **deed, director, instrument**, s 3

Origin: 1952/51 Eighth Schedule

### SCHEDULE 3 COVENANTS IMPLIED IN CERTAIN INSTRUMENTS

#### *Part 1: Covenants for the right to convey, quiet enjoyment and further assurance*

See section 75

A person who, by an instrument to which section 75 applies, creates, transfers or assigns an estate or interest in land covenants with the grantee, transferee or assignee

- (a) that he or she has the right and the power to create, transfer or assign the estate or interest free of all encumbrances except those to which the estate or interest will remain subject, as specified in the instrument;
- (b) that the person who becomes entitled to the estate or interest and all persons claiming under that person will be able quietly to enjoy the estate or interest without disturbance by any person to whose acts or omissions the covenants set out in this part relate;
- (c) that he or she will, at the request and the expense of the person who becomes entitled to the estate or interest, do all such acts and execute all such documents for the better assuring of the title to the estate or interest as that person may reasonably require from time to time.

Definitions: **encumbrance, instrument, land**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 72

**199-/ SCHEDULE 3 COVENANTS IMPLIED IN CERTAIN INSTRUMENTS***Part 2: Covenant implied in instruments transferring or assigning a lease of land*

See section 76

A person who, by an instrument to which section 76 applies, transfers or assigns a leasehold estate or interest in land covenants with the transferee or assignee that, as at the date of the coming into operation of the instrument,

- (a) all rent due under the lease has been paid and all covenants and conditions contained in the lease have been performed and observed, and,
- (b) if the transfer or assignment relates to an interest under a sublease, all rent due under every superior lease has been paid and all covenants and conditions of every superior lease have been performed and observed.

Definitions: **covenant, instrument, land, lease, superior lease**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 74

*Part 3: Covenants implied in instruments by a fiduciary or mortgagee*

See section 77

A person who, by an instrument to which section 77 applies, creates, transfers or assigns an estate or interest in land in a fiduciary capacity or as mortgagee or executes a memorandum of discharge of a mortgage over land covenants with the grantee, transferee, assignee or mortgagor that he or she has not done and will not do, and has not knowingly been and will not knowingly be party to, any act or thing which

- (a) will or may invalidate the creation, transfer or assignment of the estate or interest, or
- (b) will or may cause the estate or interest of the person who becomes entitled to it to be defeated or the title to the estate or interest to be encumbered, or
- (c) will or may prevent the creation, transfer or assignment of the estate or interest in terms of the instrument.

Definitions: **instrument, land, mortgage, mortgagee, mortgagor**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 75

*Part 4: Covenants implied in encumbrances of property*

See section 78

A person who, by an instrument to which section 78 applies, encumbers any property covenants with the holder of the encumbrance that he or she

- (a) has the right and the power to encumber the property free of all other encumbrances except those to which the property will remain subject, as specified in the instrument;
- (b) will, at the request of the person for whose benefit the property is encumbered, do all such acts and execute all such documents for the better assuring of the title of that person under the encumbrance as that person may reasonably require from time to time.

Definitions: **encumbrance, instrument, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 72

*Part 5: Covenant for the performance of the obligations under an encumbrance*

See section 79

To the extent provided in section 79, a person to whom land is transferred or assigned subject to an encumbrance covenants with the transferor or assignor that he or she

- (a) will pay all moneys and perform all other obligations secured by the encumbrance as and when they fall due;
- (b) will observe all other provisions of the encumbrance and carry out all the express or implied covenants it contains;
- (c) will indemnify the person who transfers or assigns the land subject to the encumbrance for any cost which that person incurs by reason of the failure of the person to whom the land is transferred or assigned to perform or carry out any obligations, provisions or covenants referred to in paragraphs (a) or (b).

Definitions: **encumbrance, land, property**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 73

SCHEDULE 4  
COVENANTS, CONDITIONS AND POWERS  
IMPLIED IN MORTGAGES

*Part 1: Covenants, conditions and powers implied in mortgages over land*

See section 91

The mortgagor covenants with the mortgagee as follows:

**1 Payment of principal and interest**

- (1) The mortgagor will pay to the mortgagee the principal moneys secured by the mortgage at the time and in the manner specified in the mortgage or any other instrument.
- (2) The mortgagor will pay to the mortgagee interest on the principal moneys and all other moneys secured by the mortgage, from the date on which all or any of those moneys are advanced by the mortgagee, or otherwise attract interest, until the date of their payment, at the agreed rate (if any) specified in the mortgage or any other instrument, and at the times and in the manner specified in the mortgage or any other instrument.
- (3) If the mortgagee obtains judgment against the mortgagor for any amount owing under the mortgage, the mortgagor will pay to the mortgagee interest on that amount, at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage, from the date of judgment until the date of payment of the sum awarded by the judgment.

Definitions: **instrument, mortgage, mortgagee, mortgagor**, s 3

Origin: 1952/51 s 78 and cl 1 Fourth Schedule

**2 Insurance**

- (1) The mortgagor will at all times keep insured all buildings and other insurable improvements from time to time erected on the mortgaged land against loss or damage by fire and also, to the extent possible, against loss or damage by natural disaster or any other event normally covered by an insurance policy in respect of buildings and improvements of the relevant kind.
- (2) The insurance policy or policies will be effected in the joint names of the mortgagor and the mortgagee for their respective rights and interests in an insurance office in New Zealand approved by the mortgagee, and will be for the full insurable value of the buildings and other

improvements; and, if the mortgagee so requires, will be on normal replacement terms.

- (3) The mortgagee is entitled to the custody of every insurance policy effected under this clause.
- (4) The mortgagor will punctually pay all premiums, valuation fees and other sums payable to keep the insurance on foot and will, on request, immediately deliver to the mortgagee a certificate or other confirmation from the insurer that all such sums have been paid.

Definitions: **land, mortgagee, mortgagor**, s 3

Origin: 1952/51 s 78 and cl 2 Fourth Schedule

### 3 Application of insurance moneys

- (1) If any building or improvements on the land are destroyed or damaged, all money received by the mortgagee, in respect of that destruction or damage, under any insurance policy will be applied, at the option of the mortgagee, either in or towards rebuilding or repairing the buildings and improvements, or in or towards payment of the principal moneys, interest, and other moneys for the time being secured by the mortgage, notwithstanding that any such principal moneys, interest or other moneys may not then have fallen due.
- (2) If the mortgagee applies the insurance money in or towards payment of the principal moneys, interest and other moneys for the time being secured by the mortgage,
  - (a) the mortgagor may, at any time within 2 months after the date on which the insurance money was so applied, pay off the whole amount still owing under the mortgage, and
  - (b) interest ceases to be payable on moneys secured by the mortgage and paid to the mortgagee under this clause as from the date of payment.

Definitions: **land, mortgage, mortgagee, mortgagor**, s 3; **month**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 78 and cl 6 Fourth Schedule

### 4 Obligations in respect of the mortgaged land

The mortgagor will

- (a) pay all rates, taxes and charges in respect of the land as and when they become due, and
- (b) perform all duties and obligations imposed on the owner or occupier of the land in respect of the land including, without limiting the generality of this provision, all obligations binding on the owner or occupier of the land under

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- (i) the *Resource Management Act 1991* or any consent given, or any notice, order or requirement made, under that Act or under the rules of any regional or district plan, and
- (ii) the *Building Act 1991* or any building consent given under that Act, and
- (c) comply with all notices and demands relating to the land made under the provisions of any other enactment, ordinance or by-law.

Definitions: **land, mortgagor, occupier, owner**, s 3

Origin: 1952/51 s 78 and cl 3 Fourth Schedule

## 5 Repairs

- (1) The mortgagor will put and keep in good and substantial repair all buildings, fences, drains or other improvements at any time erected, laid or made on the land.
- (2) The mortgagee may at all reasonable times, either personally or by agents, enter the land to inspect the buildings and improvements.
- (3) The mortgagor will not, without the written consent of the mortgagee, cause or permit any buildings or improvements to be removed, dismantled or structurally altered, in whole or in part.

Definitions: **land, mortgagee, mortgagor**, s 3

Origin: 1952/51 s 78 and cl 4 Fourth Schedule

## 6 Observance of covenants under prior mortgages

- (1) Where, and to the extent that, the security for the payment of moneys or the performance of obligations under any other mortgage or encumbrance over the mortgaged land has priority in relation to the present mortgage, the mortgagor will
  - (a) duly and punctually pay all principal, interest and other moneys secured by that mortgage or encumbrance, and
  - (b) duly perform and observe all the covenants and conditions contained or implied in that mortgage or encumbrance.
- (2) To the extent that the mortgagor complies with the provisions of any mortgage or other encumbrance referred to in subclause (1) which relate to the duty to insure against loss or damage by fire or other cause, that compliance is compliance also with any like duty to insure contained or implied in the present mortgage.

Definitions: **covenant, encumbrance, mortgage, mortgagor**, s 3

Origin: 1952/51 s 78 and cl 11 Fourth Schedule



**7 Observance of other covenants**

The mortgagor will do everything that may be required to be done by the occupier of land under any positive covenant to which section 228 of the *Property Law Act 199-* applies and will comply with any restrictive covenant burdening the land and with any other covenant registered against the title to the land.

Definitions: **land, mortgagor, positive covenant, registered, restrictive covenant,** s 3

Origin: 1952/51 s 78 and cl 4A Fourth Schedule

**8 Mortgagee may remedy defaults of mortgagor**

- (1) If the mortgagor fails to do punctually any of the acts or things which the mortgagor covenants to do under the mortgage, or under any mortgage or other encumbrance over the land having priority in relation to the present mortgage, or under any covenant referred to in clause 5, or under any lease upon which the mortgagor holds the land, it shall be lawful for, but not obligatory upon, the mortgagee to do that covenanted act or thing on behalf of the mortgagor.
- (2) All moneys expended by the mortgagee in terms of subclause (1), or in lawfully exercising or enforcing or lawfully attempting to exercise or enforce any power, right or remedy contained or implied in the mortgage, are repayable to the mortgagee by the mortgagor upon demand.
- (3) In subclause (2), **upon demand** means upon demand for payment of the moneys referred to in that paragraph being made to the mortgagor by a notice in writing signed by the mortgagee or by an agent of the mortgagee.

Definitions: **covenant, encumbrance, land, lease, mortgage, mortgagee, mortgagor, signed,** s 3

Origin: 1952/51 s 78 and cl 7 Fourth Schedule

**9 Power to call up mortgage moneys**

- (1) If the mortgagor fails to pay any moneys secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, or if
  - (a) the mortgagor sells, transfers, exchanges, leases, parts with possession of or otherwise disposes of the land or any part of it, or agrees to do any of those things without the prior written consent of the mortgagee, or
  - (b) the land or any part of it is taken under any enactment, or
  - (c) the mortgagor becomes bankrupt or, in the case of a company, is placed in liquidation, or, in the case of an overseas company, its

assets in New Zealand are being liquidated under section 342 of the *Companies Act 1993*, or

- (d) the mortgagor is a body corporate and there is
- (i) a change in the legal or beneficial ownership of any of its shares, or
  - (ii) an issue of new capital, or
  - (iii) an alteration of voting rights or other rights attaching to any of its shares,
- with the result, in any of those cases, that the effective management or control of the body corporate is materially different from that when the mortgage was executed, or
- (e) the mortgagor is a body corporate and a receiver or statutory manager is appointed in respect of all or substantially all of the assets of the mortgagor or in respect of the mortgaged land or any part of it, or
- (f) the whole or any part of the mortgaged land or any interest in the land is sold in exercise of a power of sale in any mortgage over the land,

the mortgagee may, by notice served on the mortgagor, call up all principal, interest and other money for the time being secured by the mortgage, notwithstanding that the time or times appointed for payment may not have arrived.

- (2) If, under subclause (1), the mortgagee calls up as payable moneys secured by the mortgage, the mortgagee may require the mortgagor to pay one month's premium interest calculated at the agreed rate (if any) payable in respect of the principal moneys secured by the mortgage, in addition to all other interest payable under the mortgage to the date of payment of all moneys secured by the mortgage.
- (3) No acquiescence, delay or failure to act by the mortgagee after acquiring knowledge of any failure of the mortgagor or other event referred to in subclause (1) prejudices, or operates as a waiver of, the rights of the mortgagee under this clause.
- (4) The mortgagee may agree in writing to waive the rights of the mortgagee under this clause in relation to a particular failure of the mortgagor or a particular event referred to in subclause (1), but any such waiver relates only to that failure or event and does not prejudice or operate as a waiver of the rights of the mortgagee in relation to any such failure or event that may occur in the future.

Definitions: **bankrupt, company, covenant, land, mortgage, mortgagee, mortgagor, overseas company, receiver**, s 3; **month, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 78 and cls 8 and 9 Fourth Schedule

### 10 Power to enter into possession as mortgagee or to appoint a receiver

If the mortgagor fails to pay any money secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, the mortgagee may

- (a) enter into possession of the land as mortgagee in any of the ways specified in section 115 of the *Property Law Act 199-*, or
- (b) appoint one or more receivers with the power to enter into possession of the land as the agent of the mortgagor, and receive
  - (i) any rents or profits payable by a lessee or occupier of the land, and
  - (ii) any income from any business carried on by the mortgagor on the land.

Definitions: **covenant, income, land, lessee, mortgage, mortgagee, mortgagor, receiver**, s 3

Origin: 1952/51 s 78 and cl 8 Fourth Schedule

### 11 Power of sale

- (1) If the mortgagor fails to pay any moneys secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, the mortgagee, or any receiver appointed by the mortgagee under the mortgage, may sell the whole or any part of the mortgaged land.
- (2) The mortgagee is not obliged to account for or apply the moneys arising from the sale of mortgaged land unless and until the mortgagee actually receives payment of them.
- (3) The mortgagor remains liable to the mortgagee for the amount by which the amount received on the sale of the mortgaged land and available to a mortgagee in accordance with section 155 of the *Property Law Act 199-* or to a receiver in accordance with section 173 of that Act, as the case requires, is less than the amount then secured by the mortgage.
- (4) If a contract for the sale of the land entered into by the mortgagee or a receiver is cancelled, the mortgagee is entitled to make to the purchaser all such allowances or refunds as the purchaser may be entitled to receive, at law or in equity, upon the cancellation of the contract, and in any event the mortgagee is not responsible for any act or thing done or omitted by any purchaser; nor is the mortgagee obliged to enforce against the purchaser any right or power contained or implied in the contract of sale.

- (5) The mortgagee's costs and expenses arising out of the cancellation or the exercise or any attempted exercise by the mortgagee of rights and powers against any purchaser will be borne by the mortgagor.

Definitions: **covenant, land, mortgage, mortgagee, mortgagor, receiver**, s 3

Origin: 1952/51 s 78 and cl 8 Fourth Schedule

## 12 Power to subdivide

- (1) For the purpose of exercising the power conferred by clause 11 to sell the whole or any part of the mortgaged land, the mortgagee (without the need to enter into possession of the land as mortgagee) or any receiver appointed by the mortgagee under the mortgage may subdivide the land.
- (2) The power to subdivide conferred by subclause (1) includes the following powers:
- (a) to apply for and obtain all necessary consents under the *Resource Management Act 1991*;
  - (b) to comply with all reasonable and proper conditions of consent, including but not limited to
    - (i) the payment of any financial contributions;
    - (ii) the vesting of reserves;
    - (iii) the provision of services;
    - (iv) the formation and dedication of roads and service lanes;
    - (v) the formation of access ways and rights of way;
    - (vi) the creation of easements;
    - (vii) the execution of any bonds, covenants or consent notices;
  - (c) to survey the land and deposit a plan of subdivision in the land registry office of the relevant land registration district under the *Land Transfer Act 1952*.
- (3) The mortgagor irrevocably appoints the mortgagee as the attorney of the mortgagor to execute and do all such documents and things as may be reasonably necessary or incidental to the exercise of the powers conferred by subclauses (1) and (2).
- (4) The mortgagee, as attorney of the mortgagor, has power from time to time to appoint and remove one or more substitute attorneys and the mortgagor agrees to ratify and confirm anything that the mortgagee or a substitute attorney lawfully does or causes to be done under this clause.

Definitions: **land, mortgage, mortgagee, mortgagor, receiver**, s 3

Origin: 1952/51 s 78

**13 Unit titles**

- (1) Where the mortgage is of, or includes, any stratum estate under the *Unit Titles Act 1972*, the mortgagor will
  - (a) comply with all obligations of the mortgagor under the *Unit Titles Act 1972* and the Rules of the Body Corporate, and
  - (b) duly and punctually pay to the Body Corporate all moneys payable by the mortgagor under the *Unit Titles Act 1972* and the Rules of the Body Corporate, and
  - (c) effect and maintain a mortgage redemption policy under section 39(1)(b) of the *Unit Titles Act 1972* for an amount not less than the whole of the sum from time to time secured by the mortgage, and
  - (d) do all things reasonably necessary to enforce the obligations of the Body Corporate under the *Unit Titles Act 1972* and the Rules of the Body Corporate, and
  - (e) give the mortgagee such information relating to the affairs of the Body Corporate as the mortgagee reasonably requires.
- (2) If either
  - (a) the principal unit is damaged or destroyed so that it is no longer habitable or usable, or
  - (b) an administrator is appointed by the court under section 40 of the *Unit Titles Act 1972*,the mortgagee may call up as payable all principal, interest and other money for the time being secured by the mortgage, notwithstanding that the time or times appointed for payment may not have arrived, in the same manner, and subject to the same conditions as if the power to do so were conferred by clause 9 of these covenants.
- (3) The mortgagor's voting rights under the *Unit Titles Act 1972* and the Rules of the Body Corporate (whether at a meeting or by entry in the minute book) may be exercised by the mortgagee, at the expense of the mortgagor, and, for this purpose, the mortgagor irrevocably appoints the mortgagee as the attorney of the mortgagor. The mortgagor will not vote on any resolution put at a meeting of the Body Corporate requiring a unanimous vote for its passing without the prior consent of the mortgagee, and then the mortgagor shall vote only as directed by the mortgagee.
- (4) The mortgagee, as attorney of the mortgagor, has power from time to time to appoint and remove one or more substitute attorneys and the mortgagor agrees to ratify and confirm anything that the mortgagee or a substitute attorney lawfully does or causes to be done under this clause.

Definitions: **court, mortgage, mortgagee, mortgagor**, s 3

**14 Farming provisions**

If the land is used, or is suitable for use, for agricultural, pastoral, orchard or other farming purposes, the mortgagor

- (a) will keep the land clear of all blackberry, gorse, other noxious plants and animal and insect pests;
- (b) will take all reasonable steps to control disease in crops, pastures, trees, plants and stock on the land;
- (c) will farm and manage the land in accordance with established farm management practices and keep properly cultivated any part of the land that is or has usually been cultivated;
- (d) will not, without the mortgagee's prior written consent, make any material change in the type of farming conducted on the land, but such consent may not unreasonably be withheld.

Definitions: **covenant, land, mortgagee, mortgagor**, s 3

**15 Covenants implied in mortgages of a leasehold estate or interest in land**

- (1) Where the mortgage is over a leasehold estate or interest in land, the mortgagor covenants that the rent reserved by the lease under which the mortgagor holds the land has been paid, and that the covenants and conditions expressed or implied in the lease, and to be performed and observed by the lessee, have been performed and observed up to the date of the mortgage.
- (2) The mortgagor will from time to time, so long as any moneys remain owing under the mortgage, pay the rent reserved by the lease under which the mortgagor holds the land, and perform and observe the covenants and conditions expressed or implied in the lease and to be performed and observed by the lessee, and will at all times keep the mortgagee indemnified against all actions, expenses and claims on account of the non-payment of that rent, or the breach or non-observance of those covenants or conditions, or any of them.
- (3) The mortgagor irrevocably appoints the mortgagee as the attorney of the mortgagor to do, in the name and on behalf of the mortgagor, all or any of the following:
  - (a) to make any enquiry of the lessor concerning the lease;
  - (b) to do anything necessary to obtain a new or renewed lease or an assurance of the reversion expectant on the lease in accordance with the provisions of the lease and to negotiate and agree upon any new rental and to make any application under section 208 or 213 of the *Property Law Act 199-*;
  - (c) to execute a new mortgage over any such new or renewed lease or reversion in substitution for this mortgage on terms, covenants and

conditions as like or similar to those of the present mortgage as the circumstances will permit;

- (d) to enforce the rights of the mortgagor to any compensation, damages or other moneys for any cause, including compensation for the value of improvements and buildings which is or may be payable if any person other than the mortgagor becomes the purchaser at auction of any right to a lease of the land, or otherwise, and to receive that compensation, damages or other moneys on behalf of the mortgagor;
  - (e) to enter into, execute and register any instrument that is necessary or expedient for any of those purposes including the making of a request to the District Land Registrar under section 117 or 118A of the *Land Transfer Act 1952*.
- (4) The mortgagee, as attorney of the mortgagor, has power from time to time to appoint and remove one or more substitute attorneys and the mortgagor agrees to ratify and confirm anything that the mortgagee or a substitute attorney lawfully does or causes to be done under this clause.

Definitions: **covenant, instrument, land, lease, lessee, lessor, mortgage, mortgagee, mortgagor, register**, s 3; **person, writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 s 78 and cls 14-16 Fourth Schedule

## 16 Discharge of mortgage

The mortgagee will, on payment by the mortgagor of all moneys and the performance of all other obligations secured by the mortgage, return to the mortgagor the mortgage instrument, with a memorandum of discharge executed in compliance with section 82 of the *Property Law Act 199-*, together with all certificates or instruments of title and other documents deposited with the mortgagee on account of the mortgage.

Definitions: **instrument, mortgage, mortgagee, mortgagor**, s 3

Origin: 1952/51 s 78 and cl 10

## 17 Production of instruments of title

Except where required to do so by a notice issued by the District Land Registrar under section 211 of the *Land Transfer Act 1952*, the mortgagee is not bound to produce at a land registry office or elsewhere the certificate of title or other instruments of title to the land or the mortgage

- (a) while the mortgagor is failing to pay any moneys secured by the mortgage and then due, or failing to perform or observe any covenant expressed or implied in the mortgage, or

- (b) for the purpose of any dealing in respect of the land referred to in clause 9(1)(a) or 9(1)(f) of these covenants to which the mortgagee has not consented, or
- (c) until the proper and reasonable costs of their production have first been paid to the mortgagee.

Definitions: **covenant, land, mortgage, mortgagee, mortgagor**, s 3

### 18 Mortgagor's liability for costs

- (1) The mortgagor will pay all costs and expenses of and incidental to the arranging and preparation of the mortgage and any variation or discharge of the mortgage or any transfer of the mortgage or the mortgaged land instead of a discharge.
- (2) If and as often as the mortgagor fails to pay any moneys secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, the mortgagor will pay the costs of the mortgagee (as between solicitor and client) of and incidental to the enforcement or attempted enforcement by the mortgagee of the mortgagee's rights, remedies and powers under the mortgage, including the giving or attempted giving of any notice required by the *Property Law Act 199-* and the costs of inspection and valuation of the mortgaged land.

Definitions: **covenant, land, mortgage, mortgagee, mortgagor**, s 3

Origin: 1952/51 s 78 and cl 8

#### *Part 2: Covenants, conditions and powers implied in fixed mortgages over goods*

See section 92

The mortgagor covenants with the mortgagee as follows:

#### **1 Payment of principal and interest**

- (1) The mortgagor will pay to the mortgagee the principal moneys secured by the mortgage at the time and in the manner specified in the mortgage or any other instrument.
- (2) The mortgagor will pay to the mortgagee interest on the principal moneys and all other moneys secured by the mortgage, from the date on which all or any of those moneys are advanced by the mortgagee, or otherwise attract interest, until the date of their payment, at the agreed rate (if any) specified in the mortgage or any other instrument, and at the times and in the manner specified in the mortgage or any other instrument.



- (3) If the mortgagee obtains judgment against the mortgagor for any amount owing under the mortgage, the mortgagor will pay to the mortgagee interest on that amount, at the agreed rate (if any) at which interest is payable on the principal moneys secured by the mortgage, from the date of judgment until the date of payment of the sum awarded by the judgment.

Definitions: **instrument, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cls 1 and 2 Fourth Schedule

## 2 Insurance

- (1) The mortgagor will at all times keep insured such of the mortgaged goods as are of an insurable nature against loss or damage by fire and also, to the extent possible, against loss or damage by natural disaster or any other event normally covered by an insurance policy in respect of goods of the relevant kind.
- (2) The insurance policy or policies will be effected in the joint names of the mortgagor and the mortgagee for their respective rights and interests in an insurance office in New Zealand approved by the mortgagee, and will be for the full insurable value of the goods.
- (3) The mortgagee is entitled to the custody of every insurance policy effected under this clause.
- (4) The mortgagor will punctually pay all premiums, valuation fees and other sums payable to keep the insurance on foot and will, on request, immediately deliver to the mortgagee a certificate or other confirmation from the insurer that all such sums have been paid.

Definitions: **goods, mortgagee, mortgagor**, s 3

## 3 Application of insurance moneys

- (1) If any of the mortgaged goods are destroyed or damaged, all money received by the mortgagee, in respect of that destruction or damage, under any insurance policy will be applied, at the option of the mortgagee, either in or towards replacing the goods, or in or towards payment of the principal moneys, interest, and other moneys for the time being secured by the mortgage, notwithstanding that any such principal moneys, interest or other moneys may not then have fallen due.
- (2) If the mortgagee applies the insurance money in or towards payment of the principal moneys, interest and other moneys for the time being secured by the mortgage,

## 199- / SCHEDULE 4 COVENANTS IMPLIED IN MORTGAGES

- (a) the mortgagor may, at any time within 2 months after the date on which the insurance money was so applied, pay off the whole amount still owing under the mortgage, and
- (b) interest ceases to be payable on moneys secured by the mortgage and paid to the mortgagee under this clause as from the date of payment.

Definitions: **goods, mortgage, mortgagee, mortgagor**, s 3; **month**, *Acts Interpretation Act 1924* s 4

#### 4 Repairs and replacement

- (1) The mortgagor will keep and maintain the mortgaged goods in the same order as they are in at the date of the mortgage, and will repair any damage to the goods, and replace any of the goods which may be destroyed, lost or cease to exist with other goods of similar nature and value, and will, if required by the mortgagee, execute any mortgage which may be necessary to give the mortgagee security over the replacement goods.
- (2) The mortgagee may at all reasonable times, either personally or by agents, enter upon the premises of the mortgagor to inspect the goods.

Definitions: **goods, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cl 4 Fourth Schedule

#### 5 Observance of covenants under prior mortgages

- (1) Where, and to the extent that, the security for the payment of moneys or the performance of obligations under any other mortgage or encumbrance over the mortgaged goods has priority in relation to the present mortgage, the mortgagor will
  - (a) duly and punctually pay all principal, interest and other moneys secured by that mortgage or encumbrance, and
  - (b) duly perform and observe all the covenants and conditions contained or implied in that mortgage or encumbrance.
- (2) To the extent that the mortgagor complies with the provisions of any mortgage or encumbrance referred to in subclause (1), relating to the duty to insure against loss or damage by fire or other cause, that compliance is compliance also with any like duty to insure contained or implied in the present mortgage.

Definitions: **covenant, encumbrance, goods, mortgage, mortgagor**, s 3

**6 Mortgagee may remedy defaults of mortgagor**

- (1) If the mortgagor fails to do punctually any of the acts or things which the mortgagor covenants to do under the mortgage, or under any mortgage or other encumbrance over the goods having priority in relation to the present mortgage, it shall be lawful for, but not obligatory upon, the mortgagee to do that covenanted act or thing on behalf of the mortgagor.
- (2) All money expended by the mortgagee in terms of subclause (1), or in lawfully exercising or enforcing or lawfully attempting to exercise or enforce any power, right or remedy contained or implied in the mortgage, is repayable to the mortgagor by the mortgagor upon demand.

Definitions: **encumbrance, goods, mortgage, mortgagee, mortgagor**, s 3

**7 Mortgagor's right to retain possession of mortgaged goods**

Unless and until

- (a) the mortgagor fails to pay any money secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, or
  - (b) the mortgagee, under clause 8 of these covenants, calls up as payable moneys secured by the mortgage,
- the mortgagor may retain possession of the mortgaged goods.

Definitions: **covenant, goods, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cl 5 Fourth Schedule

**8 Power to call up mortgage moneys**

- (1) If the mortgagor fails to pay any moneys secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, or if
  - (a) the mortgagor sells, assigns, exchanges, parts with possession of or otherwise disposes of the goods or any of them or agrees so to do without the prior written consent of the mortgagee, or
  - (b) the mortgagor becomes bankrupt or, in the case of a company, is placed in liquidation, or, in the case of an overseas company, its assets in New Zealand are being liquidated under section 342 of the *Companies Act 1993*, or
  - (c) the mortgagor is a body corporate and there is
    - (i) a change in the legal or beneficial ownership of any of its shares, or
    - (ii) an issue of new capital, or
    - (iii) an alteration of voting rights or other rights attaching to any of its shares,

- with the result, in any of those cases, that the effective management or control of the body corporate is materially different from that when the mortgage was executed, or
- (d) the mortgagor is a body corporate and a receiver or statutory manager is appointed in respect of all or substantially all of the assets of the mortgagor or in respect of the mortgaged goods or any of them, or
- (e) the goods or any of them are sold in exercise of a power of sale in any other mortgage or encumbrance over the goods,
- the mortgagee may, by notice served on the mortgagor, call up as payable all principal, interest and other money for the time being secured by the mortgage, notwithstanding that the time or times appointed for payment may not have arrived.
- (2) If, under subclause (1), the mortgagee calls up as payable moneys secured by the mortgage, the mortgagee may require the mortgagor to pay one month's premium interest calculated at the agreed rate (if any) payable in respect of the principal moneys secured by the mortgage, in addition to all other interest payable under the mortgage to the date of payment of all moneys secured by the mortgage.
- (3) No acquiescence, delay or failure to act by the mortgagee after acquiring knowledge of any failure of the mortgagor or other event referred to in subclause (1) prejudices, or operates as a waiver of, the rights of the mortgagee under this clause.
- (4) The mortgagee may agree in writing to waive the rights of the mortgagee under this clause in relation to a particular failure of the mortgagor or a particular event referred to in subclause (1), but any such waiver relates only to that failure or event and does not prejudice or operate as a waiver of the rights of the mortgagee in relation to any such failure or event that may occur in the future.

Definitions: **bankrupt, company, covenant, encumbrance, goods, mortgage, mortgagee, mortgagor, overseas company, receiver**, s 3; **month, writing**, *Acts Interpretation Act 1924* s 4

#### 9 Power to take possession as mortgagee

If the mortgagor fails to pay any money secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, the mortgagee may take possession of the mortgaged goods or any of them as mortgagee in any of the ways specified in section 115 of the *Property Law Act 199-*.

Definitions: **covenant, goods, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cl 7 Fourth Schedule

**10 Power of sale**

- (1) If the mortgagor fails to pay any moneys secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, the mortgagee may sell all or any of the mortgaged goods.
- (2) The mortgagee is not obliged to account for or apply the moneys arising from the sale of mortgaged goods unless and until the mortgagee actually receives payment of them.
- (3) The mortgagor remains liable to the mortgagee for the amount by which the amount received on the sale of the mortgaged goods and available to a mortgagee in accordance with section 155 of the *Property Law Act 1999* is less than the amount then secured by the mortgage.
- (4) If a contract for the sale of any goods entered into by the mortgagee is cancelled, the mortgagee is entitled to make to the purchaser all such allowances or refunds as the purchaser may be entitled to receive, at law or in equity, upon the cancellation of the contract, and in any event the mortgagee is not responsible for any act or thing done or omitted by any purchaser, nor is the mortgagee obliged to enforce against the purchaser any right or power contained or implied in the contract of sale.
- (5) The mortgagee's costs and expenses arising out of the cancellation or the exercise or any attempted exercise by the mortgagee of rights and powers against any purchaser will be borne by the mortgagor.

Definitions: **covenant, goods, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cl 7 Fourth Schedule

**11 Discharge of mortgage**

The mortgagee will, on payment by the mortgagor of all moneys and the performance of all other obligations secured by the mortgage, return to the mortgagor the mortgage instrument, with a memorandum of discharge executed in compliance with section 82 of the *Property Law Act 1999*, together with all certificates or instruments of title and other documents deposited with the mortgagee on account of the mortgage.

Definitions: **instrument, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cl 7 Fourth Schedule

**12 Mortgagor's liability for costs**

- (1) The mortgagor will pay all costs and expenses of and incidental to the arranging and preparation of the mortgage and any variation or discharge of the mortgage.

- (2) If and as often as the mortgagor fails to pay any moneys secured by the mortgage on the due date, or fails to perform or observe any covenant expressed or implied in the mortgage, the mortgagor will pay the costs of the mortgage (as between solicitor and client) of and incidental to the enforcement or attempted enforcement by the mortgagee of the mortgagee's rights, remedies and powers under the mortgage, including the giving or attempted giving of any notice required by the *Property Law Act 199-* and the costs of inspection and valuation of the mortgaged goods.

Definitions: **covenant, goods, mortgage, mortgagee, mortgagor**, s 3

Origin: 1924/49 cl 7 Fourth Schedule

SCHEDULE 5  
COVENANTS, CONDITIONS AND POWERS  
IMPLIED IN LEASES OF LAND

*Part 1: Covenants, conditions and powers implied in all leases of land*

See section 183

The lessor and the lessee covenant with one another as follows:

**1 Payment of rent**

- (1) Except as provided in subclause (2), the lessee will pay the rent payable under the lease when it falls due.
- (2) If the leased premises or any part of them are destroyed or damaged
- (a) by fire, flood or explosion (whether or not that fire, flood or explosion is caused or contributed to by the negligence of the lessee), or
  - (b) by lightning, storm, earthquake or volcanic activity, or
  - (c) by any other cause against the risk of which the lessor has insured the premises,
- so as to make the premises unfit for occupation and use by the lessee, then, subject to subclause (3), the rent, and any contribution payable by the lessee to the outgoings on the premises will abate, in fair and just proportion to the destruction or damage, until the premises have been repaired and reinstated so as again to be fit for occupation and use by the lessee.
- (3) The lessee is not entitled to any abatement under subclause (2), if, and to the extent that, any insurance moneys which would otherwise have been payable to the lessor in respect of the destruction of or damage to

the premises are irrecoverable, by reason of an act or omission of the lessee, or an agent, contractor or invitee of the lessee.

- (4) Any dispute arising under this clause will be referred to arbitration under the law for the time being in force concerning the arbitration of such a dispute.

Definitions: **lease, lessee, lessor**, s 3

Origin: 1952/51 ss 106 and 107

## 2 Alteration of buildings

The lessee will not, without the consent of the lessor, make any alteration to any building which comprises, or is part of the leased premises, or of which the premises form part, such consent not to be unreasonably withheld.

Definitions: **lessee, lessor**, s 3

Origin: 1952/51 ss 106 and 107

## 3 Noisome or offensive acts or things

The lessee will not do or permit on the leased premises any noisome or offensive act or thing, or any act or thing which is, or is likely to be, or to cause, nuisance, damage or disturbance to the lessor or to other lessees of the lessor, or to the owners or occupiers of neighbouring properties.

Definitions: **lessee, lessor**, s 3

Origin: 1952/51 ss 106 and 107

## 4 Commission of waste

The lessee will not commit, or permit any agent, contractor or invitee of the lessee to commit, the tort of voluntary waste in relation to the leased premises.

Definitions: **lessee**, s 3

Origin: 1952/51 ss 106 and 107

## 5 Lessor not to derogate from grant

The lessor will not derogate from the lease.

Definitions: **lease, lessor**, s 3

Origin: 1952/51 ss 106 and 107

**6 Lessee entitled to quiet enjoyment**

The lessee and all persons claiming under the lessee will be able quietly to enjoy the leased premises without disturbance by any person to whose acts or omissions this covenant relates.

Definitions: **covenant, lessee**, s 3; **person**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 106 and 107

**7 Premises unable to be used for a particular purpose**

If it is an express or implied term of the lease that the leased premises may be used for any one or more specified purposes, the lessee may terminate the lease, on reasonable notice to the lessor, if, at any time during the currency of the lease, the leased premises cannot be, or can no longer be, lawfully used for any one or more of those purposes.

Definitions: **lease, lessee, lessor**, s 3

Origin: 1952/51 ss 106 and 107

**8 Power to inspect premises**

- (1) The lessor may at all reasonable times, either personally or by agents, enter the leased premises for the purpose of inspecting their state of repair, and for the purpose of carrying out repairs or complying with the requirements of any law, regulation or by-law, or any notice issued by a competent authority.
- (2) In the exercise of the power conferred by subclause (1), the lessor will not unreasonably interfere with the occupation and use of the premises by the lessee.

Definitions: **lessee, lessor**, s 3

Origin: 1952/51 ss 106 and 107

**9 Power to re-enter or seek order for possession for non-payment of rent or other breach**

- (1) The lessor may cancel the lease, in accordance with section 203 of the *Property Law Act 199-*, by peaceably re-entering the leased premises, or any part of the premises in the name of the whole, or by applying to a court for an order for possession of the premises, if
  - (a) any rent is unpaid for 15 working days after the due date for payment (whether or not a demand for payment has been made to the lessee by a notice in writing signed by the lessor or by an agent of the lessor), or



- (b) the lessee has failed for a period of 15 working days to observe or perform any other covenant, condition or stipulation on the part of the lessee expressed or implied in the lease.
- (2) Re-entry by the lessor or the making of an order for possession in favour of the lessor does not release the lessee from liability for the payment of unpaid rent due under the lease or for the breach or non-observance of a covenant, condition or stipulation referred to in subclause (1).

Definitions: **covenant, court, lease, lessee, lessor, signed, working day**, s 3; **writing**, *Acts Interpretation Act 1924* s 4

Origin: 1952/51 ss 106 and 107

## 10 Leased premises include land

In these covenants, **premises** include all land comprised in the lease.

Definitions: **covenant, land, lease**, s 3

Origin: 1952/51 ss 106 and 107

*Part 2: Covenant implied in all leases of land other than short term leases*

See section 184

The lessee covenants with the lessor as follows:

### 1 Lessee to keep and yield up premises in existing condition

- (1) The lessee will at all times during the continuance of the lease keep, and at the termination of the lease yield up, the premises in the same condition as they were in when the term of the lease began, except that the lessee is not bound to repair damage caused by
- (a) reasonable wear and tear, or,
  - (b) subject to subclause (2), any of the following:
    - (i) fire, flood or explosion (whether or not that fire, flood or explosion is caused or contributed to by the negligence of the lessee);
    - (ii) lightning, storm, earthquake or volcanic activity;
    - (iii) any other cause against the risk of which the lessor has insured the premises.
- (2) The lessee is not excused from liability under subclause (1)(b), if, and to the extent that, any insurance moneys which would otherwise have been payable to the lessor in respect of the destruction of or damage to the premises are irrecoverable, by reason of an act or omission of the lessee, or an agent, contractor or invitee of the lessee.

- (3) In this covenant, **premises** include all land comprised in the lease.

Definitions: **covenant, land, lease, lessee, lessor**, s 3

Origin: 1952/51 s 106

*Part 3: Covenant implied in short term leases*

See section 185

The lessee covenants with the lessor as follows:

**1 Lessee to use premises reasonably**

- (1) The lessee will, at all times during the continuance of the lease, use the leased premises in the manner of a reasonable tenant.
- (2) In this covenant, **premises** include all land comprised in the lease.

Definitions: **covenant, land, lease, lessee**, s 3

Origin: 1952/51 s 106

SCHEDULE 6  
COVENANTS IMPLIED IN GRANTS OF  
VEHICULAR RIGHTS OF WAY

See section 223

The grantor and the grantee of a vehicular right of way covenant with one another as follows:

**1 Right to pass and repass**

The grantee, and the grantee's employees, tenants, agents, contractors, licensees and invitees (in common with the grantor, and the grantor's tenants, agents, servants, contractors, licensees or invitees) have the right, at all times, by day and by night, to go, pass and repass, with or without vehicles, machinery and equipment of any kind, over and along the land over which the right of way is granted.

Definitions: **land, person bound, person entitled**, s 3

Origin: 1952/51 s 126B and cl 1 Ninth Schedule

**2 Right to establish and maintain driveway**

The owners and occupiers of the land for the benefit of which, and the land over which, the right of way is granted, have the following rights against one another:

- (a) the right to establish a driveway on the land over which the right of way is granted, and to make necessary repairs to any existing

- driveway, and to carry out any necessary maintenance or upkeep, altering where necessary the state of the land;
- (b) any necessary rights of entry on to the land, with or without machinery, plant and equipment;
  - (c) the right to have the land at all times kept clear of obstructions, whether caused by parked vehicles, deposit of materials, or unreasonable impediment to the use and enjoyment of the driveway;
  - (d) the right to a reasonable contribution towards the cost of establishment, maintenance, upkeep, and repair of the driveway to an appropriate standard;
  - (e) the right to recover the cost of repairing any damage to the driveway made necessary by any deliberate or negligent act of a person bound by these covenants or that person's tenants, agents, employees, contractors, licensees or invitees.

Definitions: **land, person bound, person entitled**, s 3

Origin: 1952/51 s 126B and cl 2(1)(a)-(d) Ninth Schedule

### 3 Right to have land restored after completion of work

If work is undertaken by a person entitled to enforce these covenants on the land over which a right of way is granted, in accordance with the right conferred by clause 2(a) or with an order of a court, a person bound by these covenants has the right, after the completion of the work, to have the land restored as far as possible to its former condition (except for the existence of the driveway), and subject to the right of the person entitled to receive a reasonable contribution towards the cost of the work, in accordance with clause 2(d).

Definitions: **court, land, person bound, person entitled**, s 3

Origin: 1952/51 s 126B and cl 2(1)(e) Ninth Schedule

## SCHEDULE 7 IMPERIAL ENACTMENTS CEASING TO BE PART OF THE LAW OF NEW ZEALAND

See section 264(1)

*The Statute of Marlborough 1267* (52 Hen 3, c 23)

*Quia Emptores 1289–90* (18 Edw 1, St 1, c 1, c 3)

*Partition Act 1539* (31 Hen 8, c 1)

*Partition Act 1540* (32 Hen 8, c 32)

*Grantees of Reversions Act 1540* (32 Hen 8, c 34)  
*Distress Act 1689* (2 Will and Mar, Sess 1, c 5)  
*Administration of Justice Act 1705* (4 and 5 Anne, c 3) sections 9 and 10  
*Landlord and Tenant Act 1709* (8 Anne, c 18) sections 1, 4, 6 and 7  
*Landlord and Tenant Act 1730* (4 Geo II, c 28) sections 2, 4, 5 and 6  
*Distress for Rent Act 1737* (11 Geo II, c 19) sections 1, 2, 7, 8, 11, 14, 16  
and 17  
*Fires Prevention (Metropolis) Act 1774* (14 Geo 3, c 78) sections 83 and 86  
*Statute of Frauds Amendment Act 1828* (9 Geo 4, c 14) section 6  
*Prescription Act 1832* (2 and 3 Will 4, c 71) sections 1, 2 and 4 to 8  
*Wills Act 1837* (7 Will 4 and 1 Vict, c 24) section 3  
*Landlord and Tenant Act 1851* (14 and 15 Vict, c 25) sections 1 to 4

SCHEDULE 8  
ENACTMENTS REPEALED

See section 264(2)

*Distress and Replevin Act 1908*  
*Property Law Act 1952*  
*Contracts Enforcement Act 1956*

SCHEDULE 9  
ENACTMENTS AMENDED

See section 265

*City of Christchurch Loan Act 1871* (1871/71)  
section 4  
**Repeal** the whole section  
section 5  
**Repeal** the whole section  
*Oamaru Gasworks 1875* (1875/30)  
section 13  
**Delete:** “be subject to distraint for rent of the premises where the same may  
be used, nor to”

*Agricultural and Pastoral Act 1908* (1908/4)

section 8(3)

**Delete:** “and distrain”

*Official Appointments and Documents Act 1919* (1919/18)

section 3(4)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199–*”

*Maori Housing Act 1935* (1935/34)

section 14A

**Delete:** “section 152 of the *Property Law Act 1952*”

**Substitute:** “sections 259 and 260 of the *Property Law Act 199–*”

*Maori Housing Amendment Act 1938* (1938/17)

section 21(8)

**Delete:** “conferred by the *Land Transfer Act 1952* and the *Property Law Act 1952* in respect of mortgages”

**Substitute:** “implied in mortgages over land by the *Property Law Act 199–*”

*District Courts Act 1947* (1947/16)

section 32

**Repeal** the whole section

section 95

**Repeal** the whole section

*Land Act 1948* (1948/64)

section 24(1)

**Delete** from paragraph (e): “distrain,”

section 84(4)

**Delete:** “, and, in case the same is levied by distress, an order by the Commissioner shall be a sufficient warrant and authority to distrain, any law or enactment to the contrary notwithstanding”

*Law Reform (Testamentary Promises) Act 1949* (1949/33)

section 3(2)

**Delete** from paragraph (b): “section 4 of the *Statute of Frauds 1677*, or section 2 of the *Contracts Enforcement Act 1952*”

**Substitute:** “sections 38 to 41 of the *Property Law Act 199–*”

*Limitation Act 1950* (1950/65)

section 2(5)

**Delete:** “or, in the case of rentcharges, to distrain for arrears of rent;” and “or distress”

section 16

**Delete:** “section 81 of the *Property Law Act 1952*”

**Substitute:** “section 93 of the *Property Law Act 199—*”

section 19

**Delete:** “, or distress made,”

section 20

**Repeal** subsection (2)

**Delete** from subsection (3): “and the right to foreclose on any personal property subject to the mortgage or charge”

section 25

**Repeal** subsection (1)

**Substitute:**

“(1) Where there has accrued any right of action to recover land, and the person in possession of the land acknowledges the title of the person to whom the right of action has accrued, the right shall be deemed to have accrued on and not before the date of the acknowledgment.

section 27(2)

**Delete:** “foreclose or otherwise to”

*Land Transfer Act 1952 (1952/52)*

section 96

**Repeal** the whole section

section 98

**Repeal** the whole section

section 104

**Repeal** the whole section

section 105

**Delete:** “any such sale as aforesaid”

**Substitute:** “exercising a power of sale over any land”

section 106

**Repeal** the whole section

section 107

**Repeal** the whole section

section 108

**Repeal** the whole section

section 110

**Repeal** the whole section

section 115

**Delete** from subsection (1): “for a life or lives, or for any term of not less than 3 years”

**Substitute:** “otherwise than by way of short term lease under section 175 of the *Property Law Act 199–*”

**Repeal** subsection (2)

section 121L(2)

**Delete** from paragraph (b): “Section 104 of the *Property Law Act 1952*”

**Substitute:** “Section 174 of the *Property Law Act 199–*”

section 141(1)

**Delete** from paragraph (a)(ii): “section 101 of the *Property Law Act 1952*”

**Substitute:** “section 166 of the *Property Law Act 199–*”

section 244

**Repeal** the whole section

**Substitute:**

**“244 Property Law Act 199– to be subject to this Act**

Except where the *Property Law Act 199–* provides otherwise, that Act shall, as regards land under this Act, be read and construed so as not to conflict with the provisions of this Act.”

Third Schedule, paragraph (2)

**Delete:** “and the provisions of paragraph (7) of the Fourth Schedule to the *Property Law Act 1952*”

**Substitute:** “and the provisions of clause 8 in Part 1 of Schedule 4 to the *Property Law Act 199–*”

Fourth Schedule

**Delete:** “Part VIII of the *Property Law Act 1952*”

**Substitute:** “Part 9 of the *Property Law Act 199–*”

*Maori Trustee Act 1953* (1953/95)

section 49(2)

**Delete:** “expressed by the *Land Transfer Act 1952* or the *Property Law Act 1952*, as the case may be, in respect of mortgages,”

**Substitute:** “implied in mortgages over land by the *Property Law Act 199–*”

*Maori Vested Land Administration Act 1954* (1954/60)

First Schedule, clause 18

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “sections 183 and 184 of the *Property Law Act 199–*”

First Schedule, clause 31

**Delete:** “and shall be recoverable by distress under the *Distress and Replevin Act 1908* or otherwise as if the same were rent in arrear hereby reserved”

First Schedule, clause 33

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “sections 183 and 184 of the *Property Law Act 199-*”

*Maori Reserved Land Act 1955* (1955/38)

Second Schedule, Form A, clause 11

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199-*”

Second Schedule, Form A, clause 16

**Delete:** “by distress under the *Distress and Replevin Act 1908* or otherwise”

Second Schedule, Form A, clause 18

**Delete:** “implied in leases by the *Property Law Act 1952*”

**Substitute:** “implied in leases (other than short term leases) by the *Property Law Act 199-*”

Second Schedule, Form B, clause 16

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199-*”

Second Schedule, Form B, clause 25

**Delete:** “by distress under the *Distress and Replevin Act 1908* or otherwise”

Second Schedule, Form B, clause 27

**Delete:** “implied in leases by the *Property Law Act 1952*”

**Substitute:** “implied in leases (other than short term leases) by the *Property Law Act 199-*”

*Companies Act 1955* (1955/63)

section 44

**Repeal** subsection (3)

**Substitute:**

“(3) The provisions of sections 16 to 18 of the *Property Law Act 199-* apply with the necessary modifications, in relation to a power of attorney executed by a company to the same extent as if the company was a natural person and as if the commencement of the liquidation, or if there is no liquidation, the removal from the register kept for the purposes of this Act of the company was an event revoking the power of attorney within the meaning of those sections.”



Schedule 8C, clause 11

**Delete:** “landlord or other” where it twice occurs

*Trustee Act 1956* (1956/61)

section 14

**Insert** after subsection (6A):

“(6AA) Where, under a marriage settlement of land, there is a tenant for life in possession, a trustee may exercise a power conferred by subsection (1)(a) or (1)(b) of this section only at the request in writing of the tenant for life.”

*Public Trust Office Act 1957* (1957/36)

section 127(1)

**Delete:** “the *Property Law Act 1952* or”

section 129(2)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199*—”

*New Zealand Society of Accountants Act 1958* (1958/42)

section 12(1)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199*—”

*Reserves and Other Lands Disposal Act 1958* (1958/58)

section 13(5)

**Delete:** “clause eight of the Fourth Schedule to the *Property Law Act 1952*”

**Substitute:** “clause 11 in Part 1 of the Fourth Schedule to the *Property Law Act 199*—”

**Delete** from the first proviso: “section one hundred and fifty-two of the *Property Law Act 1952* referred to in the said clause eight”

**Substitute:** “section 105 of the *Property Law Act 199*—”

**Delete** the second proviso

**Substitute:** “Provided also that the period of the notice required by section 105 may be modified or extended by agreement between the Public Trustee and the lender where the advance is made pursuant to paragraph (a) of subsection (3) of this section.”

*Forestry Encouragement Act 1962* (1962/20)

section 5

**Repeal** subsection (10A)

**Substitute:**

“(10A) Forestry encouragement agreements, whether entered into before or after the commencement of this subsection, shall be deemed to be

mortgages for the purposes of section 87 of the *Property Law Act 199-*; and the Minister shall be deemed to be a mortgagee of the leasehold estate or interest for the purposes of section 206(1)(a) of that Act.”

*Innkeepers Act 1962* (1962/140)

section 10

**Delete:** “for the rent of the inn or any other claim”

*Family Benefits (Home Ownership) Act 1964* (1964/32)

section 13(7)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199-*”

**Delete:** “the Fourth Schedule to that Act”

**Substitute:** “Part 1 of Schedule 4 to that Act”

*Building Societies Act 1965* (1965/22)

section 2

**Delete** the definition of ‘Land’

**Substitute:** “‘Land’ has the same meaning as in the *Property Law Act 199-*; and includes a licensee’s interest under any licence to occupy within the meaning of section 121A of the *Land Transfer Act 1952* or under a deferred payment licence within the meaning of section 65 of the *Land Act 1948*:”

section 56G

**Delete:** “section 79 of the *Property Law Act 1952*”

**Substitute:** “section 82 of the *Property Law Act 199-*, and without affecting section 9 of that Act,”

*Trustee Companies Act 1967* (1967/35)

section 13(1)

**Delete:** “section 134 and subsections (1), (2), and (5) of section 135 of the *Property Law Act 1952*, and of section 399 of the *Companies Act 1955*”

**Substitute:** “sections 16 and 17 of the *Property Law Act 199-* and section 343 of the *Companies Act 1993*”

section 24(1)

**Delete:** “or the *Property Law Act 1952*”

*Insolvency Act 1967* (1967/54)

section 24(4)

**Repeal** paragraph (g)

section 50(5)

**Delete:** “and no distress for rent due by the bankrupt shall thereafter be levied, but if previously levied may be proceeded with”

**Substitute:** “but distress for rent due by the bankrupt may be proceeded with if previously lawfully levied”

section 58(1)

**Delete:** “and section 60 of the *Property Law Act 1952*,”

*Minors Contracts Act 1969* (1969/41)

section 4

**Insert** after subsection (2):

“(3) A minor who is or has been married may, by deed, appoint an attorney with the power to execute any deed, make any appointment (otherwise than by will) or do any other thing which such a minor can do in person.”

*Administration Act 1969* (1969/52)

section 36

**Insert** after subsection (3):

“(4) Section 149 of the *Property Law Act 1952* shall continue to apply to any will made before the 1st day of January 1971 as if that section had not been repealed by the *Property Law Act 199-*”

section 43

**Repeal** the whole section

*Pharmacy Act 1970* (1970/143)

section 47(2)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199-*”

*Marine Farming Act 1971* (1971/29)

section 50(2)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199-*”

*Unit Titles Act 1972* (1972/15)

section 27(1)

**Repeal** paragraph (b)

section 29(4)

**Delete:** “section 120 of the *Property Law Act 1952*”

**Substitute:** “section 213 of the *Property Law Act 199-*”

*Overseas Investment Act 1973 (1973/14)*

section 2(1)

**Delete** from the definition of "Property": "the *Property Law Act 1952*"**Substitute:** "the *Property Law Act 199-*"*Housing Corporation Act 1974 (1974/19)*

section 19(4)

**Delete** from paragraph (c)(i): "within the meaning of the *Property Law Act 1952*"**Substitute:** "within the meaning of the *Property Law Act 199-*"**Delete** from paragraph (c)(ii) "the *Property Law Act 1952*"**Substitute:** "the *Property Law Act 199-*"*Cornish Companies Management Act 1974 (1974/27)*

section 8(1)

**Delete** from paragraph (d): "Foreclose," and "distrain for rent,"*Local Government Act 1974 (1974/66)*

section 567(8)

**Delete:** "section 99 of the *Property Law Act 1952*"**Substitute:** "sections 159 to 163 of the *Property Law Act 199-*"*Trustee Companies Management Act 1975 (1975/25)*

section 4(2)

**Delete** from paragraph (d): "Foreclose," and "distrain for rent,"*Contractual Mistakes Act 1977 (1977/54)*

section 8(2)

**Delete:** "section 130 of the *Property Law Act 1952*"**Substitute:** "sections 42 to 46 of the *Property Law Act 199-*"*Trustee Companies Management Amendment Act 1978 (1978/39)*

section 7

**Delete** from paragraph (d): "Foreclose," and "distrain for rent,"*Public Service Investment Society Management (No 2) Act 1979 (1979/9)*

section 6(1)

**Delete** from paragraph (d): "Foreclose,"**Delete** from paragraph (e): "distrain for rent,"*Contractual Remedies Act 1979 (1979/11)*

section 11(4)

**Delete** from paragraph (a): "section 104 of the *Property Law Act 1952*"**Substitute:** "section 174 of the *Property Law Act 199-*"

section 15

**Repeal** paragraph (g)

**Substitute:**

“(g) Sections 51 to 54 of the *Property Law Act 199–* (which relate to relief against cancellation of agreements for sale and purchase) and sections 208 to 212 of that Act (which relate to relief against cancellation of leases for breach of covenant or condition):”

*Credit Contracts Act 1981* (1981/27)

**Insert** after section 4:

“4A **Mortgages of property**

In Part I of this Act, the term “credit contract” includes a mortgage or charge over property, whether or not, but for this section, such a mortgage or charge would be a credit contract.”

*Public Works Act 1981* (1981/35)

section 221(3)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199–*”

*Law Practitioners Act 1982* (1982/123)

section 65(1)

**Delete** from paragraph (a): “within the meaning of the *Property Law Act 1952*”

**Substitute:** “within the meaning of the *Property Law Act 199–*”

**Delete** from paragraph (b): “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199–*”

section 70(12)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199–*”

*Contracts (Privity) Act 1982* (1982/132)

section 14(1)

**Delete** from paragraph (b): “The *Contracts Enforcement Act 1956*”

**Substitute:** “Sections 38 to 41 of the *Property Law Act 199–*”

**Repeal** paragraph (c)

*Life Insurance Amendment Act 1983* (1983/50)

section 40B(2)

**Delete** from paragraph (d): “Foreclose,”

**Delete** from paragraph (e): “distrain for rent,”

*Insurance Law Reform Act 1985 (1985/117)*

## section 13

**Repeal** subsection (1)**Substitute:**

“(1) During the period between—

- (a) The making of a contract for the sale of land and all or any fixtures thereon; and
- (b) The purchaser taking possession of the land and fixtures or final settlement, whichever is the sooner—

any policy of insurance maintained by the vendor in respect of any damage to or destruction of any part of the land or fixtures shall, in respect of the land and fixtures agreed to be sold and to the extent that the purchaser is not entitled to be indemnified or to require reinstatement of that land and those fixtures under any other policy of insurance, enure for the benefit of the purchaser as well as the vendor, and the purchaser shall be entitled to be indemnified by the insurer or to require the insurer to reinstate that land and those fixtures in the same manner and to the same extent as the vendor would have been so entitled under the policy if there had been no contract of sale:

Provided that nothing in this subsection shall oblige an insurer to pay or expend more in total under a policy of insurance than it would have had to pay or expend if there had been no contract of sale.”

**Repeal** paragraph (a) of subsection (2)**Substitute:**

“(a) Any claim by a purchaser against an insurer under this section, that the vendor otherwise would not be entitled to be indemnified by the insurer or to require reinstatement because the vendor has suffered no loss or has suffered diminished loss by reason of the fact that the vendor is or was entitled to be paid the purchase price, or the balance thereof, by the purchaser; or”

*Residential Tenancies Act 1986 (1986/120)*

## section 5

**Insert** after paragraph (t):

- “(u) Where the tenancy has been entered into by a leasing authority under section 7(1)(e), (f), (g) or (h) of the *Public Bodies Leases Act 1969*:
- (v) Where the Maori Trustee has leased a Maori reserve or township land under section 26 of the *Maori Reserved Land Act 1955*:
- (w) Where the lease provides for a perpetual right of renewal.”

section 6

**Repeal** the whole section

**Substitute:**

**“6 Long fixed-term tenancies**

- (1) This Act shall not apply where, before — 199– (being the date on which the *Property Law Act 199–* came into force), the premises were let for a fixed-term tenancy of at least 5 years.
- (2) So far as sections 104A to 104E, section 107A, section 107B or sections 116A to 116M of the *Property Law Act 1952* were applicable to a tenancy referred to in subsection (1) of this section immediately before — 199– [insert date on which the *Property Law Act 199–* comes into force], those sections shall continue to apply to that tenancy, as if they had not been repealed by the *Property Law Act 199–*.
- (3) Where, on or after — 199– [insert date on which the *Property Law Act 199–* comes into force], the premises are let for a fixed-term tenancy of at least 5 years, this Act shall apply, but, in the instrument creating the tenancy, the parties may include any provision notwithstanding that it is inconsistent with a provision of this Act (other than this section), or excludes, modifies or restricts the operation of a provision of this Act (other than this section); and any such provision included in the instrument shall have effect in accordance with its terms, notwithstanding anything in this Act to the contrary.”

section 58(2)

**Delete:** “the *Property Law Act 1952*”

**Substitute:** “the *Property Law Act 199–*”

section 77

**Repeal** subsection (4)

**Substitute:**

- “(4) In respect of tenancy agreements, the Tribunal shall have jurisdiction to exercise, and may exercise, all the powers conferred on a court by section 213 of the *Property Law Act 199–* (which relates to the granting of relief to the tenant against the landlord’s refusal to enter into a renewal of a tenancy agreement or to sell the landlord’s interest in the premises to the tenant).”

section 142

**Repeal** the whole section

**Substitute:**

**“142 Effect of *Property Law Act 199–***

- (1) Nothing in Part 9 of the *Property Law Act 199–* applies to a tenancy to which this Act applies.

- (2) Notwithstanding the provisions of subsection (1) of this section, the Tribunal, in exercising its jurisdiction in accordance with the provisions of section 85 of this Act, may look to part 9 of the *Property Law Act 199-* as a source of the general principles of law relating to any matter provided for in that part.
- (3) So far as the provisions of Part VIII of the *Property Law Act 1952* were applicable to any fixed term tenancy or service tenancy immediately before this Act came into force, the corresponding provisions of Part 9 of the *Property Law Act 199-* shall, so far as applicable, apply to that tenancy, but shall be read subject to the provisions of this Act.”

*Protection of Personal and Property Rights Act 1988* (1988/4)

section 57(1)

**Delete** from paragraph (c): “Foreclose”

**Delete** from paragraph (d): “distrain for rent,”

*Corporations (Investigation and Management) Act 1989* (1989/11)

section 42(1)

**Delete** from paragraph (d): “Foreclose,”

**Delete** from paragraph (e): “distrain for rent,”

*Maori Affairs Restructuring Act 1989* (1989/68)

section 43(5)

**Delete:** “expressed by the *Land Transfer Act 1952* or the *Property Law Act 1952*, as the case may be, in respect of mortgages”

**Substitute:** “implied by the *Property Law Act 199-* in mortgages over land”

*Reserve Bank Act 1989* (1989/157)

section 122(1)

**Delete** from paragraph (d): “Foreclose,”

**Delete** from paragraph (g): “distrain for rent,”

*Defence Act 1990* (1990/28)

section 92(3)

**Delete:** “from distress and”

*Resource Management Act 1991* (1991/69)

section 11(1)

**Delete** from paragraph (d): “section 129B of the *Property Law Act 1952* (which relates to the granting of access to land-locked land)”

**Substitute:** “sections 242 to 246 of the *Property Law Act 199-* (which relate to the granting of access to landlocked land)”



*Tē Ture Whenua Māori Act 1993* (1993/4)

section 21

**Delete:** “sections 118 and 119 of the *Property Law Act 1952*”

**Substitute:** “sections 208 to 212 of the *Property Law Act 199–*”

section 22

**Delete:** “section 120 of the *Property Law Act 1952*”

**Substitute:** “section 213 of the *Property Law Act 199–*”

section 23

**Delete:** “conferred on the District Court by subsections (1), (2), and (4) of section 128 of the *Property Law Act 1952*”

**Substitute:** “conferred on a court by section 236 of the *Property Law Act 199–*”

section 24

**Repeal** the whole section

**Substitute:**

**“24 Power of Court to grant relief where building is on wrong land or there is an encroachment**

The Court may exercise with respect to Māori freehold land all of the powers conferred on a court by sections 237 to 241 of the *Property Law Act 199–*”

section 107

**Delete:** “Sections 37 and 38 of the *Property Law Act 1952*”

**Substitute:** “Section 28 of the *Property Law Act 199–*”

*Historic Places Act 1993* (1993/38)

section 6(9)

**Delete:** “section 126G of the *Property Law Act 1952*”

**Substitute:** “section 235 of the *Property Law Act 199–*”

*Human Rights Act 1993* (1993/82)

section 2

**Repeal** the definition of “dispose”

**Substitute:** ““Dispose”, in sections 53 and 54 of this Act, includes sell, assign, lease, let, sublease, sublet, license, or mortgage, and agree to dispose; and “disposition”, in sections 136A to 136C of this Act, has a corresponding meaning:”

**Insert** after section 136:

**“136A Restrictions on ground of colour, race, etc to be void**

Any provision in or in connection with any disposition of property (whether oral or in writing) made on or after 10 September 1965 (being the date on which the *Property Law Amendment Act 1965* came

into force) shall be void to the extent that its effect would be to prohibit or restrict the transfer, assignment, letting, subletting, charging, or parting with the possession of the property or any part of it, by any party to the disposition or that party's successor in title, to any person by reason only of the colour, race, or ethnic or national origins of that person or of any member of that person's family.

**“136B Property dispositions by persons living together**

No disposition made by persons of any gender of property owned or to be acquired by one or more of them, made by reason of the fact that those persons are living in a relationship other than legal marriage, and no such disposition made in contemplation of living in such a relationship, shall be void or illegal as being contrary to public policy or founded upon an illegal consideration; and every such disposition, if otherwise valid, may be enforced in accordance with its terms.

**“136C Stipulations requiring sterility**

A stipulation in or in connection with a disposition of property made on or after 16 December 1977 (being the date on which the *Property Law Amendment Act 1977* came into force) shall be void to the extent that its effect is to require any party to the disposition, or any successor in title to such a party, or the spouse of any such party or successor, to be, or to undertake to become, sterile.”

*Companies Act 1993* (1993/105)

section 181

**Repeal** subsection (3)

**Substitute:**

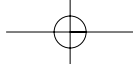
“(3) The provisions of sections 16 to 18 of the *Property Law Act 199–* apply with the necessary modifications, in relation to a power of attorney executed by a company, to the same extent as if the company was a natural person and as if the commencement of the liquidation or, if there is no liquidation, the removal from the register kept for the purposes of this Act of the company was an event revoking the power of attorney within the meaning of those sections.”

section 343

**Repeal** subsection (1)

**Substitute:**

“(1) The provisions of sections 16 to 18 of the *Property Law Act 199–* apply with the necessary modifications, in relation to a power of attorney executed by an overseas company registered under this Part of this Act, to the same extent as if the company was a natural person and as



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if the commencement of the liquidation of the company was an event revoking the power of attorney within the meaning of those sections.”

Seventh Schedule, clause 11

**Delete:** “landlord or other” where it twice occurs

*Receiverships Act 1993* (1993/122)

section 2(1)

**Delete** paragraph (c) in the definition of “Receiver”

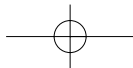
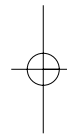
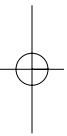
**Substitute:**

“(c) A mortgagee who, whether personally or through an agent, exercises a power –

- (i) To enter into possession of mortgaged property in a manner referred to in section 115 of the *Property Law Act 1999*; or
- (ii) To sell or otherwise alienate mortgaged property; or”

section 9

**Repeal** the whole section



# III

## Commentary on the New Property Law Act

### PART 1: PURPOSE AND APPLICATION

#### Section 1 Purpose

108 This section states the purpose of the new Act: to make the law relating to real and personal property more accessible and better suited to present and future needs by restating and developing that law and codifying it in part. The new Act attempts to restate many existing rules of property law in modern language and at the same time includes statements of principles of judge-made law. It is hoped that, whether or not the Act modifies the previous law, the statements in statutory form will make the law easier to locate, more understandable and more coherent. Full codification is attempted in relation to cancellation of leases and relief against forfeiture of leases: see s 214 (paras 656–657). Other codifications are partial, an example being the statement of rules relating to mortgagees in possession: subpart 5 of part 8 (paras 439–479).

#### Section 2 Entry into force

109 This section will state the date on which the new Act will come into force.

#### Section 3 Definitions

110 A number of the terms defined for the purposes of the Act in s 3 describe particular types of document pertaining to property or (in the case of **covenant**) a constituent element of a document.

111 A **deed**, in relation to land under the Land Transfer Act 1952, includes an **instrument** having the effect of a deed under that Act. Section 201 of that Act provides that an instrument executed for the purpose of creating, transferring or charging any estate or interest

under that Act, and signed and attested as prescribed in that section, has, as from the time of execution, the force and effect of a deed executed by the parties signing it: see Adams *The Land Transfer Act 1952* (2nd ed, Butterworths, Wellington, 1961) para 445.

112 **Instrument** is given a very broad definition: a writing or an enactment which creates or affects legal or equitable rights or liabilities. It encompasses both formal and informal documentation under which any kind of right or liability arises, as well as any **covenant** which is either expressly stated in an instrument or is implied in an instrument under the new Act or under any other enactment. **Instrument** also includes a variation of an instrument, except where otherwise provided. **Covenant**, too, is broadly defined and means a promise expressed or implied in an **instrument** or in a **short term lease** (para 125) that is not made in writing.

113 The purpose of having broad definitions (a purpose also reflected in the definitions of **mortgage** and **lease** (para 115 and 123 respectively)) is to avoid distinctions being drawn between formal (including **registered**) documents and other less formal arrangements which create or govern a legal relationship.

114 Similarly, **disposition** is given a wide definition. Except where otherwise provided, it means any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, disclaimer, appointment, settlement or other assurance. It is also defined to include the creation of an easement, profit à prendre, or any other interest in property and the creation of a trust in the lifetime of a settlor, or by will, and a devise, bequest or appointment by will in respect of property. However, not all of these kinds of disposition will always be relevant in a particular case. For example, the provision in s 49 that a person may make a **disposition** to himself or herself does not, in the nature of things, include a **disposition** under a will. Further, the provisions of the Wills Act 1837 will prevail to the extent that there is any conflict: s 7(3) (see para 161). For the purposes of subpart 2 of part 5 [Prejudicial dispositions], **disposition** is given a different meaning—that provided for in s 3 of the Insolvency Act 1967.

115 A **mortgage** is defined to include not only a legal mortgage (involving a transfer of the mortgagor's property to the mortgagee with proviso for redemption) but also a charge over property for securing the payment of money or the performance of an obligation. The term **mortgage** includes equitable mortgages and charges of all kinds. Because **mortgage** includes a charge, it is necessary to provide a

definition of **redeem** in relation to mortgaged property so as to include in that expression the right to have the property discharged from a mortgage (as well as reconveyance of property transferred to the mortgagee by legal mortgage). A **person entitled to redeem** mortgaged property is a person with an interest in it and entitled under the general law to redeem the mortgage. It includes under the general law a subsequent charge holder, a lessee and a purchaser. The definition refers expressly to the **current mortgagor**, any **former mortgagor** and any **covenantor**.

116 A **mortgagor** is *either* the original mortgagor who mortgaged or charged the property *or* someone who subsequently “accepted” the mortgaged property subject to the mortgage; that is, became its owner in circumstances rendering his or her interest in the property liable for the moneys and obligations secured by the mortgage. A **mortgagor** can be either a **current mortgagor** (ie, a current owner whether or not the original mortgagor and whether or not personally liable) or a **former mortgagor** (ie, one who has ceased to be the owner but still remains personally liable under the mortgage covenants). A **mortgagor** is distinct from a **covenantor**: one who has agreed to pay money or perform obligations secured by the mortgage. A **covenantor** and a **former mortgagor** may be liable for a **deficiency** after a mortgagee sale or a sale by receiver when the amount recovered by that means is not sufficient to meet the amount still owing to the mortgagee after the proceeds of sale have been applied under s 155 (mortgagee) or s 173 (receiver).

117 **Mortgagee** is the person to whom a mortgage is given or the assignee of such a person. A **mortgagee in possession** is a mortgagee who has exercised a power to enter into possession of mortgaged property. The concept is defined in s 115 (see paras 439–442).

118 **Encumbrance** is a wider term than mortgage. It includes a mortgage (and therefore a charge) and also a trust securing payment of money and a lien. **Encumbrance** is used in the new Act (as it is in the 1952 Act) in the sense of a security interest, rather than bearing its broader meaning of any interest burdening land, such as an easement.

119 A **mortgage** over land may secure a **rentcharge**. The term is defined accordingly.

120 A **mortgage** includes a **mortgage debenture**. That term is defined, for the purpose of the warning notices which must be given before exercise of a power of sale or other remedies (ss 105–114), to distinguish a general charge on the property of a body corporate (which will ordinarily be in the form of a floating charge or partly floating and partly

fixed charge), from a specific and fixed mortgage over particular assets. A distinction is drawn in ss 105–113 between a receivership under a mortgage and a receivership under a mortgage debenture. The intention is to modify the requirement for warning notices where enforcement action is sought to be taken under a general debenture charge by the appointment of a receiver: see commentary on s 105 (paras 402–418). **Mortgage debenture** is therefore defined as an instrument creating a charge on property of a body corporate, that property being all, or substantially all, of the assets of the chargor body corporate. The term **debenture**, except when used in the term **mortgage debenture**, means a secured or unsecured debenture.

121 A discharge sum is the sum nominated by a vendor mortgagee (one proposing to sell the mortgaged property through the Registrar of the High Court under s 159: see paras 499–511). It is the sum at which the property is able to be redeemed prior to such a sale or withdrawal of the property from such a sale, and the minimum sum at which the vendor mortgagee may buy in.

122 **Registered**, in relation to an instrument concerning land under the Land Transfer Act 1952, is defined as meaning registered under that Act. In relation to any other land, it means registered under the Deeds Registration Act 1908. The term also includes registration in Part A of the New Zealand Register of Ships (established under the Ship Registration Act 1992) and registration under the Personal Property Securities legislation proposed by the Law Commission (NZLC R8).

123 **Lease** is defined as widely as possible. It means a lease of any kind of property, whether or not registered under any of the Acts referred to in the definition of **registered**, and it expressly includes a **short term lease** and an agreement to lease. The term also includes a sublease, as that is a lease of property. A **superior lease** means a lease in respect of which a sublease is entered into.

124 A **lessor** and a **lessee** include their respective successors in title: those who have accepted a transfer or assignment of a reversion or a lease. In ss 180, 203–214 and 219, the terms are also applied to licensors and licensees: s 175(2).

125 **Short term lease** is defined in s 176 (paras 531–536). A **short term lease** is an unregistered lease of land. The term of the lease must commence not later than 20 working days after the date of contract to lease (so as to exclude future leases) and is

- a lease for a term of one year or less, or
- a periodic tenancy for periods of one year or less, or
- a statutory tenancy under s 177 (terminable on 20 working days' written notice given at any time).

126 A **short term lease** may be made orally or in writing: s 176(2). A reference to a **lease** in the Act, unless a contrary indication is given, encompasses both legal and equitable leases (ie, registered or unregistered) and any agreement that such a lease is to be granted and, in the case of a lease for one year or less or a periodic or statutory tenancy, includes an oral lease or agreement to lease. Thus no distinction is made between a lease and a tenancy, the latter being included within the definition of **lease**.

127 There are some definitions which are used in connection with the rules relating to land covenants in part 10 (paras 676–744). The definitions are in part drawn from s 126 of the 1952 Act.

128 An **occupier** of land means a lessee under a lease for a term of at least 10 years or a renewal, for a term of any length, of such a lease, or a lease validated under s 178 [Lease terminating on the occurrence of a future event], and it also includes a lessee who remains in occupation with the consent of the lessor, that is, holding over, after the term of such a lease or renewal. In subpart 1 of part 11 [Entry on neighbouring land] and subpart 4 of part 11 [Trees and unauthorised improvements on neighbouring land], **occupier**, in relation to a lease, is extended to include leases or renewals, etc, for one year or any greater term. Where subpart 1 of part 11 refers to an **occupier** of neighbouring land, *any* lessee comes within the term.

129 For the purposes of subpart 2 of part 10 [Covenants] and part 11 [Special powers of the court relating to land], an **owner** is the holder of the fee simple estate or a life estate, or the holder of a licence to occupy land within the meaning of s 121A of the Land Transfer Act 1952, or the holder of a deferred payment licence within the meaning of s 65 of the Land Act 1948 and, in relation to a public reserve, includes the local authority, trustees or persons having control of the reserve. The term owner is also found elsewhere in the Act (eg, in the definition of **current mortgagor**), where it has its ordinary meaning.

130 A **person bound** is an **owner** or **occupier** of land against whom a vehicular right of way or other easement, or a positive or restrictive covenant burdening the land, is enforceable. Conversely, a **person**



**entitled** is an owner or occupier of land who is entitled to enforce such an easement or covenant.

131 A **positive covenant** is a **covenant** including one expressed or implied in an easement under which the covenantor undertakes to do something in relation to the covenantor's land which would beneficially affect the value of the covenantee's land or the enjoyment of the covenantee's land by any person occupying it. A **restrictive covenant** is a **covenant**, including one expressed or implied in an easement, under which the covenantor undertakes to refrain from doing something in relation to his or her land which, if done, would adversely affect the value of the covenantee's land or its enjoyment by an occupier. The expression also includes a restrictive covenant in gross in an easement.

132 **Structure** means any building, driveway, path, retaining wall, fence, plantation, or other improvement. But subpart 2 of part 11 [Wrongly placed structures] requires disputes concerning fences to be resolved, if possible, under the Fencing Act 1978: s 238(2).

133 **Territorial authority** has the same meaning as in the Local Government Act 1974.

134 **Vehicular right of way** is essentially defined in the same way as "Easement of vehicular rights of way" is defined in s 126 of the 1952 Act. It is an easement entitling owners or occupiers of land benefited by an easement to pass with a vehicle over the burdened land. The easement must have been created by an **instrument registered** under the Land Transfer Act 1952 or by a contract or arrangement that is otherwise enforceable at law or equity against the **person bound**.

135 Certain other definitions relate to types of property. The first of these is, of course, **property** itself, which is defined to include everything capable of being owned, whether it is real or personal and tangible or intangible. It includes any debt and any thing in action (as to which, see further definitions in s 42). It also includes any estate or interest in property. It may be situated in any part of the world, although, in relation to **land**, it is restricted to land in New Zealand: see commentary on s 7 (paras 157–161).

136 **Land** includes estates and interests, whether freehold or chattel, in real property, so it includes a lease of land. The new Act, therefore, departs (as did the 1952 Act) from the historical origins of the lease—as a hybrid between real and personal property—and deals with a lease as an interest in land. **Land under the *Land Transfer Act 1952*** is

defined by reference to s 10 of that Act. It should be noted that this is not limited to land in respect of which a Torrens title has been issued, and includes land alienated or contracted to be alienated from the Crown in fee. **Land not under the *Land Transfer Act 1952*** means all other land to which the Act applies.

137 **Goods** are defined in the same manner as in the Law Commission's proposal for a Personal Property Securities Act (NZLC R8); namely, as tangible personal property other than chattel paper, a document of title to goods, a negotiable instrument, a security or money. The definition includes crops and the unborn young of animals, but not trees until they are severed or minerals until they are extracted. It also includes ships but, under s 4(5)(b)(viii) of the draft Personal Property Securities Act, a security interest does not include a transaction in relation to a registered ship or a ship which is required to be registered.

138 **Ship** is defined in terms of a ship registered in New Zealand under Part A of the New Zealand Register of Ships established under the Ship Registration Act 1992. It also includes any share of a ship. Any other ship (ie, a ship registered under Part B of that register or a ship registered overseas or an unregistered ship) to which the new Act applies, in terms of s 7, will be **goods** for the purposes of the Act.

139 Two of the definitions in s 3 relate to the control exerted on a mortgagee. The definitions apply to the mortgagee who wishes to call up payment of moneys owing under the mortgage before the maturity date where there has been a breach by the mortgagor, or some other event has occurred which triggers the right to require early repayment.

140 **Default** is defined in s 3 as meaning

- a failure to pay any money secured by an **instrument** on the due date or to perform or observe any other **covenant** expressed or implied in an **instrument**, or
- any other event, other than the arrival of the due date, on the occurrence of which any moneys secured by an **instrument** become payable, or may be called up as becoming payable, under any term expressed or implied in an **instrument**.

141 Lastly, in relation to this group of definitions, **acceleration clause** means a term expressed or implied in an instrument under which, by reason of a **default**, any moneys secured by a mortgage become payable, or may be called up as becoming payable, on a date earlier than that on which they would otherwise have become payable.

142 The definition of **acceleration clause** is linked back to the definition of **default**. These definitions are used in ss 105–114 (paras 402–438). Their purpose is to ensure that, in circumstances where a warning notice must be given before remedies are exercised, that notice must be given in all circumstances categorised as giving rise to call up the mortgage moneys. In other words, the mortgage documentation may prescribe the same consequences for occurrences which are not defaults in a literal sense, as well as for those which are. The intention of the new Act is to prevent the use of this device in an endeavour to free the mortgagee from the obligations imposed in subpart 4 of part 8 (paras 399–438).

143 Section 3 also contains some definitions primarily relating to companies. **Company** is given the same meaning as that term has in the Companies Act 1955 or the Companies Act 1993, whichever applies in the particular case. **Company under the Companies Act 1955** includes a company formed and registered under that Act. **Company under the Companies Act 1993** means a company registered under Part II of that Act or a company reregistered in accordance with the Companies Reregistration Act 1993. **Overseas company** means a body corporate that is incorporated outside New Zealand. The term “body corporate” is not defined, but bears its ordinary meaning of any body corporate. **Signed** in relation to a body corporate means executed in accordance with s 9(4) (which relates to execution of deeds by bodies corporate), or signed on behalf of the body corporate by a person acting under its express or implied authority.

144 **Receiver** is given broadly the same meaning as in the Receiver-ships Act 1993. The definition of **receiver** excludes a **mortgagee in possession** or the agent of such a **mortgagee**.

145 **Creditor**, in relation to the liquidation of a company or an overseas company, includes a person who is entitled to claim that a debt is owing to that person by the company under s 277 of the Companies Act 1955, or by the company or the overseas company in accordance with s 303 of the Companies Act 1993, as the case requires. In relation to the bankruptcy of an individual, it is defined as a person who is entitled to prove a debt or liability under s 87 of the Insolvency Act 1967.

146 Three definitions relate to succession by operation of law. **Administrator** means a person to whom probate of the will of a deceased person or letters of administration are granted. It also includes a trustee body corporate acting as an executor or administrator under the Administration Act 1969.

147 **Bankrupt** means adjudged bankrupt and includes the case where a person has died and an order for the administration of that person's estate has been made under the Insolvency Act 1967.

148 **Official Assignee**, in relation to a **bankrupt**, means an Official Assignee or Deputy Assignee appointed under the Insolvency Act 1967 and having charge of that person's estate. In relation to a person who has died and whose estate has been ordered to be administered by an appointee within the meaning of s 159 of that Act, **Official Assignee** includes such an appointee.

149 There are also two definitions relating to courts. **Court** itself means, in relation to any matter, the court by which a matter falls to be determined. The definition is intended to make it clear that a foreign court may apply the Act in a matter governed by New Zealand law. As to the jurisdiction of a District Court under the new Act, see s 262 and commentary (paras 768–771). Where there is a reference to **court** in any section, it will be necessary to refer to s 262 to see whether a District Court has jurisdiction in that case and, if so, whether there is any limit to that jurisdiction. But nothing in the new Act limits the general jurisdiction of a District Court conferred under the District Courts Act 1947.

150 **Registrar** means, except as otherwise provided, the Registrar of the High Court. Where the Act is referring to a Registrar of a different kind (such as a District Land Registrar or the Registrar under the Ship Registration Act 1992) an indication is given on each occasion. In ss 100 and 102, which concern the discharge of mortgages by the court (where the District Court has a limited jurisdiction), the expression means the Registrar of the court by or before which the matter falls to be determined. In certain sections relating to reports to be made by mortgagees in possession of property of a body corporate, **Registrar** means the Registrar discharging the powers, functions and duties under the relevant enactment (eg, Registrar of Incorporated Societies).

151 There are also some miscellaneous definitions:

- **Address** means the actual or last-known place of residence or business of a person except where the context otherwise requires. The term has specific reference to the giving of notices.
- The expression **co-owner** means a tenant in common or a joint tenant. **Joint tenants** in part 9 includes tenants in common.
- **Income** in relation to land includes rents and profits.

- The expression **periodical payment** appears in ss 102 and 258. It is defined in s 3 as a payment in respect of a fixed or ascertainable period in the nature of income in the hands of the recipient. The definition specifically excludes instalments of purchase price, repayment of capital or capital gain. A **periodical payment** can be one bearing various names, including rent, rentcharge, salary, pension, bonus, dividend, interest or outgoing. But it does not include an annual sum payable to a person entitled to it under a policy of assurance.
- **Working day** means any day of the week other than a weekend or public holiday (Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday and Labour Day) and the period commencing 25 December and ending 5 January in the following year. Working day also excludes the day observed as the anniversary of any province in which an act is to be done.

#### Section 4 Interpretation

152 Section 4(1) deals with references in the Act to the acquiring, claiming or deriving of title "through" some person and extends that concept to the acquisition of title pursuant to s 41 of the Land Transfer Act 1952. Technically, where an instrument is registered under that Act, it is the registration of the instrument which passes legal title to the person intended to benefit under the instrument. Title does not pass from the transferor or mortgagor but, rather, is created by the registration. Subsection (1) ensures that, nevertheless, such a title is, for the purposes of the new Act, one which is acquired, claimed or derived "through" the person who formerly had title. This will include a situation in which the registration conferred title, notwithstanding the fact that the instrument which was registered was a nullity.

153 In many places, the Act refers to the "coming into operation" of an instrument. The term is also used in relation to the transitional provisions of the Act. Subsection (2) explains that the term means in the case of a will, the date of death of its maker; in the case of an enactment (ie, an Act of Parliament or subordinate legislation), the date on which it comes into force; and in any other case, the date on which the instrument is first executed by one of the parties to it. If one party has signed an instrument before the Act commences, that instrument is treated as having operated before that time; but for other purposes the instrument will usually not at that point have "come into force" (an expression used occasionally in the Act, for example, in s 86: relating in subs (2) to the commencement of the Act, and in subs (1) to the point at which, in accordance with ordinary principles, a mortgage takes effect).

### **Section 5 Attorney or agent may act**

154 Except in relation to the service of notices (governed by ss 259 and 260, where the question of agency to receive notices is expressly dealt with (paras 754–766), and in cl 7(1)(a) of schedule 1 relating to deeds system land), whatever the Act requires or authorises to be done or suffered by a person may be done or suffered by that person's duly authorised attorney or other agent. This provision avoids the need to refer to attorneys or agents throughout the Act.

### **Section 6 Crown bound**

155 The Law Commission, in its report on the Acts Interpretation Act 1924 (NZLC R17), recommended that the Crown should generally be subject to statutes. The report proposed that a new Interpretation Act should contain a provision stating that every enactment binds the Crown unless it otherwise provides or the context otherwise requires. Until and unless a new Interpretation Act is passed to this effect, it is necessary to provide in any new statute for the Crown to be bound in order to achieve this. The 1952 Act did not bind the Crown, although certain sections, of recent origin, were expressed to do so. In NZLC PP16 (para 35), we called for comment on the suggestion that the new Act should bind the Crown. No submission was of the contrary view. We confirm that all provisions of the new Act should bind the Crown.

156 Specific statutes concerned with Crown land, such as the Land Act 1948, will override the general provisions of the new Property Law Act: see s 7(3).

### **Section 7 Application of Act**

157 In principle the new Act is to apply to

- all land in New Zealand,
- all other property, wherever situated, to the extent that any matter in relation to it is governed by New Zealand law, and
- all instruments wherever executed, and whether coming into operation before or after the coming into force of the new Act to the extent that New Zealand law governs any matter in relation to them for which the Act provides: subs (1).

158 The Act will apply subject to normal choice of law principles. Section 7(1) sets out the application of the Act in standard choice of law terms. It is not, however, a codification. If a choice of law issue arises, it will still, generally speaking, be necessary to examine the conflicts rules of the relevant jurisdiction. However, the section should alert the user of the Act to the possibility of such an issue.

159 Reference should also be made to the transitional provisions in s 264 which ensure that, unless the Act provides expressly to the contrary, an instrument which was valid and enforceable before the new Act comes into force will not be invalidated. But, equally, the new Act will not validate or make enforceable an otherwise invalid or unenforceable instrument executed before the Act comes into force: see definition of **instrument** in s 3 (para 112). Many sections apply only to instruments coming into operation after the coming into force of the Act. For example, subpart 5 of part 9 applies to transfers and assignments of leases where the transfer or assignment occurs after that time (whether or not the lease was in operation before that time). But, because the subpart applies to post-Act assignments of pre-Act leases, s 198, dealing with the effect of the assignment upon an assignor's ongoing liability, will apply to a pre-Act lease.

160 Subsection (2) provides that the Act does not apply to Maori customary land under Te Ture Whenua Maori Act 1993.

161 Subsection (3) provides for the new Act, which is of general application, to be subordinate to other enactments of special application: *generalia specialibus non derogant*. It is most important in reading the new Act that this subordination be borne in mind. In particular, the new Act will be subject to the Land Transfer Act 1952 (which is confirmed by s 244 of that Act) and Te Ture Whenua Maori Act 1993. In some instances, sections of the new Act reverse the general rule and are expressed to override other statutes: see, for example, ss 10 and 262. The term "enactment" is used to include both statutes and subordinate legislation: see s 24(1) (NZLC R17).

### **Section 8 Provisions having effect only in relation to land not under the *Land Transfer Act 1952***

162 Schedule 1 contains provisions brought forward from the 1952 Act which are intended to be applicable only to deeds system land. Dealings with deeds system land are exceptionally rare. Where such land is found, it is in practice brought within the provisions of the Land Transfer Act 1952 and then dealt with as such. Deeds system land is land outside the land transfer system which is not land owned by the Crown. As to when land is land transfer land, see s 10 of the Land Transfer Act 1952, noting particularly that land may be land transfer land though no certificate of title has been issued in respect of it. Maori customary land is not affected by the provisions in schedule 1: s 7(2).

## PART 2: DEEDS AND OTHER INSTRUMENTS

### Section 9 Requirements of a deed

163 A **deed** includes an instrument having the effect of a deed under the Land Transfer Act 1952: see definition in s 3 (para 111).

164 Section 9 lays down certain formal requirements for the creation and delivery of a deed. The formalities for execution can be contrasted with those required for the execution of instruments under the Land Transfer Act 1952: see ss 157 and 161 of that Act. The section replaces ss 4 and 5 of the 1952 Act. It relates to, but does not affect, the validity or enforceability of instruments executed as deeds before the coming into force of the Act: s 264(4) and (5).

165 Section 9 requires a deed to be in writing. Different requirements are set out for execution by individual (ie, natural) persons, by bodies corporate and by the Crown. Witnessing must be as required by subs (6). The signature of a natural person, or of one person only on behalf of a body corporate or the Crown, requires witnessing (ie, signature only) by at least one person who is not a party to the deed: subss (3), (4) and (5). That is all that is required if the deed is signed outside New Zealand by the person whose signature is being witnessed. Where a deed is signed in New Zealand, the person witnessing the signature must, in addition to signing his or her name as witness, add the name of the city, town or locality where that person lives and that person's occupation or description: subs (6).

166 Section 9(4) deals with execution of deeds by bodies corporate. There are three possibilities. First, the execution of a deed by a body corporate can be done in accordance with subs (4)(a), that is, by signature in the name of the body corporate by two or more of its directors; or, if there is only one director, by that director; or, if the constitution of the body corporate so provides, by one director or another person or member of a specified class of persons. In each of these cases, the signature must be witnessed, if so required, in accordance with subs (6). This method of execution may be used regardless of the requirements of any other enactment relating to execution of deeds by a body corporate: subs (4)(a).

167 Secondly, execution can still be effected in accordance with any other enactment: subs (4)(b). The third possibility applies only to deeds executed by a body corporate not incorporated by or under the law of New Zealand. They may be executed in a manner which would be



authorised by the law of the place in which the body corporate is incorporated if the obligation had been entered into there and had been governed by that law.

168 Express provision is made for execution by the Crown. A deed may be signed on behalf of the Crown by one or more Ministers of the Crown or other officers or servants of Her Majesty the Queen in right of New Zealand with express or implied authority to do so: subs (5). The signature must be witnessed if only one person signs on behalf of the Crown: subs (6).

169 Section 9(4) does not repeat the irrefutable presumption of regularity of a deed executed under seal or by a certifying attorney now found in s 5 of the 1952 Act. Indeed, for a New Zealand body corporate there will be little or no significance in the use of a common seal. In the case of companies under the Companies Act 1993, a seal will be an “optional extra”: s 181 of that Act. Sealing by a body corporate which actually has a common seal will be unnecessary: subs (4)(a).

170 The new section does not bring forward the statement in s 6(3) of the 1952 Act that sealing (by an individual), formal delivery and indenting are not necessary. As those requirements have already been abolished, it is unnecessary to repeat the abolition. However, s 6(3) deals with *formal* delivery. Section 9(7) and (8) of the new Act now provides express rules relating to delivery. A deed is to be binding when delivered by the person to be bound by it, or by another person (eg, a solicitor) having express or implied authority to deliver it on behalf of the person to be bound. Delivery will have occurred when it is apparent from the circumstances that the person sought to be bound intended to be bound by the deed, or when any condition precedent to the entry into force of the deed has been fulfilled. A deed which has been delivered is to enter into force upon any date specified in the deed. Where there is no such provision, it will enter into force on delivery or upon the fulfilment of any escrow.

171 The present law is that the making of an unauthorised material alteration to a deed without consent of all parties renders it void. Section 9(9) abolishes that rule. Any such alteration will have no more nor less effect than an unauthorised alteration to any other document.

172 Section 9(10) confirms the rule that, in order for an attorney to be empowered to execute a deed, that person must have been appointed as attorney by deed. (For a modern illustration in relation to the appointment of a receiver by a writing signed by a debenture holder pursuant to a debenture deed, see *Phoenix Properties Ltd v Wimpole Street*

*Nominees Ltd* [1992] BCLC 737.) The subsection also makes it apparent on the face of the legislation that nothing in s 9 prevents execution of a deed on behalf of a body corporate by a duly appointed attorney.

### **Section 10 Obligations entered into by bodies corporate**

173 This section applies to contracts or other enforceable obligations of a New Zealand body corporate, or contracts or other such obligations of any body corporate when they are entered into in New Zealand, or contracts or other such obligations whose proper law is the law of New Zealand. The section overrides other statutes. It provides that, where a deed is required, the body corporate can enter into it by a deed or instrument executed by the body corporate, as provided in s 9(4).

174 If a deed is not required, the contract or other enforceable obligation may be entered into on behalf of a body corporate by any person acting under the express or implied authority of the body corporate. Where the law requires the obligation be entered into in writing (see ss 38, 39 and 40), someone must sign on behalf of the body corporate. So s 3(3) of the Public Bodies Contracts Act 1959—prohibiting oral contracts by a public body for any sum exceeding \$1000—will continue to have its full force. In other cases, the obligation can be entered into orally or in writing.

### **Section 11 Construction of supplementary or annexed deed**

175 The equivalent section in the 1952 Act (s 8) did not apply to land transfer land. Section 11 must be read subject to the Land Transfer Act 1952: see s 7(3).

### **Section 12 Receipt in body of deed**

176 This section repeats the substance of s 6 of the 1952 Act. A receipt within the text of a deed has the same force as one endorsed upon the deed. Any rule of law to the contrary is abolished.

### **Section 13 Powers of appointment**

177 This section combines ss 9 and 11 of the 1952 Act. It applies the requirements concerning execution, in s 9 of the new Act, to powers of appointment. If a power of appointment is exercised in the manner prescribed by s 9, it is unnecessary to comply with any other or additional formalities prescribed by the instrument conferring the power. The section does not apply to the exercise of a power of appointment by will, since the formalities in that case are prescribed by the Wills Act 1837.

### **Section 14 Disclaimers**

178 This section repeats the substance of s 12 of the 1952 Act but deletes the reference to a court of record. The authority of the **court** will depend upon its general jurisdiction: see definition in s 3 (para 149). In the case of a disclaimer relating to registered land, it will also be necessary to complete the process for registration of an instrument under the Land Transfer Act 1952.

### **Section 15 Specific performance of voluntary promises made by deed**

179 When a voluntary promise is contained in a deed, it is binding on the promisor at law and damages can be awarded for failure to carry out the promise. But equity will not assist a volunteer and, therefore, specific performance is not available for a voluntary promise. This new section reverses the equitable rule: a court is not to refuse to enforce a voluntary promise in a deed on the ground that there was no valuable consideration for it. Where a promise would have been enforceable if consideration had been given for it (eg, a promise to assign future property of the assignor—as to which see subpart 2 of part 4 and commentary (paras 241–264)), it will be enforced despite the absence of consideration if it is made with such formality as is required to embody it in a deed. A deed executed before the Act comes into force will not become enforceable in equity under the section: s 15(2).

### **Section 16 Powers of attorney**

180 This section, together with ss 17 and 18 (and schedule 2), will replace Part XII of the 1952 Act (ss 134–139) and the Eighth Schedule to that Act. Section 134A of that Act is moved to the Minors Contracts Act 1969 (as a new s 4(3); see schedule 9).

181 Subsection (1) confirms the general rule that anything done by an attorney on behalf of the donor of the power that is within the attorney's powers, and while the power of attorney continues in force, is as effectual in law as if done by the donor. But this is subject to compliance with subs (2) and to the rule in s 9(10) that an attorney executing a deed must have been appointed by deed. A power given by a minor will not be valid except where the minor is or has been married: s 4(3) of the Minors Contracts Act 1969, replacing s 134A of the 1952 Act: see schedule 9.

182 Subsection (2) deals with the making of an instrument by an attorney. It must be made in the name of the donor, and state that it is being executed on the donor's behalf by the attorney. It must otherwise

be executed as would be required if the attorney were a party to the instrument.

### **Section 17 Continuation in force of power of attorney until notice of revocation received**

183 Subsection (1) sets out the basic rule: a power of attorney, unless it provides otherwise, will continue in force until actual receipt by the attorney of notice of an event of revocation. Notice to the person dealing with the attorney will not in itself revoke the power, but such a person could not rely upon a certificate of non-revocation because subs (2) makes good faith and lack of notice of the event a prerequisite to reliance on the certificate. The words at the beginning of subs (1), “unless it provides otherwise”, are intended to permit the giving of irrevocable powers of attorney: see s 18 (para 187).

184 Subsection (2) provides for the making of and reliance upon certificates of non-revocation in the form set out in schedule 2. A certificate in due form can be relied upon by those dealing with an attorney in good faith and without contrary notice, that the power of attorney has not been revoked at the date of the certificate. Sections 16–18 do not distinguish between powers given by individuals and bodies corporate, but the prescribed form of certificate contains alternative wordings for them. In the case of a body corporate, a director or officer or other agent can give the certificate.

185 Subsection (3) provides that the giving of a false certificate, with the knowledge that it is false, is an offence, punishable by a fine of up to \$5000.

186 The section does not carry forward the present requirement in s 135 that a person relying upon a certificate must have given valuable consideration. Nor, where the certificate relates to the execution of an instrument, is there to be any requirement that the certificate be endorsed on the instrument.

### **Section 18 Irrevocable powers of attorney**

187 The section applies to a power of attorney expressed in the instrument to be irrevocable, or irrevocable for a fixed period. Such a power is not revoked by notice of an event which would otherwise revoke it—in the latter case, within the fixed period. But, if valuable consideration has not been given for the power of attorney, it can be irrevocable only for one year after the date of the instrument or for any shorter period stipulated in the instrument.

### **Section 19 Construction of instruments**

188 This section replaces ss 13 and 70 of the 1952 Act. In relation to the word “month”, it omits the present limitation to express or implied covenants in instruments executed on or after 5 December 1946. The new section includes a construction of “person” which encompasses a body corporate and recognises the neuter gender. The section will apply to instruments executed before or after the new Act comes into force to the extent that New Zealand law governs any matter relating to them: s 7(1)(c). As to implied covenants, see the definition of **instrument** in s 3, which includes them (para 112).

## **PART 3: ABOLITION OR MODIFICATION OF COMMON LAW RULES AFFECTING PROPERTY**

189 Part II of the 1952 Act contains a miscellany of sections which abrogate or modify some basic common law rules relating to property. Although the modifications are expressed, the underlying rules often are not. The approach taken in the new part 3 is to state rules in their modified form so that the intention of the legislation and the modified legal position is made clearer.

### **Section 20 Feudal incidents of an estate in fee simple abolished**

190 Section 20 is concerned with freehold (or fee simple) estates and contains declarations having the following effect:

- All such estates granted by the Crown at any time confer freehold tenure without obligations in the form of services to the Crown.
- Fee simple estates are freely transferable.
- Subinfeudation of an estate in fee simple is prohibited: therefore, any attempt to create a fee simple out of a fee simple operates as a conveyance of the fee simple without any reservation.

191 All these propositions have always been true in New Zealand, so the provisions are merely confirmatory. However, the lacuna referred to as a possibility in para 131 of NZLC PP16 is removed. The transferability of other estates, interests and rights is covered by s 25(1). Section 20 must be read subject to the terms of any other statute: s 7(3). The section replaces the Statute of Westminster III 1289-1290, known as *Quia Emptores*, the history of which is briefly discussed in NZLC PP16 paras 126–132. If the Law Commission’s proposals in NZLC PP20 are proceeded with and adopted, references to allodial ownership would replace references to fee simple and it would then be unnecessary to prohibit subinfeudation.

### **Section 21 Abolition of obsolete estates and rules**

192 This section confirms the abolition, in earlier Property Law Acts, of certain estates and rules (including estates tail): see ss 15–17 of the 1952 Act. Any attempt to create an estate tail creates an estate in fee simple. Subsection (3) provides for the meaning to be given to wording in an instrument affected by the abolition of the rule in *Shelley's* case: see s 22 of the 1952 Act.

### **Section 22 Future estates and interests**

193 This section confirms that estates and interests in property (including leases) can be created so as to take effect at a future time: see ss 18 and 19 of the 1952 Act. However, the power to do so will continue to be limited by the rule against perpetuities, as modified by the Perpetuities Act 1964.

### **Section 23 Doctrine of *interesse termini* abolished**

194 This new provision is included, as a matter of precaution only, against the remote possibility that this doctrine still survives in New Zealand. At common law a tenant had to perfect title by taking possession; until this occurred the tenant had no estate, merely a proprietary right—“an interest of a term”—coupled with the right to take possession in terms of the lease: Hinde, McMorland and Sim *Land Law* (Vol 2, Butterworths, Wellington, 1979) para 5.014. The section confirms that there is no need to perfect title in this manner, so that the estate of the tenant under a lease to take effect in the future arises immediately, like any other future estate.

### **Section 24 Life estate in a leasehold estate**

195 At common law it was not possible to create a life estate in a leasehold. This section, replacing s 19 of the 1952 Act, confirms the reversal of that rule.

### **Section 25 Creation and disposition of estates and interests in property**

196 This section, together with ss 22 and 24, replaces ss 18, 19 and 21 of the 1952 Act.

197 It states another basic rule concerning property, namely that estates, interests or rights of all kinds in property can be created or disposed of by a person during the life of that person or afterwards by will. The rule also applies to a body corporate during its existence. However, it should be noted that the section relates only to estates, interests or rights “that a person is capable of creating or disposing of”, so that it does not validate something which could not otherwise be done. For

example, a bare right of litigation is, for reasons of public policy, not assignable. This section does not authorise such an assignment.

198 The formalities for the creation and transfer of various property interests are found in part 4 [Form and effect of certain transactions relating to land and other property], with which s 25 should be read.

199 The wording of s 21 of the 1952 Act created doubt about whether a voluntary assignment of a debt to arise in the future in favour of the assignor could be made by deed: see *Gray Garrow and Gray Law of Personal Property* (5th ed, Butterworths, Wellington, 1968) 296–298. That is now permissible: see s 15 (para 179).

200 Subsection (2) makes it clear that the section does not enable a joint tenant to sever the tenancy by will, and thus prevents the other joint tenant or tenants receiving the interest by survivorship.

### **Section 26 Contingent remainders and interests**

201 A contingent remainder is a remainder in land expressed to take effect upon the occurrence or fulfilment of an event or condition which may never occur or be fulfilled or which may not occur or be fulfilled until after the determination of the preceding estate in the land. (There is now a definition in subs (1).) This section replaces s 20 of the 1952 Act which reversed two common law rules, namely that

- the preceding estate which supported a legal contingent remainder had to be an estate of freehold—it could not be an estate of leasehold, and
- a legal contingent remainder was void unless it was limited in such a way that it could vest during the continuance of the estate preceding it or at the moment that estate determined, and unless it did in fact so vest.

Subsections (2) and (3) respectively confirm reversal of these rules.

202 The statutory rules are also to apply to contingent interests. The distinction is illustrated thus:

A gift to A for life, then to B for life (contingent interest), and then to C if C survives both A and B (contingent remainder).

203 Section 25(2) of the 1952 Act reversed the rule that if a life estate and a fee simple remainder or reversion became vested in the same person in the same right, any intermediate contingent remainder was destroyed. Subsection (4) of the new section repeats this reversal of the common law rule.

204 The subject matter of this section is discussed in NZLC PP16 at paras 139–143.

### **Section 27 When gifts over cease to be capable of taking effect**

205 This section replaces s 23 of the 1952 Act. It ensures that a provision for a gift over in the event that a person holding an estate or interest in land has no child (or no surviving child) cannot operate once any such child has attained the status of an adult, for example, a gift to A for life, remainder to A's children who survive A, and failing that to C. In this example, the section prevents the gift over to C from operating once any child of A attains 20 even if no child of A survives A. It avoids continuing uncertainty concerning the gift. A commentary on the former section can be found at paras 144–146 of NZLC PP16. For the equivalent rule concerning property other than land, see s 29 of the Wills Act 1837.

### **Section 28 Meaning of “heirs” and similar words**

206 This section combines ss 37 and 38 of the 1952 Act. It relates to the construction in an instrument of certain words signifying family relationships. They are directed to be construed so as to confer benefit in accordance with the Administration Act 1969. Reference should be made to

- s 80 of the Administration Act 1969, which provides for the construction of references in an instrument inter vivos or a will to “any statutes of distribution”, “statutory next-of-kin” and similar references, by reference to the rules for the distribution of estates on intestacy;
- s 3(2) of the Status of Children Act 1969, which abolishes the rule of construction that words of relationship signify only a legitimate relationship. It therefore provides a gloss on the meaning of the terms “issue” and “child” and will have the like effect on expressions to be construed in accordance with the new section;
- s 16(2) of the Adoption Act 1955, by which adopted children are deemed to become the children of the adopting parents and to cease to be the children of the natural parents “for all purposes”. The subsection does not apply where the adoption order is made after the date of the deed or instrument or after the date of death of the testator or intestate.

207 Subsection (2) does not attempt to explain the concept of per stirpes used in s 38 of the 1952 Act, but instead invokes a reference to



the statutory trusts under s 78(1) of the Administration Act 1969 which sets out the concept very fully.

208 The section applies only to instruments coming into operation on or after 1 January 1953 (when the 1952 Act came into force). It is an example of an exception to s 7(1)(c).

### **Section 29 Future interests to carry accumulated income**

209 This section replaces and restates s 35 of the 1952 Act and, like it, has effect only in respect of wills and other instruments coming into operation on or after commencement of that Act (1 January 1953). It provides for the destination of income from property in which a future interest has been created, pending the future interest taking effect. It applies either from the date on which the instrument comes into operation or from any later date on which an earlier interest ceases. The future interest is to carry the income, which will accumulate during the period in question; for example, if a gift is made to A for life and then to B at age 25, and A dies before B is 25, B will receive the income which accumulates before B is 25. Reference to the statutory provisions relating to accumulations found in s 35 of the 1952 Act, has been omitted because there is no longer a statutory limitation on accumulations: s 21 of the Perpetuities Act 1964, which repealed ss 41 and 42 of the 1952 Act.

### **Section 30 Vendor's lien taken away**

210 This section restates s 28 of the 1952 Act and extends it to legal liens as well as equitable liens: see NZLC PP16 paras 185–186.

### **Section 31 Voluntary or equitable waste by a life tenant or lessee**

211 This new section renders a life tenant or a lessee of land liable to pay damages to the person entitled to the reversion or remainder for the torts of voluntary waste and equitable waste unless the grant of the life estate or lease provides otherwise. A reversion is an interest in land held by an owner of an estate who has granted out of it a lesser estate but has not disposed of the whole estate. A remainder is an estate in land which takes effect in possession on the determination of all preceding estates. Where A grants a lease to B, A has the reversion in the land. Where A grants a life estate to B and the residual interest to C, C's interest is a remainder and will take effect in possession when B's life estate comes to an end on B's death. The subject of life estates and their relationship to reversions and remainders is discussed in greater depth in NZLC PP20.

212 The tort of voluntary waste involves taking certain action in relation to premises whereby their nature or character is altered in a permanent way to the prejudice of the person entitled to the reversion or remainder. A lessee who alters buildings on the land in a manner which damages the interest of the lessor commits voluntary waste and can be sued in tort by the lessor. However, this is rarely necessary since ordinarily the action just described will constitute a breach of the lease contract as well and the lessor will sue in contract. But the action in tort may be of assistance to a lessor where the lease covenants are inadequate; for example, in relation to the destruction of trees on the property, or where someone encourages or directs the lessee to cause damage to the property. In *Mancetter Developments Ltd v Garmanson Ltd* [1986] 1 QB 1212, a director of a tenant company was found liable and ordered to pay damages, because he had caused the company to commit voluntary waste by removing trade fixtures without reinstatement of holes made in the outside walls during their installation.

213 The covenants implied in all leases under s 183 (unless negated) include a covenant by the lessee not to commit, or permit any agent contractor or invitee to commit, the tort of voluntary waste in relation to the leased premises: see cl 4 of part 1 of schedule 5.

214 Equitable waste occurs only where the life tenant or lessee has the right to commit waste (a lease granted “without impeachment for waste”) but the grantee then does, in relation to the premises, a particularly flagrant act of destruction, such as pulling down buildings, which is not covered by the dispensation. Subsection (2) provides that, where there is a grant which excludes liability for waste, or for voluntary waste, the life tenant or lessee is to remain liable for equitable waste unless the grant expressly provides to the contrary.

### **Section 32 Voluntary or equitable waste by a co-owner**

215 The need for this section, which has no counterpart in the 1952 Act, is discussed in paras 580–582 of NZLC PP16. It removes any doubt as to whether these torts of waste (as to which, see commentary on s 31: paras 211–214) can be committed as between co-owners.

### **Section 33 Permissive waste abolished**

216 Permissive waste is a failure to prevent dilapidation. As is pointed out in para 573 of NZLC PP16, in modern times an action for permissive waste is a rarity since liability for deterioration is usually addressed in the express terms of the lease or under an implied covenant, such as that found in part 2 of schedule 5 (implied by s 184). As there is no need for this tort, it is now abolished.

### **Section 34 Release of part of land from rentcharge**

217 This new section in substance repeats s 31 of the 1952 Act. Historically, a rentcharge is a rent received by someone who is not the owner of an interest in land. The burden of the rentcharge runs with the land. It confers a right to distrain if the rent is not paid. Now, however, the right to distrain is abolished (by s 215) so every rentcharge becomes a rent seck. It will burden the land in the hands of the grantor and, subject to the operation of the Land Transfer Act 1952, the grantor's successors, but enforcement remedies will not include distress. In order to avoid use of the archaism "rent seck", the new Act defines **rentcharge** in s 3 (para 119) as a rent secured by a mortgage over land. A **mortgage** includes a charge: s 3 (para 115).

218 Section 34 provides that, upon a partial release of an encumbrance securing a rentcharge, the whole of the rentcharge continues to be secured over the land which is not released from the encumbrance. The burden is apportioned if the owner of the residue is not the owner of the part released and has not consented to the release. This section reverses a common law rule. The original view was that a rentcharge was one entire right issuing out of every part of the land charged, and a release in respect of any part of the land operated as a release in respect of the whole. The rule in the section applies whether or not an encumbrance securing a rentcharge is registered (but see also s 111 of the Land Transfer Act 1952 concerning how a discharge is effected under that Act).

### **Section 35 Bodies corporate may hold property as joint tenants**

219 This section confirms that a body corporate with power to acquire and hold property can do so as joint tenant, either with individuals or other bodies corporate. Subsection (2) provides for devolution on the surviving joint tenant where a company or overseas company is removed from the New Zealand register, or any other body corporate ceases to exist. This section carries forward the substance of s 32 of the 1952 Act.

### **Section 36 Release and disclaimer of powers**

220 This section restates s 34 of the 1952 Act. It applies to a power to deal with or dispose of property (which may be one coupled with an interest). It enables a power to be released or disclaimed by deed, or to be released by contract. The release of the power extinguishes it. Where a power is disclaimed, it can no longer be exercised by the person who has disclaimed. But, unless the instrument creating the power provides otherwise, no other holder of the power who is not joined in

the disclaimer, is affected. The power can continue to be exercised by any remaining donee(s).

221 A power which is coupled with a duty (ie, one in the nature of a trust) is not within the section: subs (1). A person with such a power is bound, for so long as he or she remains a trustee, to preserve the power and to decide in his or her discretion, as circumstances arise, whether the power should be used or not. The trustee cannot by a voluntary act destroy the power: *Re Eyre* (1883) 49 LT 259.

### **Section 37 Appointments may be made among different objects**

222 This section restates s 40 of the 1952 Act. Formerly, when a special power (ie, one which can be exercised only in favour of specified persons or classes of persons) was given and an exclusive appointment was not expressly authorised, it was held by the courts of equity that each person or member of the class should have a substantial share: *Adams Garrow's Law of Real Property* (5th ed, Butterworths, Wellington, 1961) 509. The section reverses the rule and confirms the breadth of the discretion given to the holder of the power. However, it applies subject to the terms of the instrument creating the power.

## **PART 4: FORM AND EFFECT OF CERTAIN TRANSACTIONS RELATING TO LAND AND OTHER PROPERTY**

### *Subpart 1—Writing required in certain cases*

#### **Section 38 Writing required for enforcement of contracts relating to land**

223 Sections 38 and 41 bring provisions now found in the Contracts Enforcement Act 1956 within the new Property Law Act, which is where they are located in the comparable United Kingdom and Australian state legislation. The Contracts Enforcement Act 1956 is repealed: see s 264(2) and schedule 8. Section 38 governs the enforceability of contracts in respect of land (eg, sale and purchase agreements, agreements for mortgages and easements and agreements to lease, except **short term leases**: for which see s 176 (paras 531–536)). Section 38 will sit alongside s 39, which imposes formal requirements for certain forms of conveyance relating to land, and close to subpart 2 of part 4, governing assignment of choses in action, which may include debts charged on land.

224 Section 38 encompasses the species of contract which now fall within s 2(1)(a), (b) and (c) of the Contracts Enforcement Act 1956.

The wide definition of **disposition** in s 3 of the new Act should be noted (para 114). It corresponds with the similarly wide definition of that term in s 2(4) of the 1956 statute. However, it must be emphasised that s 38 applies only to a *contract* for the disposition of land. Therefore, the reference to trusts and wills in the definition of disposition is relevant only to a contract which calls for the creation of a trust or a contract for the making of a will in relation to land.

225 Section 38, like s 2(2) of the Contracts Enforcement Act 1956, requires that, to be enforceable, a contract for the disposition of land must be in writing or there must exist a written memorandum of such a contract. The contract or memorandum must also be signed by or on behalf of the “party to be charged” (which phrase is now rendered as “the party against whom the contract is sought to be enforced”). (**Signed** is defined in s 3 in relation to a body corporate.) There is no requirement that, where a contract or memorandum is signed by an agent, the agent need be appointed in writing. Section 5 authorises signature by an agent (para 154).

226 Section 2 of the Contracts Enforcement Act 1956 applies to contracts for dispositions “required by any enactment to be made by deed or instrument or in writing or to be proved by writing”. This in fact refers to s 49A of the 1952 Act, the remnant of which can now be found in the new s 39. Section 49A(5)(a) states that the section does not affect the creation of any lease of land subject to the Land Transfer Act 1952 for a term of less than 3 years or of any other land for a term not exceeding one year. In the new Property Law Act the period for an exempted lease is a term of one year or less, and such a lease is known as a **short term lease**: s 176 (para 125). A short term lease is exempted from s 38 by subs (2)(a).

227 Subsection (2)(b) preserves the exemption now found in s 2(3)(a) of the Contracts Enforcement Act 1956 for sales ordered by the court or those made through the court. As there seems to be no good purpose in continuing the exemption for alienation of Maori land, which ought to be required to be in writing notwithstanding that they have to be confirmed by the Maori Land Court, s 2(3)(b) has not been brought forward.

228 The doctrine of part performance is preserved by s 40.

### **Section 39 Writing required for certain dispositions of interests in land**

229 Subsection (1) requires a signed writing for *conveyances* of certain equitable interests in land. *Contracts* for dispositions of land

are covered by s 38. The Land Transfer Act 1952 and Te Ture Whenua Maori Act 1993 provide relatively stringent requirements for the making of conveyances of legal interests in land. Section 39(1) is therefore very much a residual section intended to catch certain conveyances which are not caught by those other provisions. (It should also be observed that cl 1 of schedule 1 contains requirements for the conveyance of legal interests in deeds system land and is a re-enactment of s 10 of the 1952 Act.)

230 Section 39(1) relates only to:

- dispositions of existing possessory interests in land, that is, transfers of squatters' rights; and
- dispositions of existing equitable interests in land or in a mixed fund, that is, one containing both real and personal property.

The word "existing" is used so as to make it clear that the section does not apply to the creation of such interests.

231 Thus s 39(1) relates to such matters as the conveyance of beneficial rights under a trust containing land, a transfer of a purchaser's interest under an agreement for sale and purchase, and a transfer of a debenture secured over land. All these interests can be disposed of only in writing signed by or on behalf of the person making the disposition. Once again, an agent need not have been appointed in writing.

232 Subsection (2) requires that an inter vivos trust in respect of land must be created in writing signed by or on behalf of the settlor.

233 Short term leases are again exempted from the operation of the section, as are resulting, implied or constructive trusts, the making or operation of wills, and the creation or disposition of land by operation of law: subs (3) and (4).

234 Section 39 replaces s 49A of the 1952 Act. Section 49A(1) presently has effect only in relation to possessory interests in land which have already come into existence (note the exemption of the original acquisition of such a possessory interest: s 49A(5)(c)). The application of s 39 to possessory interests is similarly limited. Section 49A(2) now appears as s 39(2). Section 49A(3) appears now as s 39(1) but limited to land or mixed funds. A disposition of an equitable interest in or trust of personal property only will not require a writing.

#### **Section 40 Doctrine of part performance not affected**

235 This section preserves the equitable doctrine of part performance in relation to oral contracts and conveyances relating to land.

### **Section 41 Writing required for contracts of guarantee**

236 This section moves the provisions relating to guarantees in the Contracts Enforcement Act 1956 into the new Property Law Act. Under the Contracts Enforcement Act 1956, the requirement was for a guarantee to be in writing or for a memorandum of it to be in writing signed by the party to be charged or by some other person lawfully authorised by that person. Section 41 imposes a more restrictive requirement. The contract of guarantee must actually be made in writing and be signed by the guarantor. An agent appointed to sign a guarantee need not have been appointed in writing (as to agents, see s 5 (para 154)).

237 The terms of the guarantee must be in the written document, but subs (2) brings forward in simplified form the dispensation contained in s 3 of the Contracts Enforcement Act 1956, whereby consideration for the guarantee does not have to be recorded in writing or to appear by necessary implication from a writing.

238 The definition of **contract of guarantee** in subs (3) is taken from s 2(1)(d) of the Contracts Enforcement Act 1956.

239 Because the requirements of s 41 are more strict than those of the existing law, the section is to apply only to contracts of guarantee coming into operation after the new Act comes into force: subs (1).

240 The doctrine of part performance has never applied to guarantees: *Maddison v Alderson* (1883) 8 App Cas 467, 490. An oral guarantee is not to be recognised and cannot be enforced in equity. Hence s 40 does not refer to s 41.

### *Subpart 2—Assignment of things in action*

#### **Section 42 Definitions for the purposes of subpart 2**

#### **Section 43 Application and effect of subpart 2**

#### **Section 44 How a thing in action is assigned**

#### **Section 45 Further consequences of assignment of a thing in action**

#### **Section 46 Assignment of moneys payable in the future**

#### *Introduction*

241 Subpart 2 replaces s 130 of the 1952 Act and substantially recasts the law relating to things (or choses) in action; that is, things that are enforceable only by the bringing of an action, as contrasted to things of which possession can be taken. The new subpart also brings into the statute (in modified form) some judge-made rules concerning assign-

ments of things in action. It deals with the manner in which they can be transferred or assigned either for consideration or by way of gift.

242 Assignments of things in action may be in absolute form, absolute but by way of legal mortgage, conditional, or by way of charge. Things in action include debts, beneficial interests in trust funds, and contractual rights. They may include interests in land, for example, mortgages, trusts invested in land, and mixed funds of land and personal property.

243 In s 42 the term **debt** is defined to include, as well as an obligation to pay money, an obligation to deliver or transfer property or to do or refrain from doing any thing. **Debt owing** and **payment of a debt** are likewise inclusively defined in relation to the performance of an obligation. **Debtor** has a corresponding meaning and includes a trustee. A **thing in action** is a right to receive payment of a debt (and therefore the right to have an obligation of the foregoing kind performed). It includes a part of a thing in action.

244 Things in action are legal or equitable, depending historically on how they were enforced. For example, a debt was enforced at law whereas an interest in a trust could be enforced only in the equity jurisdiction. There were significant differences in the approach of the separate courts. At common law things in action could not be assigned at all, but in equity both legal and equitable things in action could be assigned. However, the assignment was equitable only: the legal interest remained where it was beforehand.

245 An assignee of a legal thing in action had to join the assignor in any action to enforce it. This was because otherwise the assignor might sue the debtor in the common law court; but an assignor who was before the equity court could be controlled by it. Since an equitable thing in action could be enforced only in equity, this control mechanism was unnecessary in the case of an action to enforce it (eg, against a trustee) and joinder of the assignor was unnecessary. The assignor could not go off to a common law court and obtain a conflicting judgment.

246 Section 130 (like its predecessors) enables the whole title of the assignor in *either* a legal *or* an equitable thing in action to be completely transferred to the assignee and also enables the assignee to sue the debtor without joining the assignor. But it applies only in the case of absolute assignments and those which are in absolute form but by way of legal mortgage. It is inappropriate to allow full transfer of all the assignor's legal title where the arrangement between the assignor and the assignee is conditional (eg, an assignment to take effect only on



the happening of a certain event in the future) or where only an equitable security (charge) is intended.

*Formalities for legal assignments*

247 Section 44(1) deals with legal assignments of legal or equitable things in action. The section is restricted to absolute assignments (including those by way of legal mortgage: see the definition of **absolute** in s 42) and requires only a writing signed by or on behalf of the assignor. (Section 5 contains the authorisation for signature by an agent. The agent does not need to have been appointed in writing (para 154).) The signed writing is by itself effective to pass to the assignor all the rights and remedies of the assignor in respect of the thing in action and the power to give a good discharge to the debtor. This occurs regardless of whether the debtor has been given notice of the assignment or otherwise has knowledge of it. The effect of the assignment between the parties to the assignment and the effect of the assignment on the debtor have thus been separated. This has been done because those matters are already separate in equity. An equitable assignment is already effective against an assignor before notice is given to the debtor.

248 As is the case with an assignment under s 130, an assignment under s 44(1) is subject to any equities in respect of the thing in action which would, but for the subsection, have priority in relation to the rights of the assignee. Because the point at which the assignment becomes effective at law between the parties to it and the point at which notice is given to the debtor have been separated, s 44(1) spells out that equities may arise in favour of the debtor until actual notice is given to the debtor—either in writing or orally.

249 As indicated, the protection of the debtor is treated by the new section as a separate matter from the assignment. It should be observed that the present requirement in s 130 of the 1952 Act for written notice to the debtor is misleading since the debtor is exposed to a double claim *in equity* if, after receiving oral notice, the debtor pays the assignor. Moreover, the rule in *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475 (which is referred to below) requires only oral notice to the debtor. Therefore, from the debtor's point of view, it presently makes no difference whether the notice is written or oral, and there is no point in retaining a requirement of written notice for the passing of legal title from assignor to assignee.

### *Equitable assignments*

250 Section 44(1) deals with both legal and equitable things in action and controls the way in which they may be assigned *at law*. In contrast, s 44(2) deals with assignments *in equity* of legal or equitable things in action. It applies both to oral and written equitable assignments. It makes an equitable assignment effective to constitute the assignee the owner of the debt in equity if the assignee has given valuable consideration, or if the assignment is complete. Section 44(3) states that an equitable assignment is complete when the assignor has done everything needing to be done *by the assignor* to transfer to the assignee (whether absolutely, conditionally or by way of charge) the rights of the assignor in respect of the thing in action. This is even though some other thing may remain to be done, without the intervention or assistance of the assignor, in order to confer title to those rights in respect of the thing in action on the assignee.

### *Joinder of assignor*

251 Both subs (1) and (2) in s 44 operate where *part* of a legal or equitable thing in action is being assigned. As pointed out above, the definition of a thing in action includes part of a thing in action (see also s 43, which provides that where an assignment is of part only, the various rights and obligations relate only to the part assigned). These provisions change the law in relation to legal assignments under s 130, which does not extend to an assignment of part of a debt. This can at present be assigned only in equity. This restriction was imposed because it has been thought inappropriate to allow the assignee to sue the debtor where part of the debt still remains the property of the assignor. That is a valid objection. Consequently, it is provided in s 45(4) that, where part only of a thing in action has been assigned under s 44(1), the assignor must be joined in any proceeding brought by the assignee against the debtor.

252 The same rule will apply where there is an equitable assignment under s 44(2); that is, to those assignments which are conditional or by way of charge. It will also apply if an assignment is in writing but has not been signed. In all these cases it is important that the occurrence of the assignment is properly proved. The evidence of the assignor may be critical. Section 45(4) protects both the debtor and the assignor.

### *Voluntary assignments*

253 The reason for the distinction drawn in s 44(2) between an assignment given for valuable consideration and a complete equitable

assignment (with the former being effective without being complete) is the intention to preserve, in relation to incomplete assignments (except in relation to promises by deed), the rule that equity will not assist a volunteer. The mere promise of future performance requires consideration unless embodied in a deed: s 15 (para 179). At present, consideration is not required either under s 130 or for an equitable assignment which is complete in the sense that nothing further needs to be done *by the assignor*.

254 In *Olsson v Dyson* (1969) 120 CLR 365, the High Court of Australia held that, because of the existence of a provision in similar form to s 130, a donor who gave away a debt orally (“I hereby give this debt”) had not done all that could have been done to complete the gift *because a writing was not used*. This view has been doubted by text writers and it is reversed by s 44(2), which contemplates that a voluntary assignment can be a complete assignment, notwithstanding that it is done orally. It will be noted that the subsection is to apply notwithstanding any rule of equity to the contrary. It will be for the courts, taking into account the effect of s 44(2), to decide in individual cases whether an assignment is complete in terms of s 44(3).

255 A further problem with the current law relating to voluntary assignments of things in action is a line of cases (mostly concerning taxation) in which an attempt has been made to assign the benefit of all or part of a future income stream arising from an existing property interest: see *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 and *Williams v Commissioner of Inland Revenue* [1965] NZLR 395. An example of such an attempt is an assignment of all or part of next year’s rent from a current lease or next year’s income from a current partnership agreement. (This is to be contrasted with an assignment of a mere expectancy, such as all or part of the rent from a lease not yet entered into with the lessee, or an assignment of what the assignor hopes that her aunt will leave her by will when the aunt dies. We are not here considering attempts to assign, without consideration, mere expectancies; but again refer to s 15 which changes the law in relation to those effected by use of a deed (para 179). The subpart does not affect the operation of s 15: s 43(3).) No problem exists where consideration is given. The transaction binds the assignor’s conscience, and equity deems the future debt to be assigned as the assignor’s actual, rather than anticipatory, right arises; that is, when the debt or other obligation comes into existence.

256 When the “assignment” is gratuitous, the attempt fails, even though it is in relation to a right to arise under an existing thing in

action. Section 46 changes this position. It will operate in relation to assignments of money (not property generally) gratuitously assigned pursuant to an existing property interest. To overcome the semantic arguments which have dominated the case law, s 46 treats the assignment of moneys payable in the future as the assignment of a present thing in action; that is, a present right to future enjoyment of property. Notwithstanding how the assignment is expressed, it is to be regarded as an assignment of the existing right to the money, rather than an assignment of the (future) money itself. It should, however, again be emphasised that s 46 does not extend to a mere expectancy.

*Notice to the debtor*

257 Section 45(1) sets out rules relating to the notice to the debtor and is intended to be protective of the debtor. First, it is confirmed in para (a) that the debtor may safely pay the assignor where the debtor does not have actual notice of the assignment. The payment to the assignor discharges the debtor to the extent of the payment.

258 Section 45(2) deals with the effect of registration under the Land Transfer Act 1952, the Deeds Registration Act 1908, the Ship Registration Act 1992 or the proposed Personal Property Securities Act: see NZLC R8; and the definitions of **registered** and **registration** in s 3 (para 122). Section 45(2) states that registration of the assignment does not, in itself, give actual notice of the assignment to the debtor. It is only if the debtor has actual notice of the assignment that the debtor must pay the assignee.

259 However, where the debtor receives actual notice of two or more assignments, then the debtor must pay the assignee who has priority. That question of priority is determined under the general law and, in particular, the rule in *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475, under which priority depends upon the time at which actual notice is given to the debtor; the assignee who first gives notice has priority.

260 Notice to a debtor can take the form of a written notice but can be given orally or constituted by the debtor's knowledge, however that knowledge is obtained: s 45(1)(b). A requirement of written notice in order that the debtor be disbarred from paying the assignor and for the rule in *Dearle v Hall* to operate, would create a trap for a debtor who acted upon an oral notification. It would also remove protection from an assignee who did not know of the requirement that a written notice was needed. It would be counter to the policy behind *Dearle v Hall*, which is to make the debtor an unofficial "registrar" of the ownership of the debt, from whom inquiry can be made by persons proposing to

take assignments. Therefore the new section, in this respect, confirms the existing equitable rule, rather than introducing a new, and possibly over-rigid, procedural requirement concerning notice.

#### *Interpleader*

261 Section 45(1)(c) gives the debtor further protection where there is uncertainty over who to pay. The debtor can either interplead in a proceeding brought for payment of the debt or can apply to the court for an order determining the entitlement.

#### *Notice to joint debtors*

262 Under s 45(3), notice to one joint debtor constitutes notice to all of them.

#### *Things in action not capable of assignment*

263 Section 43(2) ensures that, except as provided in s 46 [Assignment of moneys payable in the future], the subpart does not make assignable a thing in action (eg, a bare right of litigation) which is not capable of being assigned.

#### *Interests in land*

264 Since the new rules may apply to interests in land, assignment of such interests are, in s 44(2), made subject to the rules in ss 38 and 39 requiring the existence of writing for certain land transactions. This will prevent, for example, an oral assignment of a mortgage being enforceable under the subpart when it is otherwise unenforceable for non-compliance with s 39.

#### *Subpart 3—Other transactions*

##### **Section 47 Effect of a “no registration” clause**

265 The perceived problem which this new section is designed to solve is discussed in NZLC PP16 paras 96–100, though the drafting of the section departs substantially from what is suggested there. In brief, the section is precautionary and is intended to ensure that the rule in *Walsh v Lonsdale* (1882) 21 Ch D 9 is not prevented from operating because of a contractual stipulation stopping the court from ordering that the holder of an equitable interest be given a legal interest, which, in relation to land transfer land, can only be achieved by registration—except in the case of a short term lease. Contracts for leases, particu-

larly of commercial premises, often contain stipulations that there shall be no registered lease.

266 The rule in *Walsh v Lonsdale* relies upon the ability of the court to treat the equitable interest as a mere contract for the grant of a legal interest. Accordingly, the new section is intended to ensure that a contract for a grant of an interest in land which contains a “no registration” clause can nevertheless operate as an equitable interest. But, so as not to override the “no registration” clause, the section also states that the court is not thereby empowered to order registration of a lease etc, to which the section relates.

#### **Section 48 Tenants in common may declare that they are joint tenants**

267 Two or more persons who have a beneficial entitlement to property as tenants in common are authorised to declare by deed that they will be joint tenants: subs (1). Subsection (2) gives effect to such a declaration as from its date. This section applies to property and therefore to land, but is to be read subject to the Land Transfer Act 1952: s 7(3). The comparable section in the 1952 Act (s 48) did not apply to land transfer land, but the principle in it should be of general application.

#### **Section 49 Person may make a disposition of property to himself or herself**

268 This section restates the rule presently contained in s 49 of the 1952 Act. A person is empowered to make a disposition of property to himself or herself, alone or jointly with another person, and the disposition is enforceable in the same manner as a disposition to another person. The section should be read with s 72, which makes covenants by a person with himself or herself enforceable in the same manner as a covenant with another person. For the definition of **disposition**, see s 3, where it is widely defined (para 114). (But the inclusion in that definition of reference to interests under a will cannot, in the nature of things, have any practical application under s 49.)

#### **Section 50 Power to reissue redeemed debentures in certain cases**

269 This section was formerly found as s 98 of the Companies Act 1955 and was brought across into the 1952 Act in 1993. It has been re-drafted. The section applies to secured and unsecured debentures at any time issued, redeemed, reissued or deposited by a **company**: defined in s 3 (para 143). A company which redeems debentures is deemed to have power to reissue them: subs (1). Reissue, by subs (4), includes the issue of a replacement debenture, but does not if that would be contrary to the company’s articles or constitution, or any contract which it has

made, or if the company has, by resolution or other means, manifested its intention that the debentures are cancelled: subs (1).

270 Where there is a reduction in the number or amount of debentures which the company may issue, the reissue does not count for that purpose: subs (4). A reissued debenture is given by subs (2) the same priority as the redeemed debenture. This provision has effect unless the debenture itself, or the deed securing it, states that the reissued debenture is to have a lower priority.

271 While debentures are deposited by a company to secure advances on current account or otherwise, they are not to be taken as being redeemed by reason only of the fact that the account ceased to be in debit: subs (3).

## PART 5: SALES AND LIKE TRANSACTIONS

### *Subpart 1—General provisions*

#### **Section 51 How vendor of land may regain possession**

#### **Section 52 Form of vendor's notice**

#### **Section 53 Relief against cancellation of agreement for the sale of land**

#### **Section 54 Application for relief not to constitute an admission**

272 These sections replace s 50 of the 1952 Act. As s 53(1) indicates, it is intended to be a code regulating the circumstances in which relief can be given to a purchaser against a valid cancellation of an agreement for sale and purchase of land. Relief against cancellation of the purchaser's equitable interest in the land should be distinguished from relief against forfeiture of moneys paid. The law governing relief against forfeiture of moneys paid is unaffected by these sections.

273 Relief against cancellation can be granted only where the purchaser has entered into possession of the land and in terms of the power conferred by s 53. Sections 51 and 52 also regulate the manner in which a vendor with a contractual right of cancellation or a right of cancellation under ss 7 and 8 of the Contractual Remedies Act 1979 may exercise that right. The vendor may exercise such a right to cancel an agreement for sale and purchase where the purchaser is already in possession only by

- obtaining a possession order from the court, or
- resuming possession of the land peaceably (without committing forcible entry under s 91 of the Crimes Act 1961).

274 The vendor must comply with s 51(2), which obliges the vendor to serve a notice under s 52(1) on the purchaser and prevents cancellation if the breach of contract of which the vendor complains has been remedied within the period specified in the notice. This period must be not less than 12 working days after service of the notice. That minimum period has been selected because it has for many years been the minimum period for a settlement notice under the widely used standard form of agreement for sale and purchase approved by the New Zealand Law Society and the Real Estate Institute of New Zealand Inc.

275 The notice must adequately inform the purchaser of the nature and extent of the breach complained of. In some relatively rare instances, the breach may not be capable of being remedied. The notice must indicate whether or not that is the case (in the opinion of the vendor). If the breach can be remedied by payment of money, the amount must be stated. Similarly, the notice must indicate whether, in the opinion of the vendor, the breach is capable of being remedied either wholly or partly by payment of compensation. So it must say what act the vendor considers that the purchaser must do or desist from doing, and must stipulate any amount of compensation which the vendor considers reasonable.

276 The fact that the vendor may not have specified that the breach is capable of being remedied by the payment of reasonable compensation, or may have specified an amount of compensation that is unreasonable, or may not have specified what amount is considered reasonable, does not invalidate the notice or prevent the purchaser from tendering an amount as reasonable compensation for the breach: s 52(2). These matters may, however, be taken into account by the court in considering whether to grant relief to the purchaser.

277 It is also provided by s 51(3) that the section is not to prevent a vendor from claiming damages for breach of an agreement for sale and purchase or for any other matter, and is not to affect the amount which the vendor may claim by way of damages. Section 51(3) is intended to overcome the difficulties presented by case law which draws a distinction between damages and compensation, the latter being directly related to breaches specified in the notice. It has been held that where compensation is not claimed in the notice, the default complained of in the notice cannot then be the subject of a later damages claim: *Lowe v Ellbogen* [1959] NZLR 103. The intention of s 51(3) is to reverse this.



278 In some cases there may be doubt in the mind of the vendor about whether a breach is incapable of remedy or whether it can adequately be remedied, in whole or part, by payment of compensation. Although the vendor is required to indicate an opinion on these matters and to state the amount of compensation which would be acceptable to the vendor, the consequence of a misjudgment by the vendor in any of these respects should not be that the notice is invalid. However, it is important that the notice should indicate to the purchaser that, whatever opinion has been expressed by the vendor, it may, depending upon the actual circumstances, be sufficient to tender a reasonable sum in compensation. Again, if the purchaser is wrong in his or her assessment of the situation and tenders compensation where that is inappropriate or does not tender enough compensation, that mistake need not be fatal. This is because, although the vendor may then validly cancel the contract, the purchaser has a right under s 53(1) to apply for relief against cancellation of the agreement.

279 If the vendor elects to cancel by applying to the court for an order for possession, the cancellation will be effective only upon the making of the order: s 51(1). The purchaser may bring an application for relief in that proceeding or in separate proceedings brought prior to the making of the court order. If the vendor re-enters peaceably and thereby cancels the contract, the purchaser must bring an application for relief within 3 months of the date of the re-entry. In either case relief can be granted with or without conditions: s 53(2). Section 53(3) enables relief to be given despite the fact that the purchaser may have broken an essential term of the contract or be incapable of remedying a breach. Section 53(4) prohibits contracting out of the section.

280 Section 54 provides that an application for relief against cancellation of the agreement is not in itself an admission by the purchaser of any of the pre-conditions to the right of the vendor to cancel. The court can proceed to grant relief without determining any of those issues.

281 “Possession” in this context means legal possession or the right to legal possession, rather than mere physical possession: *Woods v Tomlinson* [1964] NZLR 399.

282 The sections mentioned, unlike s 50 of the 1952 Act, are not concerned with a person who is in possession under a lease or licence and also holds an option to purchase the land. This situation is dealt with under s 213 (paras 648–655). There is an overlap between the sections where the purchaser is in possession under a lease or licence containing a compulsory purchase clause. Here, an application could be made for

relief under either s 53 or 213 which, in relation to relief, are consistent with one another.

283 Notices under these sections must be served in terms of ss 259 and 260 (paras 754–766).

### **Section 55 Purchaser may apply to recover deposit**

284 This section implements proposals in paras 195–205 of NZLC PP16 and applies in circumstances where the court in its discretion would not order specific performance by a purchaser of an agreement for sale and purchase of land but, because the vendor has not broken the contract or is not in serious breach, the purchaser is not entitled to cancel. An example is a failure by the vendor to point out a defect in quality (as contrasted with a defect in title). The vendor has no legal duty to disclose it, but knows that the purchaser is ignorant. The court might decline to grant specific performance but the contract is still on foot and, under present law, the purchaser's deposit is lost. The vendor may also be able to sue for damages: *Summers v Cocks* (1927) 40 CLR 321, 329–330.

285 Another example is where a vendor has a defective title, but the purchaser has failed to put in a requisition on the title within the requisition period and the defect is not sufficiently serious to stand outside the requisitions clause. The purchaser remains bound by the agreement and liable to a damages claim even if the court would refuse to order specific performance.

286 Subsection (1) restricts the application of the new section to agreements coming into operation after the new Act comes into force: see s 4(2) (para 153). It will empower the purchaser to apply to the court for an order of a kind mentioned in subs (3). These include an order cancelling the agreement, and an order that the vendor must refund the deposit and any other moneys paid. In addition, it may be ordered that the purchaser has a lien on the land to secure payment of amounts ordered to be repaid. The vendor can also be ordered to pay interest.

287 Damages for breach of contract may still be awarded to a vendor against whom an order for relief has been made. The relief is taken into account when the award is made: subs (4).

288 The jurisdiction conferred upon the court is intended to be fully discretionary, but the section has been drawn in such a way as to prevent its use by a purchaser in circumstances in which the vendor could successfully have sought a decree of specific performance.

289 Contracting out of the section is prohibited: subs (5).

### **Section 56 Waiver of contingent condition**

290 The purpose of this section is to enable a party to an agreement for sale and purchase of a property to waive the benefit of a contingent condition (such as a finance condition, or one for the sale of the purchaser's property) inserted for the exclusive benefit of that party: subs (1). This, in itself, makes no change in the law. However, subs (2) addresses the usual contractual arrangement that, upon non-fulfilment of a contingent condition, *any* party to the agreement can cancel it. It has been found that this prevents the condition being held to be for the exclusive benefit of any one party: *Moreton v Montrose Ltd* [1986] 2 NZLR 496 (see NZLC PP16 paras 206–211). Subsection (2) is intended to reverse this construction. The fact that under the agreement any party can cancel for non-fulfilment of a condition will not, in itself, prevent the condition from being for the exclusive benefit of one or more parties.

### **Section 57 Auction sales**

291 This section carries forward s 51 of the 1952 Act.

### **Section 58 Purchaser of lease to assume that lease conditions have been observed**

292 This section preserves the rule stated in s 52(b)(v) of the 1952 Act, which is the only part of that section which applies to land transfer land (see schedule 1 for the continuance of the deeds system sections). The proviso, which seems unnecessary, has been omitted.

293 Unless the agreement for sale and purchase provides otherwise, the vendor of a lease can, by producing the receipt for the last instalment of rent due before the date of settlement, satisfy the purchaser that there has been no breach of the lease and that, in the case of a sublease, there has been no breach of the superior lease. The section provides that, on the production of the receipt, there is an assumption that those things have been duly done *unless the contrary appears*.

294 Thus the section provides for prima facie proof of the matters with which it is concerned by the mere production of the rent receipt. If the purchaser wishes to establish the contrary, the burden of doing so falls on the purchaser, who must otherwise complete settlement. The terminology has been changed, “settlement” replacing “completion”, since the distinction between the two in a Torrens system context has now been established: *Montgomery & Rennie v Continental Bags (NZ) Ltd* [1972] NZLR 884.

### **Section 59 Vendor's obligations where the certificate of title is limited**

295 This section brings forward and restates, without change of substance, s 54 of the 1952 Act. It relates to a certificate of title under the Land Transfer Act 1952 which is limited as to title. A vendor of such land must before settlement do whatever is necessary to remove the limitation as to title from the certificate, meeting the expenses of so doing.

296 Subsection (2) makes it clear that the section casts no obligation on the vendor where a certificate of title is limited as to parcels only: see s 191 Land Transfer Act 1952.

### **Section 60 Specific performance of contracts to subscribe for debentures**

297 Equity will not order specific performance of a contract of loan. Section 100 of the Companies Act 1955 reversed this rule so as to enable a company to obtain a decree requiring performance of a contract to take up and pay for debentures (both secured and unsecured) to be issued by it. In 1993 the section was transferred to the 1952 Act and, with some re-drafting designed to spell out why it is necessary, is now brought forward.

### **Section 61 Effect of court orders**

298 This section brings forward and clarifies s 59(1) of the 1952 Act. In relation to registered interests under the Land Transfer Act 1952 it must, of course, be read in the light of that Act, particularly ss 62 and 99. The latter section requires the Registrar to enter in the register a memorandum of any order made by any court of competent jurisdiction vesting any estate or interest under that Act in any person. Until such an entry is made, "the said order shall have no effect in vesting or transferring the said estate or interest". Once the order is registered, the person taking under it enjoys the benefit of the protection conferred by s 62. (See, however, *Re Duncan* [1905] 8 GLR 163, holding that, if the court was not competent to make the order, the registration may be withdrawn. But that is where the person ordered to be registered remains as registered proprietor.)

299 The new s 61 protects one who acquires property for valuable consideration and without fraud or notice of fraud from someone who became entitled to property under an order of court. The protection applies if there is any defect in the jurisdiction or power of the court to make the order, or in the procedure followed in its making. It does not

matter that the person protected had notice of the defect at the time of acquiring the property from the person who had become entitled to it under the court order. Nevertheless, fraud on the part of the purchaser, or fraud by the person named in the vesting order of which the purchaser had notice, would prevent the purchaser from obtaining the benefit of the section: 37 *Halsbury's Statutes* (4th ed, Butterworths, London, 1987) 326, discussing s 204 of the Law of Property Act 1925 (UK).

300 The section has little or no practical application to registered interests: s 62 of the Land Transfer Act 1952 would protect someone who acquired the land from the beneficiary of the court order for valuable consideration. However, it will afford protection to the purchaser of an equitable interest or a purchaser of a registered (legal) interest who has not, at the time of challenge, become registered as proprietor of the estate or interest concerned.

301 The section is not limited to land, and could be relied upon by a purchaser of personal property which has previously been vested by order of the court.

302 Section 59(2) of the 1952 Act has not been repeated as subsequent changes to the law relating to administration of estates have made it unnecessary: see ss 24, 45 and 49 of the Administration Act 1969.

### **Section 62 Instrument containing receipt to be authority to pay solicitor**

303 This section is a reworking of the drafting, but not the substance, of s 56(1) of the 1952 Act which enables someone to pay money or give other consideration to a solicitor in exchange for the production to that person of an instrument, and without further authority than the fact that the solicitor has produced the instrument. In order for this to be the case, the instrument must contain or have endorsed upon it a receipt for the money or other consideration, and the instrument or receipt must have been signed by a person entitled to give that receipt. The history of the section is briefly given in *Sims v Lowe* [1988] 1 NZLR 656.

304 It is unnecessary to bring forward s 56(2) of the 1952 Act, which applies the section to a trustee, since the ground is now covered by s 29(3)(a) of the Trustee Act 1956.

### *Subpart 2—Prejudicial dispositions*

#### **Section 63 Purpose of subpart 2**

#### **Section 64 Definitions for the purposes of subpart 2 and interpretation**

**Section 65 Application of subpart 2****Section 66 Dispositions of property with intent to prejudice creditors may be set aside****Section 67 Application for an order under section 66****Section 68 Effect of order setting aside a disposition****Section 69 Protection of persons receiving property under a disposition**

305 This subpart is a reformulation and extension of s 60 of the 1952 Act, which itself derives from the Statute of Elizabeth (13 Eliz 1, c 5). The concept of recovering, for general creditors, property transferred by a debtor to put it beyond the reach of such creditors is thus a very old one indeed. The new subpart will put into statutory form much of the common law gloss which the former statutory provision has attracted. It will also clarify procedures, especially when application is made by an individual creditor and where the debtor has not yet been bankrupted or, if a company, put into liquidation.

306 The general purpose of the subpart is stated in s 63. The court is empowered to make an order that property comprised in a “disposition” made by a debtor with intent to prejudice creditors, or the value of the property, be restored for the benefit of the creditors. The subpart is intended to benefit creditors only to the extent that their claims are unsecured. Therefore, s 63 provides that no order made by the court has the effect of increasing the value of any security.

307 **Disposition** in this subpart does not have the meaning given to it in s 3. It is defined in s 64(1) in terms of the definition in s 2 of the Insolvency Act 1967, where it includes transactions which would fall within the general definition in s 3 of the new Act, but also includes the creation of a trust and any “transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his or her own estate and to increase the value of the estate of any other person”.

308 The subpart applies only to dispositions made by a debtor after the new Act has come into force: s 65. It applies to such dispositions made when the debtor was already insolvent, or where the debtor became insolvent as a result of making the disposition. It also applies to such dispositions, regardless of the solvency of the debtor at the time, if the debtor was then engaged in or about to engage in a transaction for which the assets, which were to remain in the ownership of the debtor, were unreasonably small. Further, it applies if the debtor intended at the time to incur or believed, or reasonably should have believed, at the time that he or she would incur debts beyond his or her

ability to pay: s 65(b) and (c). Section 65(b) contemplates a debtor who, for example, gifts or sells at an undervalue to a family trust when engaged in or about to embark on an undercapitalised business.

309 Section 64(2)(d) states that a debtor is to be taken as being insolvent if the debtor is unable to pay all his or her debts, if they fall due, from assets other than the property disposed of. The disposition by way of gift includes a disposition at an undervalue with the intention of making a gift the amount of the undervalue: s 64(2)(c).

310 The subpart applies to three classes of dispositions made in the circumstances which have just been discussed. The first class is dispositions which were made by a debtor with intent to prejudice creditors. A disposition prejudices creditors if it “hinders, delays or defeats” creditors in the exercise of any right of recourse in respect of the property comprised in the disposition: s 64(2)(a).

311 Dispositions which can be attacked under this subpart are to be distinguished from voidable preferences: s 56 of the Insolvency Act 1967 or s 309 of the Companies Act 1955, and see s 292 of the Companies Act 1993. A disposition with an intent to prejudice creditors does not include a disposition made by the debtor with the intention of preferring one creditor over another: s 64(2)(b). There must be an actual or deemed intention to prejudice one or more of the unsecured creditors of the debtor and not just the desire to advantage the recipient. Voidable preferences must be challenged under the legislation referred to in this paragraph.

312 The second class is dispositions made by the debtor by way of gift. The third is dispositions made by the debtor without receiving reasonably equivalent value.

313 When one of these things has occurred, an application for an order under s 66 can be made by

- a creditor claiming to be prejudiced by a disposition;
- the **Official Assignee**, where the debtor is **bankrupt** or the deceased estate of an insolvent person has been ordered to be administered by an appointee under s 159 of the Insolvency Act 1967 (see definitions in s 3);
- the liquidator of a debtor company which is in liquidation: s 67.

314 An application can be made by a creditor, notwithstanding that the indebtedness arose after the disposition was made. This confirms the position at common law, where it is recognised that a debtor may

dispose of property before embarking on a hazardous venture and incurring debts in the course of so doing, the intent of the disposition being to put property beyond the debtor's future creditors if the hazardous venture collapses.

315 The application must specify the disposition claimed to be prejudicial and the property or compensation sought: s 67(1).

316 The application and a notice setting out the effect of the procedural provisions has to be served on the person in whose favour the disposition was made and on any other person from whom property or compensation is sought: s 67(2).

317 On an application the court, if satisfied that there has been prejudice to the applicant, may make an order directing a person either to restore the property specified in the order or to pay reasonable compensation: s 66. (**Property** for the purposes of the subpart includes the proceeds of the property which was actually transferred: s 64(1). Indeed, property is defined in such a way in that section as to enable the proceeds of proceeds to be followed if there are successive conversions of the form of the property. **Proceeds** means the proceeds of the sale or exchange of the property, and, if the property or its proceeds is money, includes property bought with that money: s 64(1).) The property ordered to be restored need not be the same property as was disposed of, though it must be connected with it in this way.

318 An order may be made by the court against any person in whose favour the disposition was made or any person who acquired the property comprised in the disposition through that person. This includes someone who acquired an interest in land by registration under s 41 of the Land Transfer Act 1952: s 4. The provisions of the Land Transfer Act 1952 do not restrict the operation of the subpart: s 68(2).

319 Certain protections are provided for people who have received property pursuant to a disposition which is attacked under the subpart. The court may not make an order against a person who overcomes the burden of proving that he or she acquired the property for valuable consideration, and in good faith and without knowledge of the fact that it had been the subject of the disposition of a kind with which s 65 deals; nor may an order be made against a person who proves that he or she acquired the property through a person who acquired it in such circumstances: s 69(a)(ii). It is not necessary for the recipient of property to show that it was acquired for *full* consideration. The Law Commission suggested that possibility in para 252 of NZLC PP16, but has been convinced by submissions pointing out the problems that this



might cause in situations in which the full or fair value of the property was difficult to assess. Under s 69(a)(i) it will still be necessary for a person resisting the making of an order to prove that valuable consideration was given and that, most importantly, he or she acted in good faith etc. Where there is a significant disparity between full value and the consideration actually given, it may be difficult for the defendant to demonstrate the elements of good faith and lack of knowledge, and such a defence might then fail.

320 The court may decline to make an order, or may impose conditions upon an order, or make an order with limited effect, against a person who proves that he or she received the property in good faith and without knowledge of the fact that it had been the subject of a disposition, and that “his or her circumstances have so changed” since the receipt of the property that it is unjust to order that the property be restored or reasonable compensation be paid (in either case in whole or in part): s 69(b). The formulation concerning change of circumstances differs from that in s 58(6)(a) of the Insolvency Act 1967 and s 311A(7)(a) of the Companies Act 1955 and s 296 of the Companies Act 1993, in that it does not require that the person from whom recovery is sought “has altered his position in the reasonably held belief that the [disposition] to him was validly made and would not be set aside”. That seems to require proof of some action taken with conscious thought that the transaction would be undisturbed. In accordance with the modern understanding of the law of change of circumstance, s 69(b)(ii) will merely require a change of circumstances of any kind which makes it unjust that an order for restoration of property or payment of compensation be made.

321 Section 68(1) deals with the consequences of the making of an order. The property ordered to be restored and the right to the compensation order to be paid (ie, the right to enforce the order and to receive the compensation) vests in the Official Assignee, where the debtor is bankrupt, and in the debtor, if the debtor is a company in liquidation (and therefore under the control of the liquidator). In any other case, an unrestricted vesting of the property or the right to compensation would plainly be undesirable, but title to the property or compensation must in some fashion be restored to the debtor so that the successful creditor applicant (together with other persons entitled to claim) can have the benefit of it. The court is given power to direct that the property or compensation shall vest either in a trustee for the debtor’s creditors or in the debtor but, in the latter case, only for the purpose of enabling the performance of execution or similar process against the debtor, or the

administrator of a bankruptcy or liquidation, or an arrangement with the debtor's creditors which, in each case, may occur thereafter. Where the court establishes a trust, it has power to make further orders concerning administration of the property or moneys paid by way of compensation, proofs of debt and the distribution of assets available to the trustee or any other relevant matter.

322 Section 58 of the Insolvency Act 1967, which sets out the procedure for recovery of property by the Official Assignee but subject to the time frames specified in the Act, also enables the Official Assignee to recover property under s 60 of the 1952 Act. In contrast to the rights of recovery under the Insolvency Act 1967, however (and those under s 311 of the Companies Act 1955 and s 293 of the Companies Act 1993), there is no time limit in subpart 2, other than under the Limitation Act 1950, for the bringing of an application. Section 60 of the 1952 Act and its predecessors have never contained a time limit, but obviously it becomes progressively more difficult to show intention to prejudice creditors as more time passes between the disposition and the failure to pay a debt which brings about the application to the court.

323 The new subpart is intended to operate as a stand alone procedure, capable of being used independently of the Insolvency Act 1967, the Companies Act 1955 and the Companies Act 1993 provisions.

## PART 6: COVENANTS AND POWERS

### **Section 70 Covenants to be joint and several**

324 This section repeats the substance of s 67 of the 1952 Act, confirming the rule that a **covenant** (as widely defined in s 3 (para 112)) in an instrument made by more than one person is, unless the contrary appears, binding on them jointly and severally.

### **Section 71 Effect of covenant with two or more jointly**

325 This section is a much simplified version of s 65 of the 1952 Act. It repeats the rule that, unless a contrary intention appears, a covenant in an instrument for the benefit of more than one person binds the covenantor to perform the obligations under the covenant for the benefit of the survivor or survivors of the covenantees. It is no longer thought necessary to retain the exception for covenants made before 1 January 1906.

### **Section 72 Covenant by a person with himself or herself**

326 This section, together with s 49 (para 268), brings forward the substance of ss 66 and 66A of the 1952 Act, making a covenant in an

instrument by a person with himself or herself enforceable in the same manner as a covenant with another person. The former sections referred to a covenant or an agreement, but an agreement is now within the wide definition of **covenant** in s 3 (para 112). The section is not limited to covenants made in connection with a disposition of property.

### **Section 73 Construction and variation of implied covenants**

327 This section brings forward the substance of s 68 of the 1952 Act. An implied covenant has the same force and effect in relation to an instrument as if it were set out in the instrument. But it can be negated, varied or extended by the instrument, or by written memorandum executed by or on behalf of the parties to the instrument. An implied covenant in a **short term lease** (defined in s 176 (paras 531–536)), which is able to be made orally, can be negated, varied or extended by any form of express or implied agreement (oral or written) of the parties.

### **Section 74 Covenants implied by this Act or other enactments to be cumulative and exclusive**

328 Subsection (1) of this new section ensures that, where more than one implied covenant is relevant to an instrument, either under the 1952 Act or under another enactment, they are to apply together.

329 Subsection (2) applies only to instruments relating to property made after the new Act comes into force. It will prevent the implication into such instruments of common law covenants, such as those relating to leases mentioned in para 394 of NZLC PP16. But its effect is limited to covenants implied generally into relationships of a certain kind as a matter of law. It will not prevent the implication of covenants arising out of the facts of a particular relationship (eg, *Liverpool City Council v Irwin* [1977] AC 239—easements and lessor's obligations implied in relation to tenancies in a high rise building).

## **PART 7: COVENANTS IMPLIED IN CERTAIN INSTRUMENTS**

330 In this part of the Act (and schedule 3) are found certain covenants which will, unless otherwise provided in the instrument, be implied into all instruments entered into after the new Act comes into force. The majority of the implied covenants in Part VI of the 1952 Act do not apply to land transfer land and are in practice, therefore, obsolete. Covenants found in the Land Transfer Act 1952 itself do not apply until registration of the document in which they are implied has occurred. In contrast, all the covenants in this part of the new Act will be of general application and will apply whether or not registration has

taken place. They are, however, consistent with the provisions of the Land Transfer Act 1952, though in some instances there will be little need for them after registration. Sections 96 and 98 of the Land Transfer Act 1952, which overlap the new sections, would be repealed: s 265 and schedule 9.

### **Section 75 Covenants implied in instruments creating, transferring or assigning an estate or interest in land**

331 This section provides for covenants to be implied in instruments entered into after the new Act comes into force. An **instrument** is defined in s 3 as “a writing which creates or affects legal or equitable rights or liabilities” (para 112). It includes implied covenants and any variation of an instrument.

332 Section 75 creates implied covenants for the right to convey, for quiet enjoyment and for further assurance (in part 1 of schedule 3) in instruments creating, transferring or assigning estates or interests in land. Section 75 does not apply to any transaction by way of encumbrance or creating a lease of land, or one which is not made for valuable consideration. It does, however, apply to a transfer of a lease—the covenants in ss 75 and 76 are cumulative: s 74(1).

333 As is the case with all of the implied covenants, they are not to be implied if a contrary intention is expressed in a manner required by s 73(b), which provides for the negating, varying or extension of implied covenants by the express terms of the instrument or by a written memorandum executed, as the instrument was required to be executed, by or on behalf of the parties to the instrument.

334 The form of the covenants for the right to convey, quiet enjoyment and further assurance in substance generally follows those now found in s 72(1)(a), (b) and (c) of the 1952 Act (see part 1 of schedule 3). (The covenant for production of title deeds in s 72(1)(d) is necessary only for deeds system land and has been transferred to schedule 1.) The qualification found in s 72(2) restricting the persons to whose acts and omissions the implied covenants relate is now found in s 75(3).

335 Section 75 does not apply to a transfer or assignment by a trustee or other fiduciary or by a mortgagee: see s 77 (paras 339–342).

### **Section 76 Covenants implied in instruments transferring or assigning a lease of land**

336 This section replaces s 74 of the 1952 Act, which was one of those applying to land transfer land. It implies the covenant found in part 2 of schedule 3 into a transfer or assignment of a lease of land

made for valuable consideration. There is an implied covenant by a transferor or assignor that, as at the date of the coming into operation of the instrument,

- all rent due under the lease has been paid and all covenants and conditions contained in the lease have been performed and observed, and
- where the transfer or assignment relates to a sublease, the same is true of every **superior lease** (defined in s 3 as a lease in respect of which a sublease is entered into).

337 As to covenants by the transferee or assignee of a lease of land with the transferor and assignor, see s 201 (para 616).

338 Section 76 does not apply to a transfer or assignment of a lease by way of encumbrance only, nor does it apply where the transferor or assignor is acting as a trustee or other fiduciary or as a mortgagee: see s 77.

### **Section 77 Covenants implied in instruments by fiduciary or mortgagee**

339 This section constitutes an exception to ss 75 and 76. It implies into instruments creating or transferring interests in land (including leases) a set of covenants less extensive than those implied under ss 75 and 76. It applies whenever any such instrument is executed by a person in a fiduciary capacity or as mortgagee (ie, selling the mortgagor's interest in exercise of a power of sale—in contrast to selling the mortgage). The limited covenants are also implied into every memorandum of discharge of a mortgage coming into operation after the new Act comes into force.

340 For the purposes of the section, a “fiduciary” is a trustee, an administrator of an estate, a manager of the property of a person under the Protection of Personal and Property Rights Act 1988, someone executing an instrument under an order of the court, or someone acting in any other fiduciary capacity. An instrument executed by the Public Trustee, except when acting as agent or attorney, is, in the absence of evidence to the contrary, to be taken as having been executed in a fiduciary capacity.

341 The covenants implied by s 77 relate only to the acts and omissions of the person signing or executing the instrument. The implied covenants are found in part 3 of schedule 3. They are that the fiduciary or mortgagee has not done and will not do (and has not been and will not be a party to) any act or thing which

- will or may invalidate the transaction;
- will or may cause title to be defeated or encumbered;
- will or may prevent the transaction being carried out in terms of the instrument.

342 The comparable section in the 1952 Act is s 75.

### **Section 78 Covenants implied in encumbrances of property**

343 Unlike ss 75, 76, 77 and 79, this section applies to all property, not merely to land. It implies the covenants found in part 4 of schedule 3 into any instrument coming into operation after the new Act comes into force creating an encumbrance over property. The implied covenants are for the right to encumber (free of all other encumbrances except as specified in the instrument) and for further assurance. However, as is presently the case under s 72 of the 1952 Act, the covenants relate only to the acts and omissions of the person creating the encumbrance, those from whom that person acquired title without giving consideration and those claiming through, under or in trust for any such person: s 4(1). In other words, no covenant is given in relation to anything done or not done by any predecessor in title other than someone from whom the creator of the encumbrance acquired title by way of gift, or as trustee, administrator or beneficiary under a deceased estate, or otherwise without valuable consideration.

### **Section 79 Covenant implied in transfers or assignments of land subject to an encumbrance**

344 This section is intended to replace s 73 of the 1952 Act, and also s 96 of the Land Transfer Act 1952, which is repealed: s 265 and schedule 9. It implies covenants in transfers or assignments of land which is already subject to an encumbrance intended to continue to encumber the land after the transfer or assignment becomes effective. An **encumbrance** is defined in s 3 to include a mortgage, a trust securing payment of money or a lien (para 118). The implied covenants are found in subpart 5 of schedule 3 and require the transferee or assignee to

- pay all money and perform all other obligations secured by the encumbrance as and when they fall due,
- observe all other provisions of the encumbrance and carry out its express or implied covenants, and
- indemnify the transferor or assignor for any breach of these covenants.

345 However, s 79(2) limits the liability of a transferee or assignee acting as the administrator of an estate, or as a trustee, to the assets of the estate or trust, so that such a person has no personal liability. But the limitation applies only if the transferor or assignor has written notice that the transferee or assignee is acting in that capacity and such notice is received before the instrument is executed or, in the case of a transfer or assignment in pursuance of an agreement for sale and purchase of land, before the execution of the agreement by the transferor or assignor.

## PART 8: MORTGAGES

### *Subpart 1—Form and effect of mortgages*

#### **Section 80 Mortgage over land to take effect as a charge only**

346 This new section implements the proposal in para 282 of NZLC PP16 that all land mortgages, with one exception, should operate as charges only. (This is already the case for mortgages registered under the Land Transfer Act 1952: s 100 of that Act.) So, for example, a mortgage of an unregistered lease effected after the new Act comes into force by assignment (by way of mortgage only) of the lease to the mortgagee, would not operate as an assignment. The literal wording of the instrument of mortgage would be overridden by the statute and consequently the mortgagee would not become, in any sense, the lessee.

347 The exceptional situation is where the form used to convey title to the mortgagee is a memorandum of transfer; but the exception applies only after the transfer has been registered under the Land Transfer Act 1952. This is the preferable method of creating a submortgage (a deed of defeasance recording the true position and giving the borrower the ability to redeem the mortgage which is being mortgaged). The exception would also apply if, unusually, security were given over a fee simple interest by way of registered memorandum of transfer. In relation to an instrument concerning land under the Land Transfer Act 1952, **registered** is defined in s 3 as meaning registered under that Act (para 122).

#### **Section 81 No mortgage over land by deposit of instruments of title**

348 This section brings forward the substance of s 77 of the 1952 Act. It has long been the case in New Zealand that land cannot be mortgaged by a deposit of title deeds, even accompanied by a memorandum

indicating the intent with which the deposit is made. In order that a security exists which will support a caveat, it is necessary to create a charge. The section does not prohibit either an agreement to execute a mortgage accompanied by the certificate of title, or a mere pledge of the certificate, which entitles the pledgee to hold it until repayment of the money due: Hinde, McMorland and Sim *Land Law* para 8.009.

### **Section 82 Discharge of a mortgage**

349 This section and ss 83 and 84 replace s 79 of the 1952 Act. They all apply to both real and personal property. As is generally the case under the new Act, they must be read subject to the provisions of the Land Transfer Act 1952 and any other relevant statute: s 7(3). Hence a transaction relating to a registered interest must be effected by complying not only with the relevant provisions of the new Act, but also the provisions of the Land Transfer Act 1952 (especially s 102), so that the memorandum or instrument may be registered under that Act.

350 The new section deals with complete or partial discharges of mortgage. It omits the present prescription of a form of discharge. The form prescribed in the Fifth Schedule to the 1952 Act is inappropriate, since it is an acknowledgement of receipt of all money intended to be secured by the mortgage. Sometimes a mortgage will be released when all or part of the mortgage money is still outstanding. The new section differs from s 79(4), which presently provides that a memorandum of discharge “shall vacate the mortgage debt”. The difficulties caused by this formulation are mentioned in NZLC PP16 para 376, and more fully discussed in (1990) 5 BCB 185. The new section does not require any statement concerning the existence or otherwise of the debt. It requires only that the discharge be by way of a memorandum endorsed on or annexed to the mortgage document and executed by the mortgagee in the same manner as a deed is executed: see s 9 (paras 163–172). The instrument of discharge must state that the property is discharged from the mortgage wholly or in part, or use words to that effect. A duly executed discharge will operate as a deed and will transfer or, in the case of land transfer land, release the mortgagee’s interest to the **current mortgagor** (defined in s 3 as the mortgagor who is the current owner (para 116)) to the extent specified in the memorandum: subs (2).

### **Section 83 Assignment of a mortgage**

351 This section permits a mortgage to be assigned by a memorandum endorsed on or annexed to the instrument of mortgage. For consistency with the Land Transfer Office practice of recording the existence of a memorandum of transfer of a registered mortgage on the mortgage



document, it also permits the existence of a separate memorandum (of transfer) to be recorded on the instrument of mortgage. The assignment memorandum must be executed by the mortgagee as a deed is required to be executed, and state that moneys or benefits secured by the mortgage, rights, powers and remedies of the mortgagee, and the mortgagee's interest are assigned to the assignee, or use words to that effect.

#### **Section 84 Variation of a mortgage**

352 This section authorises the making of a variation of mortgage (as to amount secured, rate of interest, term or alteration of any covenants, conditions and powers). It provides for this to be done by a memorandum—essentially in the same manner as is required for registration of a variation of mortgage of land under s 102 of the Land Transfer Act 1952 (although this section, like ss 82 and 83, applies also to mortgages of personal property). The section specifies by whom the memorandum must be executed in each instance and the operative statement which must be made. The memorandum must be endorsed on or annexed to the instrument of mortgage and must be executed as a deed is required to be executed: subs (5).

#### **Section 85 Effect of advance on joint account**

353 This section brings forward the substance of s 80 of the 1952 Act. It is remedial: Hinde, McMorland and Sim *Land Law* para 9.064. It covers both secured and unsecured advances made by more than one creditor under one instrument where the money belongs to those persons on joint account. Similarly, it operates in the case of a gift to, or an acquisition of, a mortgage or unsecured obligation by more than one person jointly. The section provides that the consideration secured under the mortgage or obligation is to belong to those persons on joint account, and that a receipt for the amount secured can be given by their survivor or last survivor, or the administrator of the last survivor, or the assigns of the survivors or last survivor. The section overcomes the presumption in equity that joint holders are tenants in common. It automatically applies unless the persons concerned are expressly declared in the instrument to be tenants in common.

354 Section 61 of the Land Transfer Act 1952 is also relevant. It declares that any two or more persons named in any Crown grant or instrument as transferees, mortgagees or proprietors of any estate or interest shall, unless the contrary is expressed, be deemed to be entitled as joint tenants with right of survivorship. This, of course, will continue to apply, but only to registered instruments. In other cases the

new section will operate whenever the instrument states that the money belongs to the lenders on joint account or that the mortgage or obligation is held by them jointly.

**Section 86 Priority of security for moneys advanced after the coming into operation of a subsequent mortgage**

355 This section must be read with ss 87, 88 and 89. They contain rules about the priority of advances made pursuant to mortgages and variations of mortgages. The priority may relate to all or part of the moneys or obligations to be performed and secured under the mortgage. Priority can alter during the currency of a mortgage and may be different in respect of separate advances made or other financial accommodation given under it. Priorities may be established by agreement or registration or waiver, or otherwise may arise out of some equitable rule. The four sections assume that there is already a priority for a mortgage and the rules deal simply with the priority to be accorded to further advances pursuant to it. The rules further assume the existence of a comprehensive registration system (Land Transfer Act 1952, Ship Registration Act 1992 and a Personal Property Securities Act: NZLC R8) under which a person who takes a mortgage can obtain knowledge of an existing mortgage. A mortgagee may gain priority by registering his or her mortgage and thus promoting it over any unregistered (and formerly prior) mortgage. References in the sections to a "subsequent" mortgage must be read with all this in mind.

356 Mortgagees remain free to negotiate other priority arrangements if they do not wish to rely upon these statutory rules.

357 Subsection (1) lays down that the priority of a mortgage over any form of property in relation to a subsequent mortgage of that property is not to extend to advances made under the original (prior) mortgage after the coming into force of the subsequent mortgage except as provided in the other three sections.

358 Subsection (2) is concerned with advances made, not under the original mortgage, but under a variation of it. For purposes of priority, only the variation is treated as a separate mortgage. The priority of the security for those advances is determined as if the variation was a separate mortgage. Subsection (2) applies only to variations which come into operation after the new Act comes into force. Priority of advances secured by a variation made before that time is governed by the law applicable at that time. It is important to appreciate that subs (2) does not apply to further advances or other financial accom-

modation for which security is given by the original mortgage rather than solely by the variation.

359 Subsection (3) abolishes all forms of tacking of further advances which would give a priority otherwise than in accordance with ss 87, 88 and 89: see NZLC PP16 paras 346–351. It, like subs (1), is not restricted to securities coming into operation after the new Act comes into force.

### **Section 87 Advance of specified principal sum by instalments**

360 This section relates to mortgages of any kind of property whenever executed. It brings forward the substance of s 80A(1) of the 1952 Act and is quite limited in the exception which it creates to the basic rules found in s 86. It applies when a mortgage secures a specified sum—that is, a finite amount which is advanced by instalments, for example, to fund the erection of a building by progress payments. (The mortgage may also secure further advances or further advances up to a stated priority limit; but if so, priority in respect of those advances is not governed by s 87.) If all or part of the specified principal sum is advanced after the execution of a subsequent mortgage, the priority of the mortgage in relation to the subsequent mortgage nevertheless extends to the whole of the specified sum. Knowledge by the prior mortgagee of the existence of the subsequent mortgage is irrelevant. An advance under this section may be to a third party if the mortgage so provides.

361 However, subs (2) prevents a claim for priority being made under s 87 for any amount which has been repaid and readvanced (though it may have priority in terms of the mortgage itself and s 86 if this has occurred before the subsequent mortgage has come into operation).

### **Section 88 Advances for the protection and realisation of the security**

362 This section applies to mortgages over any kind of property. It has no counterpart in the earlier legislation, but is intended to state the existing law. Under the section, all mortgages, whenever executed, secure, in priority to any subsequent mortgage (whether known to the prior mortgagee or not), moneys reasonably paid or advanced at any time by the mortgagee (or by a receiver)

- for protection, maintenance, preservation or repair of the mortgaged property;
- to remedy defaults under another mortgage or encumbrance to the extent that it has priority;

- for payment of rates or other outgoings;
- to meet expenses of entering into or being in possession;
- with a view to realisation of the security (including the cost of a statutory notice under ss 105(3) or 110(3)).

363 Interest on such sums at the rate (if any) applicable to the principal moneys is also so secured.

364 It will not be necessary for a mortgage to contain a provision along the lines of s 88. Advances of the kind referred to in s 88 will have priority whenever a mortgage has priority over another mortgage unless the former mortgage expressly or impliedly restricts the application of s 88.

### **Section 89 Further advances and tacking under mortgages over land or ships**

365 This section replaces s 80A(2) and (3) of the 1952 Act, the context and deficiencies of which are discussed in NZLC PP16 paras 352–358. Section 80A(2) and (3) have application to mortgages of personal property as well as of land, but its use in relation to the former appears to be quite limited. It is anticipated that if the Law Commission's report *A Personal Property Securities Act for New Zealand* (NZLC R8) is implemented (replacing Part IV of the Companies Act 1955 and the Chattels Transfer Act 1924), the priority of all advances made pursuant to a security interest over personal property will be the same, and the rule in *Hopkinson v Rolt* (1861) 9 HL Cas 514; 11 ER 829 (see para 366) will be abolished in respect of personal property: s 28(2)(c) of the draft Personal Property Securities Act (NZLC R8). It would, of course, be open to the holders of personal property security interests to agree amongst themselves concerning the respective priority of their interests.

366 The present section deals only with mortgages over land or registered ships (ie, registered in Part A of the New Zealand register of ships under the Ship Registration Act 1992: see definition of **ship** in s 3, which includes a share in a ship). These mortgages are outside the proposed Personal Property Securities Act regime: NZLC R8.

367 Subsection (1) is applicable to all mortgages of land or registered ships containing a "further advances" clause, whether executed before or after the Act. It is a statement of the rule in *Hopkinson v Rolt* and so does not effect any change in the law. A further advance by way of financial accommodation (of a kind actually provided for in the mortgage) ranks in priority to a subsequent mortgage if

- the mortgagee had no actual knowledge of the existence of the subsequent mortgage when the further advance was made—constructive notice of the subsequent mortgage does not prevent the further advance having priority, or
- the prior mortgagee is obliged to make the further advance pursuant to an obligation entered into when the prior mortgagee had no actual notice of the existence of the subsequent mortgage (eg, pursuant to a guarantee or letter of credit given to a third party at a time when the guarantor or person establishing the letter was unaware of the subsequent mortgage).

368 There is a wide definition of **financial accommodation** (in subs (3)), which includes advances on current account to the mortgagor or other person, payments to a third party on behalf of or by arrangement with the mortgagor, payments under a guarantee, indemnity or bond given by the mortgagee at the request of the mortgagor, payments under a contractual obligation by the mortgagee, and readvances. In order to take advantage of this statutory definition for the purposes of s 89, it is unnecessary for the mortgage expressly to use the words “further advances by way of financial accommodation” provided adequate equivalent words are used, but the security will be limited to whatever forms of financial accommodation are actually nominated.

369 For mortgages over land and ships coming into operation after the new Act comes into force, subs (2) creates an exception to the rule in *Hopkinson v Rolt* and another exception to the basic rules in s 86. Priority over a subsequent mortgage is declared to extend to further advances by way of financial accommodation (of a kind actually secured by the prior mortgage) up to a priority limit stated in the prior mortgage. That priority may exist whether or not the mortgagee had actual notice of the subsequent mortgage at the time when the further advance was made.

370 A **stated priority limit** is an amount expressly stated in a mortgage as the maximum amount for which the mortgage has priority in relation to any subsequent mortgage: subs (3)(b). The amount may be expressed in the currency of any country and *either* as a sum of money plus interest *or* as a sum of money without more, in which case it includes interest: subs (4). Advances for the protection and realisation of the security are secured under s 88 and have separate priority in terms of that section unless the mortgagee chooses to include them within the stated priority limit: subs (5).

371 Subsection (6) preserves the continued operation of s 80A(2) and (3) of the 1952 Act for mortgages executed before the new Act comes into force and for variations of such mortgages. In view of the doubts which have been expressed concerning these subsections (see NZLC PP16 para 356), it would be inappropriate for subs (2) to apply to mortgages granted before the new Act comes into force, even in relation to further advances made under them after the new Act is in operation.

### **Section 90 Right of mortgagor to bring proceedings against mortgagee**

372 This section re-enacts the substance of s 80B(2) of the 1952 Act. (The rule of law stated in subs (1) of that section having been abolished, it is unnecessary to repeat that subsection: Acts Interpretation Act 1924 s 20(f).)

### *Subpart 2—Covenants, conditions and powers implied in mortgages*

#### **Section 91 Covenants implied in mortgages over land**

373 This section enacts the covenants to be implied in mortgages of land coming into operation after the new Act comes into force.

374 Subsection (2) applies only to registered mortgages of land coming into operation *before* the new Act comes into force. It replaces s 106 of the Land Transfer Act 1952 which is the source of an implied power to go into possession after a default has occurred. It should be noted that **default** is defined in s 3 to include not only failure to pay or perform covenants, but also any other event which triggers the right to call up the mortgage: see para 140. The implied power in new mortgages is in part 1 of schedule 4.

#### **Section 92 Covenants implied in mortgages over goods**

375 This section enacts the covenants to be implied in fixed or specific mortgages of **goods** (defined in s 3 (para 137)). It is not applicable to floating, or formerly floating, charges. The covenants are found in part 2 of schedule 4.

### *Subpart 3—Redemption of mortgages*

#### **Section 93 Equity of redemption**

376 This section replaces s 81 of the 1952 Act, but makes little change to its substance. It applies both to land and other property. It declares that an owner (or other person entitled to redeem) can redeem mortgaged property in accordance with subpart 3 of part 8 at any time

before sale by the mortgagee under a power of sale. Those also entitled to redeem are other persons with an interest in the property; for example, other mortgagees, purchasers and lessees. Section 3 provides that a **person entitled to redeem** expressly includes former mortgagors and covenantors (if any) (para 115). Any person entitled to redeem is entitled to a statement of the balance owing under the mortgage which it is sought to redeem.

377 **Redeem** is defined in s 3 (para 115) to include the right to have property discharged from a mortgage; that is, the release of a charge. Once all moneys secured by the mortgage are repaid and other obligations secured have been performed, the mortgagee must, at the expense of the mortgagor, discharge the property from the mortgage in accordance with s 82 or must transfer the mortgage in terms of s 94: subs (2).

378 The moneys secured which have to be repaid, before the mortgagor can seek a discharge, include interest for the unexpired portion of the term. This rule does not apply if the mortgagee has already taken possession or appointed a receiver or taken other steps to realise the security (other than merely giving notice under s 105 or s 110). The right of the mortgagee to interest for the unexpired portion of the term is expressly made subject to the oppression provisions found in Part I of the Credit Contracts Act 1981. Section 10(1) of that Act enables the court to reopen the contract where a party is exercising its powers in an oppressive manner. Section 11(2)(b)(iii) of that Act requires the court to have regard to whether the creditor has required payment of interest of an “oppressive” amount for a period subsequent to the date of an early repayment. The court must consider the expenses of the creditor and the likelihood that the amount repaid can be invested on similar terms. (For case law on these provisions, see *National Westminster Finance NZ Ltd v United Finance & Securities Ltd* [1988] 1 NZLR 226 and *Cambridge Clothing Co Ltd v Simpson* [1988] 2 NZLR 340. See also NZLC PP16 paras 366–369.)

379 “Moneys secured” include payments for repairs and outgoings and expenses of taking or being in possession or in connection with a proposed mortgagee’s sale: s 88.

380 Where a mortgage is given to secure a contingent obligation (eg, a guarantee) or one which is to continue for an uncertain period (eg, a rentcharge during the lifetime of the holder), it may be impossible for the mortgagor to seek to redeem the mortgage until the liability so secured has been determined or its period of payment has come to an

end. This is because it is not yet possible to know what moneys or other obligations are secured by the mortgage and, therefore, to be able to pay or perform them. However, relief may be available under Part I of the Credit Contracts Act 1981 if the mortgagee or chargeholder is behaving oppressively. A consequential amendment to enable such relief to be available in appropriate cases is proposed, by adding to the Credit Contracts Act 1981 a new s 4A which, for the purposes of Part I, would extend the term “credit contract” to a mortgage, whether or not it would otherwise be a credit contract. A further possibility in these circumstances is an application to the court for a discharge of the security upon payment into court to create a fund: see s 102 (paras 397–398).

381 Where the term of a mortgage has expired (including a renewed or extended term) and the mortgagee is not in possession and has not appointed a receiver or taken other steps to realise the security (other than giving notice under s 105 or s 110), a person wishing to redeem must give the mortgagee not less than 60 working days’ written notice of the intention to redeem or pay 3 months’ interest at the rate provided in the mortgage, as well as paying all other moneys then owing under the mortgage: subs (4). This provision carries forward s 81(3) of the 1952 Act.

382 Contracting out of the section is prohibited: subs (5).

#### **Section 94 Request to mortgagee to transfer mortgage**

383 This section replaces ss 82 and 83 of the 1952 Act. It applies to land and other property. Section 94 enables the current mortgagor or anyone else entitled to redeem (see definition of **person entitled to redeem** in s 3 (para 115)) to redeem the mortgage by causing the mortgagee, in exchange for payment of the amount necessary to redeem, to transfer the mortgage to someone (other than the current mortgagor) nominated by the person seeking to redeem.

384 The operation of ss 82 and 83 is discussed in paras 370 and 371 of NZLC PP16. The section is useful if there is doubt about the right of the mortgagor to execute a new mortgage when a refinancing is occurring or if a subsequent mortgagee will not agree to priority for a new mortgage.

385 A subsequent mortgagee can make use of the section notwithstanding the existence of an intermediate interest: subs (2). Thus a third mortgagee can redeem a first mortgage by requiring it to be transferred



to the third mortgagee or his or her nominee. Where more than one request is made under the section, the request of the person with priority prevails: subs (3).

386 The section does not apply where the mortgagee is in possession of the mortgaged property (subs (1)) because, if the mortgagee were forced to transfer the mortgage, there would be no release from liability to account as a mortgagee in possession. The mortgagee might be responsible for wilful misconduct by the transferee unless the transfer were made by order of the court or with the mortgagor's concurrence. Once the mortgagee has withdrawn from possession with the consent of the court under s 141 or by order of the court under s 142, the right of redemption by transfer revives.

387 Contracting out of the section is prohibited: subs (5).

### **Section 95 Perpetual debentures**

388 This section was previously found as s 97 of the Companies Act 1955. It was transferred to the 1952 Act in 1993. It applies notwithstanding the provision in the new Act relating to redemption (s 93) and notwithstanding any rule of law or equity to the contrary. It enables a **company** (as defined in s 3 (para 143)) to issue secured and unsecured debentures upon the condition that they are to be irredeemable, or redeemable only on the happening of a contingency which is remote or the expiration of a period, however long (eg, 999 years).

### **Section 96 Right to inspect instruments of title**

389 This section re-enacts the substance of s 84 of the 1952 Act.

### **Section 97 Restriction on consolidation**

390 This section re-enacts the substance of s 85 of the 1952 Act. It forbids a mortgagee from preventing redemption under one mortgage unless payment is made under a separate mortgage over other property in favour of that mortgagee given by the **current mortgagor** or a **former mortgagor**. (These terms are defined in s 3 in relation to the mortgage (para 116).) The section does not apply to a collateral mortgage (ie, one securing the same moneys), because it is not separate.

391 Contracting out of the section is not permitted: subs (2).

### **Section 98 Sale of mortgaged property by order of the court**

392 This section replaces s 86 of the 1952 Act. It applies to all kinds of mortgaged property and entitles the current mortgagor or anyone else who is entitled to redeem the mortgage (including a former mortgagor or a covenantor) to apply to the court for an order directing the sale of

the property. This can be done either in existing proceedings concerning the mortgage or the property, or in a proceeding brought for the purpose. The section enables a mortgagor or a subsequent mortgagee, who is unable to redeem but is concerned that the mortgagee is delaying sale of the property, to cause the court to order an immediate sale: see *Palk v Mortgage Services Funding PLC* [1993] Ch 330. It provides a balancing factor against the mortgagee's right to delay the sale: see *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536. The court can assist by ordering the sale of the property and imposing conditions necessary for the conduct and completion of a sale.

393 Under subs (3) the court is able to make an order without allowing time for redemption and notwithstanding that any party is not before the court or opposes the making of an order. Conditions can be imposed, including a requirement for the applicant to deposit in court a reasonable sum to meet the expenses of sale or to secure performance of any conditions: subs (4). The court may either order that the sale be conducted by or on behalf of a party to the proceedings or by the Registrar: subs (5). An order can be made for sale without priority of the encumbrances being first determined: subs (6). (**Encumbrance** is defined in s 3 (para 118). The term includes a mortgage.)

394 For the right of a mortgagee to have a court-ordered sale, see s 168 (paras 517–519).

#### **Section 99 Redemption when mortgagee cannot be found**

#### **Section 100 Redemption by order of the court**

#### **Section 101 Redemption by payment to the Public Trustee**

395 These sections bring forward the substance of s 87 of the 1952 Act. They enable the court (s 100) or the Public Trustee (s 101) to determine the amount owing under a mortgage, discharge it and receive payment of any outstanding mortgage moneys where the mortgagee is out of the jurisdiction, cannot be found or is dead, or it is uncertain who is entitled as mortgagee. Sections 100 and 101 also contain a provision enabling, in the case of a mortgage of land, registration of a certificate by the Registrar of the court, or a sealed copy of a court order or a discharge executed by the Public Trustee. Section 101(2) also applies to mortgages over personal property for registration of a discharge, and there is a corresponding provision where relevant under the Ship Registration Act 1992 and the proposed Personal Property Securities Act (NZLC R8). There are also provisions enabling the court or the Public Trustee to ensure, where necessary, that instruments of title relating to the mortgaged property are appropriately delivered. A discharge of mortgage under the sections does not preclude a claim by the person

entitled against the mortgagor and any former mortgagor or covenantor for any amount eventually shown to be payable. A **former mortgagor** is defined in s 3 as one who has ceased to be an owner of the property but remains personally liable under the mortgage (para 116). The limitation period applicable in this case is that for a deed: s 99(2).

396 If the mortgage secures periodical payments (eg, a rentcharge), s 102 must also be complied with.

### **Section 102 Court may order discharge of mortgage if periodical payments secured are otherwise provided for**

397 This section is the companion to ss 100 and 101. It replaces s 151 of the 1952 Act and empowers the court at any time to discharge a mortgage (including a **mortgage** securing a **rentcharge**: see definitions of both terms in s 3), notwithstanding that it secures periodical payments and so may not be able to be redeemed under s 93 (which permits redemption only when all secured payments have been made and all secured obligations have been performed). The section empowers the court to make an order releasing the land from the mortgage upon establishment of a fund in court which will produce sufficient income to meet any periodical payment as it falls due. A **periodical payment** is defined in s 3 (para 151) as one which is payable by a person to another person in respect of a fixed or ascertainable period and is in the nature of income in the hands of the recipient. It does not include an instalment of purchase price, repayment of capital or capital gain. It may be described as a rent, rentcharge, salary, pension, bonus, dividend, interest, outgoing or otherwise. It does not include an annual sum payable under a policy of assurance.

398 The court is directed to assume that the fund will be invested in terms of Part II of the Trustee Act 1956. The court must also make provision for expenses and contingencies (except depreciation).

#### *Subpart 4—Restrictions on exercise of mortgagees' powers*

### **Section 103 Foreclosure abolished**

399 Foreclosure on mortgaged land is prohibited by s 89 of the 1952 Act. This section extends the prohibition to all mortgaged property: see the discussion at paras 325–331 of NZLC PP16.

### **Section 104 Mortgagee accepting interest after expiry of term not to call up without notice**

400 This section states again the substance of s 90 of the 1952 Act. It applies only after a mortgage of land or other property for a fixed term

(as opposed to an “on demand” facility) has expired and the mortgagee has “accepted” interest for a period of 3 months or more, being a period entirely after the maturity date. In this circumstance, the mortgagee is required to give 60 working days’ warning notice to the **current mortgagor** (ie, the current owner: defined in s 3 (para 116)) before calling up the principal sum. Interest is not, however, accepted if it is obtained by the mortgagee by enforcement of the right to appoint a receiver or go into possession and thereby receive rents and profits (*Industrial Park Holdings Ltd v NZI Securities Ltd* (unreported, High Court, Auckland, 10 December 1991, CP 1990/91, Barker J)). The section does not prevent the calling up of the principal sum, despite acceptance of 3 months’ interest, where there has been default under any covenant other than the covenant to repay the principal sum.

401 The warning notice under s 104 can be combined with a notice under s 105 or s 110. A notice under this section must be served in accordance with ss 259 and 260 (paras 754–766).

### **Section 105 Notice to current mortgagor of mortgaged land of exercise of powers**

402 Sections 105, 106, 107 and 109 replace s 92 of the 1952 Act. The obligations concerning service of notice on a current mortgagor of land under s 105 can be briefly summarised as follows:

- A mortgagee, debentureholder and a receiver must ensure that a notice has been issued in accordance with the section prior to exercising a power of sale.
- A mortgagee, debentureholder and receiver under a mortgage (but not a receiver under a mortgage debenture) must ensure that a notice is issued in accordance with the section before the mortgagee or debenture holder takes possession or a receiver is appointed.
- A mortgagee (but not a debentureholder) must ensure that a notice is issued in accordance with the section prior to calling up moneys in reliance on an acceleration clause.

403 The requirements of the section are now described in greater detail.

404 A warning notice is required before a mortgagee of land

- calls up money from “any person” under an “acceleration clause” (see paras 416 and 417),
- exercises a power of entry into possession or appoints a receiver, or
- exercises a power of sale,

by reason of **default**: see definition in s 3 (para 140).

405 None of these rights can be exercised until a notice complying with subs (2) has been served on the **current mortgagor** (defined in s 3 as a mortgagor who is currently the owner (para 116)) and has expired without the default being remedied. If the default is remedied after the expiry of the notice, the powers of the mortgagee may, depending upon the terms of the mortgage, remain exercisable, but the mortgagee may be acting oppressively and the court may use its powers under the Credit Contracts Act 1981 to restrain the mortgagee in such circumstances.

406 The section ensures that there is a moratorium (pending expiry of the notice) on the use of an acceleration clause and the exercise by the mortgagee of the powers of sale and entry into possession or to appoint a receiver where

- the mortgage has been given by the current registered proprietor to secure that person's debt,
- the mortgage has been given by a former registered proprietor to secure a debt, or
- the mortgage has been given by a guarantor against whom enforcement action is being contemplated.

407 If a guarantor has given a mortgage but is not a principal debtor, the section will require notice to that guarantor before entry into possession or sale; but not before exercise of an acceleration clause in the principal loan contract. This is because the moneys due under the loan contract are not secured by the guarantor's mortgage—it secures the obligation to pay under the guarantee—and the obligation to pay under the guarantee is not a payment brought forward under an acceleration clause. However, if that guarantor is a principal debtor (as is usually the case), the liability will be under the principal loan contract, and notice to the guarantor will be required before use of an acceleration clause in that contract, as well as before exercise of power to enter into possession of or sell the guarantor's land.

408 The notice must be in a form prescribed by regulations or “to like effect”. As is the case with the present s 92, it must “adequately inform” the current mortgagor of

- the nature and extent of the default complained of,
- the action required to remedy it (if capable of being remedied),
- the period for remedying the default—not being less than 20 working days, and

- the consequences of failure to remedy.

409 Where there is more than one current mortgagor, the 20 working days run from the date of service on the last of them to be served: see s 261 (para 767).

410 The notice must be given even if the default is not capable of being remedied. In this circumstance, it gives the mortgagor an opportunity to negotiate with the mortgagee and to consider whether to apply to have the transaction reopened under Part I of the Credit Contracts Act 1981.

411 It will no longer be necessary to nominate in the notice the date upon which the mortgagee's powers will be exercisable (*Sharp v Amen* [1965] NZLR 760). It will be sufficient to state the number of working days—calculated from the date of service—after which it will expire (for the definition of **working day**, see s 3 (para 151)). In making the calculation, the date of service is disregarded. Service must be effected in accordance with ss 259 and 260 (paras 754–766).

412 Subsection (3) enables a mortgagee to include in the notice a requirement for payment of reasonable costs and disbursements in preparing and serving the notice. If the amount claimed is reasonable, the default is not considered to have been remedied unless it has been paid. An amount claimable under this subsection is secured under the mortgage: s 88(1)(e). Subsection (4) enables a notice under this section to be given in the same document as a notice under s 104.

413 Subsection (5) requires service of a copy of the notice “as soon as possible” on former mortgagors and covenantors and on subsequent mortgagees and encumbrancers under registered securities (and under unregistered securities where the mortgagee has actual notice of the name and address of the holder of the security). Service is also required on any person who has lodged a caveat or a notice under s 42 of the Matrimonial Property Act 1976 against the title to the land. However, as is the case with the present section, failure to comply with this requirement does not of itself prevent the exercise of the mortgagee's powers. It may, however, give rise to a right to claim for any loss thereby caused to someone who should have received notice of the mortgagee's intention to exercise rights under the mortgage. Subsection (5) does not require service on a prior mortgagee. If a prior mortgagee is not paid off upon sale, the land will remain subject to that mortgage except in the circumstances referred to in s 155(2). Similarly, upon the taking of possession, the interest payable under the prior mortgage is a first charge on income: s 124(a).

414 The requirements of s 105 must also be complied with by a receiver appointed pursuant to a mortgage. Such a receiver must give the notices to the registered proprietor and to subsequent security holders, caveators, and claimants under the Matrimonial Property Act 1976. However, if the mortgagee who appointed the receiver has given a notice complying with subs (2) to the registered proprietor, that will meet the receiver's obligation under subs (1). Similarly, a notice under subs (5) given by a mortgagee suffices for the receiver. The subsection does not specify who of the mortgagee or the receiver must carry out service: in this context that does not matter—service by either gives the necessary notice. Moreover, in relation to subs (5)(c)(ii), it is actual notice possessed by either of them which creates the obligation to carry out service.

415 Contracting out of the section is not permitted: subs (6).

416 An **acceleration clause** is defined in s 3 (para 142) as meaning a term expressed or implied in an instrument under which, by reason of a default, any moneys secured by a mortgage become payable, or may be called up as becoming payable, on a date earlier than that on which they would have otherwise become payable. **Instrument** in turn has a wide definition in s 3 (para 112). The prohibition on use of an acceleration clause before service and expiry of a notice applies to such a clause in any instrument, not merely to one in the mortgage itself, so long as the clause enables the mortgage to be called up.

417 An acceleration clause should be distinguished from a demand made under a clause giving a right to make demand regardless of whether there has been any default. If moneys are genuinely lent "upon demand", the mortgagee has the right to call them up without any restriction being placed on that power. However, if there is an express right to make demand but its exercise is fettered in any manner (either entirely or for a period), the right will constitute an acceleration clause (and, where the fettering is for a period only, will be an acceleration clause during that time).

418 A **default** as defined in s 3 (para 140) includes a failure to pay money secured by an instrument on the due date and any other event, other than the arrival of the due date, on the occurrence of which any money secured by an instrument becomes payable, or may be called up as becoming payable, under any term expressed or implied in an instrument. This definition is intended to catch clauses (either in the mortgage or in another document) which give the mortgagee a right to call

up the mortgage moneys when a certain event occurs (such as a sale of the security) without categorising the occurrence of the event as a default. A further common example is the insolvency of the mortgagor in circumstances where mortgage payments have not fallen into arrears. For the purpose of s 105, such adverse events are treated as defaults.

### **Section 106 Notice of intention to recover deficiency in respect of mortgage over land**

419 A mortgagee or a receiver proposing to exercise a power to sell land in circumstances in which the mortgagee proposes to exercise rights against a former mortgagor or a covenantor to recover a deficiency on sale, is required to serve notice of those intentions on the former mortgagor or covenantor at least 20 working days before exercising the power of sale. However, unlike the position under the present s 92(6), failure to serve the notice does not automatically release that person. The former mortgagor or covenantor is released from liability in respect of the deficiency only to the extent that he or she can show prejudice because of the failure to serve the notice. The burden of proof rests on the former mortgagor or covenantor.

420 A **former mortgagor** is a mortgagor who has ceased to be the owner of the property but remains personally liable under the mortgage; a **covenantor** is a person other than a mortgagor who is liable for mortgage obligations, and includes a guarantor: s 3 (para 116). A **deficiency** is also defined in s 3 as an amount by which the amount received on sale and available to the mortgagee or receiver in accordance with s 156 or s 173 (respectively) is less than the secured amount owing to the mortgagee.

421 Contracting out of the section is not permitted: subs (3).

422 A receiver under a general mortgage debenture is required to serve a notice under this section. A notice must be served in accordance with ss 259 and 260 (paras 754–766).

### **Section 107 Conditional sale of land permitted before expiry of notice**

423 This section brings forward s 92(1A) of the 1952 Act which was inserted in 1993 and extends it to sales by receivers. It enables mortgagees and receivers to anticipate expiry of notice under s 105 by agreeing to sell the mortgaged land conditionally upon the mortgagor's failure to remedy the default.



### **Section 108 Notice not required before exercising certain powers under a mortgage debenture**

424 In contrast, neither a receiver appointed under a **mortgage debenture** (defined in s 3 as “an instrument creating a charge on property of a body corporate, that property being all, or substantially all, of the assets of the chargor body corporate” (para 120)), nor the debenture holder who appoints the receiver, needs to give notice under subs (1) or (5) before the receiver exercises powers in relation to land over which the debenture is secured (other than a power of sale) or before rights under an acceleration clause in the debenture are exercised. This exemption applies regardless of whether the same moneys are also secured under a collateral mortgage. The dispensation enables immediate appointment of a receiver under a general charge over the assets of a body corporate and the immediate calling up by the debenture holder of moneys secured by such a general charge. However, neither the receiver nor the debenture holder can proceed to exercise a power of sale over land secured under the general charge without fully complying with the section; nor may a debenture holder take possession before expiry of the prescribed notice. In cases of doubt concerning whether the mortgage debenture covers all or substantially all of the assets, an application may be made under s 109 for leave to take possession before a notice under s 105(1) has expired.

### **Section 109 Court may give leave to enter into possession of land**

425 Under this section the court can authorise a mortgagee to exercise a power to enter into possession of the land, or a receiver under a mortgage to exercise corresponding powers, before a notice has been given under s 105 to the current mortgagor or before such a notice expires. A similar provision is found in s 92(5) of the 1952 Act.

### **Section 110 Notice to current mortgagor of mortgaged goods of exercise of powers**

426 Sections 110–114 are new. They impose controls on the exercise of the powers of a mortgagee of **goods**, as defined in s 3, similar to those found in ss 105–109 in relation to land. The definition of **mortgage** in s 3 is also relevant: it includes a charge.

427 In respect of a mortgage over goods, there is no restriction upon a mortgagee or receiver taking possession after a default has occurred. But s 110 restricts the use of an acceleration clause and of the power of sale by a mortgagee or a receiver until expiry of a warning notice to the current mortgagor of the goods.

428 The requirements, in respect of the form of the notice, parallel those in s 105(2) but the minimum period of the notice is reduced to 7 working days for a mortgage for goods and, of course, there is no reference to taking possession, since it is not intended to be restricted by the section. The notice can require payment of the mortgagee's reasonable costs and disbursements in preparing and serving the notice, and a default will not be remedied if a reasonable amount so claimed is not paid within the time specified in the notice: subs (3). A notice under the section can be given in the same document as a notice under s 104: subs (4). If the mortgagee who appointed a receiver has given notice complying with subs (2) to the owner, that will meet the receiver's obligation under subs (1).

429 A mortgagee or receiver who serves a notice must also serve a copy on any former mortgagor or covenantor, as well as any mortgagee of the goods whose mortgage ranks in subsequent priority and of whose name and address either the mortgagee or the receiver has actual notice. Failure to comply with this requirement does not prevent exercise of the powers by the mortgagee or receiver: subs (5).

430 Contracting out of the section is not permitted: subs (6).

431 For the cases where a notice is not required under this section, including the exercise of powers by a debenture holder or a receiver under a general mortgage debenture given by a body corporate, see s 113 (para 437).

432 A notice under this section must be served in accordance with ss 259 and 260 (paras 754–766).

### **Section 111 Notice of intention to recover deficiency in respect of mortgage over goods**

433 A mortgagee or a receiver proposing to exercise a power to sell mortgaged goods, where the mortgagee proposes to recover a deficiency on sale from a former mortgagor or covenantor, must serve notice of those intentions on that person at least 7 working days before exercising the power of sale. (For the definitions of **former mortgagor**, **covenantor** and **deficiency**, see s 3 (para 116) and the commentary on s 106: paras 419–422.) Where notice is not duly given, a former mortgagor or covenantor is only released to the extent that he or she can show prejudice arising from that failure.

434 Contracting out of the section is not permitted: subs (3).

435 A notice under this section must be served in accordance with ss 259 and 260 (paras 754–766).

### **Section 112 Conditional sale of goods permitted before expiry of notice**

436 This section adopts for mortgages of goods the reform introduced in relation to land mortgages by the 1993 amendment to the 1952 Act.

### **Section 113 Cases where notice not required**

437 There is no restriction on the exercise of powers by a mortgagee or a receiver of mortgaged goods, and ss 110 and 111 do not apply, in the following cases:

- perishable goods;
- goods which will decline substantially in value if not disposed of immediately;
- goods for which care and storage will cost a disproportionately large amount in relation to their value;
- stock in trade sold at retail in the ordinary course of business;
- goods under a general mortgage debenture given by a body corporate (whether or not there is a collateral mortgage);
- where, after default, every person entitled to receive notice under ss 110 and 111 consents in writing to the immediate sale of the goods.

### **Section 114 Court may give leave to exercise power of sale of goods**

438 The court is empowered to grant leave to a mortgagee or a receiver of goods to exercise a power of sale by reason of a default without serving notice under s 110 or before such a notice expires. Leave to claim a deficiency can also be given.

## *Subpart 5—Mortgagees in possession*

### *Entry into possession*

### **Section 115 Exercise of power to enter into possession**

439 This is the first of the sections of the new Act concerning the enforcement powers of a mortgagee when a default has occurred. In each case, the source of the power is the mortgage contract. The mortgagee cannot exercise rights to go into possession, to sell the property or to appoint a receiver, unless a power to do so has been conferred by the mortgagor either expressly or impliedly; but see the implied covenants in part 1 of schedule 4.

440 This section replaces s 106 of the Land Transfer Act 1952, which is repealed. As that section is currently the only source of any implied power to enter into possession, the new Act contains an equivalent statutory power for mortgages executed prior to the Act coming into force: s 91(2).

441 The new s 115 applies to mortgages of registered and unregistered interests in land and to mortgages of goods. (Subpart 5 is not applied to mortgages of intangibles because, by their nature, they are not something of which possession can be taken.) Where there has been a default and the mortgagee is entitled to exercise a power to enter into possession (subject—in the case of land—to giving the requisite warning notice under s 105), the mortgagee may peacefully take physical possession or, if this cannot be done without breach of s 91 of the Crimes Act 1961 (forcible entry), may apply to the court for a possession order. A third course of action is that, without taking physical possession, the mortgagee may go into possession by taking over management or control of the property and requiring the lessee or the occupier (in the case of land) or bailee (in the case of goods) to pay rent or profits to the mortgagee.

442 Mere receipt of rent or profits by the mortgagee, without action on the part of the mortgagee which constitutes taking management or control of the property out of the hands of the mortgagor, does not amount to going into possession. The fact that a mortgagee may already be taking steps to exercise a power of sale does not preclude the mortgagee from taking possession of the property: subs (2). Subsection (3) confirms that, if the mortgagee has consented to a lease of the mortgaged property, there can be no taking of physical possession until expiry of the lease. But the mortgagee in possession can take control of the property under s 115(1)(b) and exercise powers under the lease in accordance with s 119.

### **Section 116 When mortgagee becomes mortgagee in possession**

443 Uncertainty was expressed by many of the submissions to the Justice and Law Reform Committee of the House of Representatives, in its deliberations on the amendments to the 1952 Act, and to the Law Commission on NZLC PP16 concerning the circumstances in which a mortgagee may be regarded as being in possession of the property, particularly when physical possession has not been taken. In view of such uncertainty, it has been thought desirable to define those circumstances. The new s 116 confirms that a mortgagee is in possession when

- that person takes physical possession, or
- that person applies for and obtains a court order for possession of the property, or
- when income is received *and* the mortgagee has management and control of the property: confirming *Noyes v Pollock* (1886) 32 Ch D 53, in which it was held that mere receipt of rent by a mortgagee, where the rent was collected on behalf of the mortgagor, did not mean that the mortgagee was in possession.

444 If the mortgagee proceeds by way of court application and obtains an order (which is almost automatic), the possession backdates to the date of the application: *Southpac Custodians Ltd v Bank of New Zealand* [1993] 1 NZLR 663.

445 Sometimes a mortgagee takes collateral security by way of specific assignment from the mortgagor of the rentals of mortgaged land. This does not amount to possession for the purposes of ss 115 and 116, as it does not occur by reason of a **default** (as defined in s 3 (para 140)): see opening words of s 115. The powers and obligations under subpart 5 are, therefore, inapplicable.

#### *Powers and obligations of mortgagees in possession*

### **Section 117 Mortgagee in possession of leasehold estate or interest**

446 This section is applicable only to a mortgage of a lease of land or of goods in respect of which the mortgagee is in possession. It replaces s 110 of the Land Transfer Act 1952, which is repealed. It renders the mortgagee liable to the lessor (“the person for the time being entitled to the reversion”) in respect of the covenants of the lessee, including payment of rent. But liability relates only to the time during which the mortgagee is in possession, and cannot exceed the amount of the income received from the property by the mortgagee as mortgagee in possession. Under s 127(2) this includes income actually received, an allowance for income which would have been received but for wilful misconduct on the part of the mortgagee, and an allowance of an occupation rent where the mortgagee in possession has personal occupation or use.

447 The puzzling reference in s 110 of the Land Transfer Act 1952 to “any person claiming the land as purchaser or otherwise” under the mortgage of a lease has been omitted from the new section.

### **Section 118 Mortgagee in possession of land may enter into a lease**

448 This section replaces s 91 of the 1952 Act. It is concerned with land only. It authorises a mortgagee in possession of land to lease it. But in so doing the mortgagee must

- have reasonable regard for the interests of the current mortgagor and of any former mortgagor, covenantor, subsequent mortgagee or encumbrancer, and
- take reasonable care to obtain the best rent reasonably available at the time of entering into the lease: subs (2).

449 The second of these requirements parallels that imposed upon a mortgagee exercising a power of sale (s 146) and a receiver in like circumstances (s 19 of the Receiverships Act 1993).

450 The present s 91 does not permit a lease to be granted for longer than 7 years. In NZLC PP16 para 303, the Law Commission canvassed a suggestion that in cases of residential tenancies, the maximum term should be 2 years, and in other cases, 15 years. This suggestion was supported by the submissions received and is adopted in subs (3)(a), but that subsection also provides for the current mortgagor or the court to consent to a longer term. In addition, the subsection requires that the lease contain such terms and conditions as are reasonable and appropriate having regard to the interests of the persons mentioned in subs 2(a), and that the lease must take effect in possession within 6 months of its date. Again, however, the current mortgagor or the court can grant dispensation in respect of any of these matters. The court can resolve a dispute concerning the reasonableness or appropriateness of a stipulation which the mortgagee in possession wishes to insert in a lease.

451 Subsection (4) prevents a mortgagee in possession of a lease from granting a sublease for a term longer than the balance of the term of the head lease. (A sublease for the balance of the head lease term is no longer to operate as an assignment: s 181.) If there is a breach of this provision or a lease is granted for a term exceeding the relevant period in subs (3)(a), the lease will not be entirely void, but will be valid for the maximum term for which it could have been granted validly: subs (5) abrogating, in this respect, the decision in *Otago Harbor* (sic) *Board v Spedding* (1885) NZLR 4 SC 272.

452 A lease granted by a mortgagee in possession will not bind someone holding a prior encumbrance, unless that person has consented to it,

but will bind a person holding a subsequent encumbrance and the current mortgagor (when the mortgagee has withdrawn from possession): subs (6). After the mortgagee has withdrawn, the current mortgagor and persons claiming through that person are bound by, and entitled to enforce, the covenants of the lease: subs (7).

453 A mortgagee in possession is given power to execute and do all things necessary for the granting of a lease: subs (8). A District Land Registrar or “other person” need not enquire whether or not occasion has arisen authorising the mortgagee to grant a lease. The Registrar is protected against an action under s 172 of the Land Transfer Act 1952 arising out of registration of such a lease: subs (9). In the case of another person, the dispensation from an obligation to inquire will not prevent challenge to the validity of the lease if that person in fact knew of an irregularity (*Selwyn v Garfit* (1888) 38 Ch D 273), but the provisions of the Land Transfer Act 1952 may be protective if the lease is registered under that Act without fraud.

454 Subsection (10) brings forward the substance of s 97 of the 1952 Act, enabling a single lease to be granted of the mortgaged land and other land subject to a collateral security between the same parties. In that case the mortgagee must apportion expenses and rents between the property, though failure to do so will not affect the validity of the lease.

#### **Section 119 Mortgagee in possession of land may exercise powers under a lease**

455 This section replaces s 108(1) of the Land Transfer Act 1952 and will enable a mortgagee in possession of land which is subject to a lease (granted by any person, including the mortgagee, at any time) to exercise the powers of the lessor and enforce the lessor’s rights and remedies under the lease. In this respect, it places the mortgagee in the same position as the mortgagor.

456 Section 108 of the Land Transfer Act 1952 is repealed without replacement of subs (2), which is inconsistent with the general discretionary scheme of relief against cancellation of a lease now to be found in ss 208-211: see para 318 of NZLC PP16.

457 The new section also brings forward the substance of s 91(11) of the 1952 Act, extending it beyond registered land. It does not refer expressly to power to accept the surrender of a lease (as does s 91(14) of the 1952 Act), since this will be included in the right to “exercise all the powers of the lessor” under the lease.

**Section 120 Mortgagee in possession may manage land or goods**

458 This section gives to a mortgagee in possession the powers possessed by a receiver under s 14 of the Receiverships Act 1993 which are relevant to the situation of such a mortgagee: see also s 122 (paras 460 and 461). The power to change the registered office of a body corporate mortgagor has been omitted, since it is inappropriate where the person being empowered is not acting as the agent of the mortgagor.

**Section 121 Mortgagee in possession of land may harvest crops and timber**

459 This section brings forward the substance of s 95 of the 1952 Act and extends it to harvest and sale of crops. The court is empowered to allow a contract to be entered into for performance beyond 12 months after the date of the contract.

**Section 122 Mortgagee in possession may protect or repair mortgaged land or goods**

460 This section should be read with s 88 and, like it, is a new provision. It does, however, reflect the position at common law in relation to the obligation to carry out repairs (which is limited to those which can be done out of the income of the property): NZLC PP16 para 311. The new section extends this principle to insurance, and thereby casts upon a mortgagee in possession an obligation to ensure that the property is adequately insured, if this can be done out of available income from the property. Under s 124 the first charge on such income is the payment of outgoings (including interest under a prior mortgage) and the expense of entering into possession and doing things which a mortgagee in possession is required or entitled to do.

461 Under s 122 a mortgagee in possession will be able to make advances where the income from the property is insufficient to meet the cost of repairing or insuring the property. Such advances will, under s 88, be secured by the mortgage, whether or not it makes provision to that effect, and those advances will rank in priority to any subsequent mortgage regardless of whether the mortgagee has notice of that subsequent mortgage.

**Section 123 Mortgagee in possession of land liable for waste**

462 This new section confirms that a mortgagee in possession of land is liable for damages for voluntary waste; that is, an act or omission whereby the nature or character of the property is altered in a permanent way to the prejudice of the person entitled to the immediate



reversion (*Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513). It involves action taken by the mortgagee in relation to the property. Mere failure to prevent dilapidation (permissive waste) is no longer a tort: s 33 (para 216). There remains, under s 122, the obligation on a mortgagee in possession to effect proper and necessary repairs insofar as the cost of them can be met from the income of the property. Those who may claim if they suffer loss because of such conduct by a mortgagee in possession, are the current mortgagor and any former mortgagor, covenantor or subsequent mortgagee or encumbrancer.

**Section 124 Application of income received by mortgagee in possession**

**Section 125 Application of income where a company under the Companies Act 1955 has given a floating charge**

**Section 126 Application of income where a company under the Companies Act 1993 or an overseas company has given a floating charge**

463 Section 124 governs (subject to ss 125 and 126) the application of income received from mortgaged land or goods by a mortgagee in possession, and requires it to be applied in the following sequence:

- payment of outgoings (including payments under a prior encumbrance);
- payment of reasonable expenses of entering into possession and doing anything which a mortgagee in possession is required or entitled to do;
- repayment of advances of the mortgagee to meet such expenses (with any interest on those amounts provided for in the mortgage);
- payment of interest and repayment of the principal moneys—the sequence of application to these items being left to any direction in the mortgage itself or otherwise to the choice of the mortgagee. In some cases, it is difficult to determine whether a payment is received as principal or interest. This will be unnecessary under s 124.

Any surplus must be paid to the current mortgagor.

464 Sections 125 and 126 carry forward, in the case of current mortgagors that are companies, the rules that applied under s 101 of the Companies Act 1955 to the holders of any floating charge over assets of the company. That section required preferential creditors to be paid out of the company's assets so charged in priority to any claim for interest or principal owing to the debenture holder (except the repay-

ment, with interest, of moneys advanced for the purpose of meeting the expenses of entering into possession). It applied also to receivers appointed by a debenture holder. In the case of receivers, the provision was carried forward by s 30 of the Receiverships Act 1993. Parallel provisions are to be inserted in the Property Law Act 1952 in relation to mortgagees who enter into possession of the mortgaged property, and receive income from it or sell it under a power of sale conferred by the mortgage.

465 The new Property Law Act anticipates this development. Sections 125 and 126 are a gloss on the rules in s 124 concerning the application of income by a mortgagee in possession. These new sections apply to any mortgagee in possession of land or goods of a company where the current mortgagor is a company and the mortgage created a floating charge over them, or a fixed or specific charge that conferred a floating security at the time it was created (ss 125(1) and 126(1)). The sections require the mortgagee to apply income received from the assets subject to the floating charge, or formerly floating charge (but not from assets subject to any portion of the security which has always been fixed upon them) in payment of preferential creditors, before paying himself or herself any principal or interest. Payment of moneys owing under any charge having priority over the charge of the mortgagee in possession is not postponed by these sections.

466 Section 125 relates to current mortgagors which are still companies registered under the Companies Act 1955: see definition of **company under the Companies Act 1955** in s 3. The section applies, to a mortgagee in possession of land or goods of such a company under a floating charge, the rules as to the payment of preferential creditors which a liquidator of such a company must observe: see s 286 and Schedule 8C to the Companies Act 1955 as inserted by the Companies Amendment Act 1993. Its provisions are modelled on those of s 30 of the Receiverships Act 1993. As is the case under that section, income received before 1 July 1994 must continue to be applied as required by s 101 of the Companies Act 1955, as if that section had not been repealed by the Receiverships Act 1993: subs (4). Section 126 relates to companies which are registered or reregistered under the Companies Act 1993: see definition of **company under the Companies Act 1993** in s 3. It also applies to **overseas companies** as defined in s 3. The section requires a debenture holder in possession under a floating charge to observe the rules as to preferential payments which bind the liquidator of such companies: see ss 312 and 342 of the Companies Act 1993 and the Seventh and Ninth Schedules to that Act.

467 Because the scheme of the new Property Law Act makes a clear distinction between the receipt of income from the mortgaged property by a mortgagee in possession or a receiver and the application of the proceeds of sale of mortgaged property, it is necessary to include corresponding provisions in subpart 6 of part 8: see ss 156 and 157 (para 496). Section 171 of the new Act [Application of income received by a receiver] and s 173 [Application of proceeds of sale of mortgaged land by a receiver] apply only to receivers appointed under mortgages over land which are and always were a fixed or specific charge over the land (s 169). The duties owed to preferential creditors by a receiver appointed by a debenture holder under a floating charge are governed exclusively by s 30 of the Receiverships Act 1993.

### **Section 127 Mortgagee in possession to account to current mortgagor**

468 This new section states the mortgagee's obligation to account to the current mortgagor, and subsequent encumbrancers for income received from land or chattels as mortgagee in possession and for its application or payment under ss 124, 125 and 126.

469 In subs (2) such income is stated to include

- income actually received by the mortgagee,
- an allowance for income which would have been received but for wilful misconduct of the mortgagee, and
- an allowance for personal occupation by the mortgagee.

470 Case law states that mortgagees who go into possession of land are liable to account for rent on the basis of wilful default in obtaining income from the property: *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513. Because **default** is already a defined term, the Act uses the expression "wilful misconduct", which is intended to have the same meaning as "wilful default" has in the case law.

471 Subsection (3) continues the present exemption from the obligation of a mortgagee to account for personal occupation of land where physical possession existed only because the mortgagee entered the land solely for the purposes of management or harvesting, or the carrying out of repairs, or doing some other act falling within s 120, s 121 or s 122, or was for the purpose of effecting a sale of the land under the mortgagees' power of sale. However, in the case of sale, the mortgagee

would have to show that the sale had not been unreasonably delayed.

472 Subsection (4) reverses the common law rule that an accounting between a mortgagee in possession and a mortgagor or a subsequent encumbrancer is usually made without rests: see NZLC PP16 para 307. The subsection provides for interest to be calculated with half yearly rests or rests of a shorter or longer interval provided for in the mortgage contract.

*Duties of mortgagees in possession*

**Section 128 Notice of entry into possession of mortgaged land or goods**

**Section 129 Address to which notice to the current mortgagor is to be sent**

**Section 130 Public notice**

**Section 131 Current mortgagor to make information available to mortgagee in possession**

**Section 132 Accounting records**

**Section 133 Duty in relation to money**

**Section 134 First report by mortgagee in possession**

**Section 135 Further reports by mortgagee in possession**

**Section 136 Extension of time for preparing reports**

**Section 137 Persons entitled to receive reports**

**Section 138 Persons entitled to inspect reports**

**Section 139 Duty to notify breaches of other Acts**

473 These sections repeat, with minor modifications, provisions which have been inserted into the 1952 Act by the Property Law Amendment Act 1993.

*Withdrawal from possession*

**Section 140 Withdrawal of the mortgagee from possession**

474 This is a matching provision to s 116, which defines when a mortgagee becomes a mortgagee in possession. Under the section, withdrawal from possession is deemed to occur when a receiver of all or part of the land or goods is appointed, or a prior mortgagee takes possession, or the court orders or consents to withdrawal under s 141 or s 142, or after redemption or sale of the land or goods, or with consent of all interested persons. A mortgagee in possession is not permitted to withdraw from possession except in one of these ways:

subs (2). After withdrawing from possession, the mortgagee has no entitlement to, or obligation to account for, income from the property (but must pay over moneys actually received after that time: subs (3)). The mortgagee forgoes any right to income accrued during the period of possession to the extent that it has not actually been received by the mortgagee before the withdrawal. But if a mortgagee has given credit for moneys not actually received when accounting under s 127, and after the withdrawal those moneys are actually received by or for the benefit of the current mortgagor, they will constitute a debt owing by the current mortgagor to the mortgagee: subs (4).

#### **Section 141 Withdrawal with the consent of the court**

475 This section implements the Law Commission's proposal in paras 314 and 315 of NZLC PP16, that a mortgagee should be able to withdraw from possession with the consent of the court. The court must be satisfied that the mortgagee has substantially performed its obligations and duties and that there is no other good reason why consent should not be given: subs (2).

#### **Section 142 Withdrawal by direction of the court**

476 This section brings forward the substance of s 104PP as inserted in the 1952 Act by the 1993 Amendment. It empowers the court to order a mortgagee in possession to withdraw.

#### **Section 143 Restriction on re-entry into possession after withdrawal**

477 This section applies where a mortgagee withdraws from possession or is ordered to withdraw from possession by court order. There may be no re-entry into possession except where there has been a fresh default.

#### **Section 144 Notice that mortgagee has withdrawn from possession**

478 This section repeats the substance of s 104OO of the 1952 Act (as inserted in 1993).

#### *Protection for directors*

#### **Section 145 Defences available to directors in proceedings for offences under this subpart**

479 This section brings forward s 104QQ of the 1952 Act (as inserted in 1993).

## *Subpart 6—Mortgagees' power of sale*

### *Exercise of power of sale*

#### **Section 146 Duty of mortgagee exercising power of sale**

480 This section brings forward the substance of s 103A of the 1952 Act (as inserted by s 4 of the Property Law Amendment Act 1993). It imposes on a mortgagee exercising a power of sale of land or other property a duty of reasonable care to the current mortgagor, any former mortgagor, any covenantor and subsequent mortgagee, or encumbrancer to obtain the best price reasonably obtainable as at the time of sale: subs (1). The duty of care applies when a mortgagee is selling through the Registrar. A new provision declares that the mortgagee may not become the purchaser except in accordance with s 166, at a sale of land or goods through the Registrar, or in accordance with a court order under s 168: subs (2).

#### **Section 147 No defence or indemnity**

481 This section brings forward s 103B of the 1952 Act (as inserted by s 4 of the Property Law Amendment Act 1993).

#### **Section 148 Powers incidental to power of sale**

482 This section is an adaptation of s 101(1)(i) of the Law of Property Act 1925 (UK). It declares the manner in which a mortgagee's sale or a sale by a receiver may be held. It confirms that the sale may be conducted with a reserve—but not where the sale is through the Registrar: s 162(1)(d). The conditions can be compared with those found in cl 8 of the Fourth Schedule to the 1952 Act.

#### **Section 149 Mortgagee may adopt agreement for sale and purchase**

483 This new section implements the proposal in para 320 of NZLC PP16 that a mortgagee should have power to adopt an agreement for sale and purchase previously entered into by the mortgagor. The section applies only when the mortgagee is entitled to exercise a power of sale. The mortgagee must give notice to the purchaser, and then has the rights and powers under the agreement for sale and purchase possessed by the mortgagor/vendor, as well as the right to execute documents and do other things necessary to complete the transaction, including execution of a registrable memorandum of transfer. Accounting for the proceeds of sale must occur in the same manner as for a sale by a mortgagee.

484 The section does not render the mortgagee or receiver liable as vendor merely because of the adoption and enforcement of the agreement for sale and purchase. The mortgagor remains liable on the agreement: subs (3).

**Section 150 Court may authorise land and minerals to be dealt with separately**

485 This section carries forward the substance of s 93 of the 1952 Act, extending it to a receiver's sale.

**Section 151 Powers incidental to power to sell land, mines or minerals**

486 This section carries forward the substance of s 94 of the 1952 Act, extending it to a receiver's sale.

**Section 152 Sale together with other property at a single price**

487 This section carries forward the substance of s 97 of the 1952 Act, so far as it relates to a sale by a mortgagee. The leasing power in s 97 is now to be found in s 118(10). Section 152 extends to a receiver.

**Section 153 Mortgagee may transfer or assign mortgaged property to purchaser**

488 This section, together with s 154, replaces s 98 of the 1952 Act. It provides for the sufficiency of a mortgagee's receipt where the mortgagee is selling the property in exercise of a power of sale. It also specifies, in subs (2), that the mortgagee has power to execute transfers or assignments of the property to a purchaser. But, where the mortgagee is the purchaser (which can happen only under ss 166 and 168), the transfer or assignment must be executed by the Registrar or otherwise in accordance with a court order under s 168: see s 146(2), which restricts the ability of a mortgagee to become the purchaser of the mortgaged property.

489 The document so executed transfers or assigns the property free from the mortgage under which the sale was made, and any subsequent mortgage or encumbrance. However, the transfer or assignment is subject to any prior mortgage, encumbrance, or other estate or interest. The transfer or assignment is also subject to any other estate or interest which is binding on the vendor mortgagee, such as a lease of mortgaged land where the mortgagee has given consent to the lease.

**Section 154 Protection of purchaser at sale by mortgagee**

490 This section combines and extends the second part of s 98(1) and s 102 of the 1952 Act, as well as the proviso in cl 8 of the Fourth

Schedule to that Act. A purchaser from a mortgagee or receiver (or someone claiming through the mortgagee) is declared not to be answerable for the loss, misapplication or non-application of the purchase money, is not to be obliged to see to its application, and need not inquire as to the necessity, regularity or propriety of the sale. However, such a provision would not protect someone who had actual knowledge of an irregularity. Consequently, subs (3) expressly gives protection from liability, except where there has been fraud of which the purchaser, or person claiming through the purchaser, is aware. If the mortgagee purchases the property, he or she is not protected from liability even if unaware of the fraud. "Fraud" in this context has a wider meaning than it does under the Land Transfer Act 1952, where it is confined to actual dishonesty, but, of course, once the purchaser registers without fraud in the latter sense, the provisions of that Act will protect the purchaser: see s 7(3).

491 The new section applies to sales of both land and other property pursuant to a mortgage.

**Section 155 Application of proceeds of sale of mortgaged property**

**Section 156 Application of proceeds of sale where a company under the *Companies Act 1955* has given a floating charge**

**Section 157 Application of proceeds of sale where a company under the *Companies Act 1993* or an overseas company has given a floating charge**

492 Section 155 replaces s 104 of the Land Transfer Act 1952 and extends it to sales by a mortgagee of all kinds of mortgaged property. It does not apply to a receiver: but see, in relation to a receiver appointed under a fixed mortgage of land, s 173 (para 524).

493 The order of application of the proceeds of sale of mortgaged property is:

- payment of moneys paid or advanced in terms of s 88 for the protection of the security, or in connection with possession or realisation of the security;
- payment of moneys secured by a prior mortgage or encumbrance, where the mortgagee has sold upon condition that it will be discharged: subs (2);
- payment of interest and the payment of principal moneys secured by the mortgage;
- payment of subsequent mortgages or encumbrances which are **registered** (as defined in s 3 (para 122)) or of which the mortgagee



has actual notice—in the order of their priority, if there is more than one.

Any surplus must be paid to the current mortgagor.

494 The section does not specify that proceeds must be applied to interest before they are applied in reduction of the principal, though the mortgage may require them to be so applied.

495 Unlike the present s 104, this section authorises the use of proceeds for the payment of a mortgage having priority over the mortgage in respect of which the power of sale has been exercised: subs (2). This assumes that the selling mortgagee has contracted to discharge the prior mortgage and that a right to redeem the prior mortgage exists: see s 93 (paras 376–382).

496 Where the current mortgagor was a company, and the mortgage created a floating charge over the mortgaged property, ss 156 and 157 vary the rules laid out in s 154. In that case, the rules for the payment of the preferential creditors of the company must be followed before the proceeds of sale of assets subject to the floating, or formerly floating, charge are applied to any claim of the debenture holder. In substance, ss 156 and 157 correspond to ss 125 and 126, which deal with the application of the income from property of a current mortgagor company subject to a floating charge, when that income is in the hands of a debenture holder in possession under the charge: see the commentary on those sections (paras 464–467) for a full discussion of the reasons for the inclusion of both sets of provisions and their effect. Where mortgaged property is sold on the condition that it will be freed of a prior mortgage or other encumbrance, ss 156 and 157 do not affect the right of the debenture holder first to apply the proceeds of sale to pay off the prior charge: see ss 156(5) and 157(4).

### **Section 158 Payment of surplus to the Crown if current mortgagor cannot be found**

497 This section carries forward s 102A of the 1952 Act, extending it to a receiver, but omits the provision that the mortgagee's failure to give further information is an offence. The sanction is that a mortgagee or receiver who does not give that information will not get a discharge for proper application of the surplus under subs (3).

498 Part VII of the Public Finance Act 1989 now contains a code about trust moneys in the hands of the Crown, so the cross reference to the Trustee Act 1956 has not been brought forward.

*Sale by mortgagee through the Registrar or through the court***Section 159 Sale by mortgagee through the Registrar****Section 160 Application for sale under section 159****Section 161 Vendor mortgagee must nominate a discharge sum****Section 162 Registrar to arrange sale****Section 163 Withdrawal of land or goods from sale****Section 164 Registrar's fees, expenses and commission**

499 Sections 159–167 replace ss 99–101 and 103 of the 1952 Act, and were foreshadowed in the discussion in paras 378–393 of NZLC PP16. Section 159 authorises the **Registrar** of the High Court (see definition in s 3) to conduct a sale by public auction of the mortgaged land or goods. Section 160 enables a mortgagee who is entitled to exercise a power of sale over mortgaged land or goods to apply to the Registrar to conduct it. The sale can be of the whole or any part of the land or goods. An application can be made in respect of either land or goods separately, or of both together: s 159(2). As reference to a sale of goods is now expressly made in the Property Law Act, s 46 of the Chattels Transfer Act 1924, along with the rest of that Act, can be repealed by the proposed Personal Property Securities Act (NZLC R8).

500 In the sections mentioned, the mortgagee who makes the application to the Registrar is called the **vendor mortgagee** (defined in s 3). What in the 1952 Act is termed the “redemption price” is in the new Act called the **discharge sum** (defined in s 3 (para 121)).

501 The language of s 160(1) concerning the office of the High Court where the application must be made, is taken from Rule 107(1) of the High Court Rules.

502 The requirements for the material to be contained in the application by the mortgagee now found in s 99(1) and (1A) of the 1952 Act are brought forward in ss 160(2) and 161. The application must contain the name and address of the current mortgagor, and any former mortgagor or covenantor, and any other mortgagee or holder of an encumbrance (where the mortgage or encumbrance is registered or the vendor mortgagee has actual notice of the holder's name and address). There is an added provision requiring a breakdown of the discharge sum where land or goods are to be sold in separate lots.

503 If there is a prior mortgage or encumbrance, the application must not include in the discharge sum any moneys owing under it, and must state if the sale is to be subject to or free of that security: s 161(2). (It will, of course, remain sensible practice for the vendor mortgagee to give in the conditions of sale an estimate of the amount secured by the

prior mortgage or encumbrance, whether or not the property is sold subject to it, for in either case a prospective purchaser needs that information when deciding upon a bid.) This rule is included because a discharge sum is not the sale price to a stranger, but the sum at which the mortgagee may buy in or the mortgagee may redeem the property. For the mortgagee's ability to repay the prior mortgagee on settling the mortgagee sale: see s 155(2) (paras 492–495).

504 The Registrar is required to be satisfied that the vendor mortgagee is entitled to sell the property and has complied with the provisions of the Act concerning exercise of the power of sale: s 162(1).

505 The Registrar must, as soon as is practicable, approve the sale, and fix a convenient time and place for it to be conducted. This must be not less than one month after the date of the application but, unlike the present s 99(2), the section does not require that the sale has to be held within 3 months of the application. Section 162(1)(c) requires notice of the details of the sale and the discharge sum to be given to the mortgagor, to any covenantor and to other mortgagees and holders of encumbrances whose names and addresses have been supplied in the application. The same section also requires the Registrar to approve proper conditions of sale, employ an auctioneer and do all other things necessary for the proper conduct of the sale by public auction. The conditions of sale must not contain provision for any reserve, confirming *Wallace v Public Trustee* [1932] NZLR 625: but see s 163(1).

506 In recognition of the practice of some solicitors in submitting a draft application, s 162(2) states that the date of the application is to be the date on which a completed application is filed: compare *Hampton v The Registrar of the High Court at Auckland* (1990) 1 NZ ConvC 190, 559.

507 The Registrar must give such notice of the sale, as the Registrar considers sufficient, by advertisement in a newspaper circulating in a locality in which the land or goods are situated. If the Registrar considers that, by reason of the character of the land or goods, such advertising is unlikely to enable the vendor mortgagee to discharge the duty (under s 146(1)) to obtain the best price reasonably obtainable at the time of sale, then the Registrar must also arrange advertisements in newspapers circulating in such other localities as the Registrar thinks fit: s 162(3). If the advertising is in fact insufficient to discharge the duty of care, the mortgagee will be liable under s 146(1). The mortgagee can apply to the court under s 162(4) to direct the Registrar to undertake further advertising and can, under s 162(5), carry out more extensive

advertising or marketing than is directed by the Registrar or the court. The costs of such further advertising reasonably incurred by the vendor mortgagee have the security and priority afforded by s 88.

508 The current mortgagor and any other person with an interest in the proposed sale can also apply to the court to direct the Registrar to undertake further or other advertising of the sale or marketing of the land or goods as the court thinks fit: s 162(4).

509 Section 162(6) is a slip rule. The Registrar may consent to correction of minor errors in the application or in the conditions of sale or any advertisement when satisfied that it will not prejudice the mortgagor or any other person who has an interest in the land or goods. The Registrar is also given the power to withdraw the property from sale upon becoming aware of an irregularity or impropriety in any matter preliminary to the sale: s 163.

510 Section 163(1) confirms the present practice whereby Registrars approve conditions of sale which give a vendor mortgagee the right to withdraw the property from sale. This can be done whether or not the bidding has reached the discharge sum but, of course, cannot be done after the property has actually been sold. However, if the vendor mortgagee unreasonably withdraws the property from sale, the Registrar, being of that opinion, must disallow all or an appropriate proportion of the expenses of the sale. An expense so disallowed does not have the protection of s 88: s 163(2).

511 Section 164 replaces s 103 of the 1952 Act, but includes in the amount which the vendor mortgagee must pay the reasonable expenses of and incidental to the sale, whether or not the property is actually sold.

**Section 165 Current mortgagor or other person may redeem on payment of nominated discharge sum**

512 This section carries forward the substance of s 100 of the 1952 Act. But, as expenses will be secured by the mortgage (under s 88), they are not separately referred to in the new section. It provides that the current mortgagor or other **person entitled to redeem** the property (see definition in s 3 (para 115)) can redeem before sale (or withdrawal from sale under s 163) by paying the discharge sum or the moneys secured by the mortgage at the time of payment. The owner may pay the lower of those amounts. Redemption can be made separately in respect of a separate lot where the property is intended to be sold in lots.

513 Upon payment, the vendor mortgagee must discharge the mortgage in accordance with the section and deliver the instruments of title

held by the mortgagee. Alternatively, where the whole of the property is redeemed in one payment, the person redeeming is entitled to require transfer of the mortgage in terms of s 94. Any balance owing of the money secured by the mortgage remains recoverable under the personal covenant of the mortgagor or anyone else personally liable under the mortgage (a former mortgagor or covenantor).

**Section 166 Mortgagee may purchase at sale through the Registrar**

**Section 167 Effect of transfer executed by the Registrar under section 166**

514 These sections bring forward the substance of s 101 of the 1952 Act and deal with one of only two instances in which the mortgagee may purchase the mortgaged property (the other being under s 168 [Sale by mortgagee through the court]). Under s 166 the price payable by the vendor mortgagee must not be less than the discharge sum. But if the vendor mortgagee's successful bid is higher than that amount, then the price will be the amount of the bid.

515 Where the vendor mortgagee becomes the purchaser, the Registrar executes the memorandum of transfer or other instrument to convey the property: s 166(3). The document so executed transfers or assigns the property free from the mortgage under which the sale was made and any subsequent mortgage or encumbrance. But the transfer or assignment is subject to any prior mortgage, encumbrance or other estate or interest. The transfer or assignment is also subject to any other estate or interest which is binding on the vendor mortgagee, such as a lease of mortgaged land where the mortgagee has given consent to the lease: s 167(1).

516 In the case of registered land, the District Land Registrar is authorised by s 167(2) to register a memorandum of transfer signed by the High Court Registrar. A similar provision is made for registration of a mortgagee sale of a ship or discharge of a financing statement registered under the proposed Personal Property Securities Act (NZLC R8): s 167(3) and (4). In the case of a registered ship, subs (3) is made subject to the provisions of the Ship Registration Act 1992, since that Act has restrictions on who may own a New Zealand ship.

**Section 168 Sale by mortgagee through the court**

517 This new section is intended to assist a mortgagee of any property in the exercise of power of sale, including completion of a sale already made. It is not restricted to land or goods. The court is given a dis-

cretion to make a range of orders on the application of the mortgagee, and on being satisfied that the mortgagor has failed to remedy a default and that the mortgagee is entitled to exercise a power of sale. The court may

- direct the sale of the mortgaged property;
- order that the sale be conducted by or on behalf of the mortgagee or by the Registrar;
- make stipulations concerning advertising, marketing, conditions of sale, or the manner in which sale is to be conducted;
- permit the mortgagee to become the purchaser of the property;
- permit redemption by the current mortgagor or other person entitled to redeem;
- order the vesting of the property in the purchaser or make an order discharging any mortgage or other encumbrance;
- order the Registrar or some other person to execute documents to transfer the property to a purchaser (including the mortgagee) or to discharge any mortgage or other encumbrance;
- determine the priority of mortgages or other encumbrances over the property: subs (2).

518 A transfer, assignment or discharge under the section vests the property in the purchaser and can be registered under any enactment as if it had been executed by the mortgagee: subs (3).

519 The application must be served on the current mortgagor and must also be served on any former mortgagor or covenantor and other security holders and, in the case of land, a caveator or persons who have lodged a notice under s 42 of the Matrimonial Property Act 1976: subs (4). Orders directing a sale may be made on conditions, which can include deposit in court of a reasonable sum fixed by the court to meet the expenses of the sale or to secure the performance of any other condition of the order: subs (5). The court can make an order under the section notwithstanding that any person with an interest in the property or in the mortgage is not before the court or opposes the order and it does not first need to determine the priority of encumbrances over the property: subs (6). Comparison can be made with the provisions of s 86(2)–(4) of the 1952 Act.

*Subpart 7—Appointment of a receiver in respect of mortgaged land*

**Section 169 Application of this subpart**

520 Sections 169–173 (subpart 7 of part 8) apply to receivers appointed under fixed charge mortgages of land, where the instrument giving power to appoint a receiver was executed after the new Act comes into force. For this purpose, a mortgage is not a fixed charge unless it has been fixed since its creation. In other words, the sections do not apply to floating, or formerly floating, charges over land.

**Section 170 Remuneration of a receiver**

521 This new section applies subject to anything to the contrary in any instrument (ie, the mortgage or any ancillary document). Like comparable provisions in the Law of Property Act 1925 (UK) and the property statutes of the Australian states, it provides for the receiver to have a commission at a maximum rate on all income received from the property while the receiver holds office. That commission covers both reimbursement of the receiver's expenses and the receiver's remuneration. The commission is at a rate, not exceeding 6 percent, specified in the instrument of appointment and, if nothing is specified in that instrument, the rate is 6 percent. However, the court can review or fix the remuneration of the receiver at a level "which is reasonable in the circumstances": s 34(2) of the Receiverships Act 1993.

**Section 171 Application of income received by a receiver**

522 This section deals with the income of mortgaged land, as distinct from the proceeds of its sale. It parallels the provision for distribution of income received by a mortgagee in possession: s 124. In parallel with that section it provides for the following sequence of distribution:

- payment of rates or other outgoings on the land (including payments in respect of a prior encumbrance);
- payment of the receiver's expenses and remuneration;
- payment of the reasonable expenses of doing anything which a receiver is required or entitled to do in respect of the land;
- repayment of advances by the mortgagee for the foregoing purposes (with interest on such amounts if provided for in the instrument);
- payment of interest under the mortgage and, if the mortgagee directs in writing, repayment of the principal moneys so far as they are then due.

Any surplus income must be paid to the current mortgagor: see also s 30 of the Receiverships Act 1993.

**Section 172 Sale of mortgaged land by a receiver to whom this subpart applies**

523 This section is a reminder that a receiver of mortgaged land under a fixed or specific charge has the rights, powers and obligations expressly conferred on receivers generally, in relation to mortgaged land, by subparts 4 and 6 of part 9 as well as by the Receiverships Act 1993. These relate to the giving of the required notices of the intention to exercise the power of sale, and to rights and powers incidental to that power. A person purchasing from a receiver, or someone who claims through such a person, has the protections given by s 154. In addition, the Receiverships Act 1993 imposes detailed duties on receivers who sell any property in receivership.

**Section 173 Application of proceeds of sale of mortgaged land by a receiver**

524 This section parallels for a receiver of mortgaged land the provisions of s 155 which are applicable to a mortgagee, and governs the application of proceeds of sale of mortgaged land: see s 169 for when the section applies (para 520; see also s 30 of the Receiverships Act 1993).

*Subpart 8—Liability to mortgagee of purchaser of land subject to a mortgage*

**Section 174 Purchaser personally liable to mortgagee**

525 This section is an adaptation of s 104 of the 1952 Act and makes someone who acquires land subject to a mortgage personally liable to the mortgagee (despite not having signed the transfer document) for the payment of all moneys secured by the mortgage and for observance of all the mortgagor's covenants. The mortgagee is given remedies directly against that person as if he or she were the original mortgagor. It should be noted that such a person comes within the definition of **mortgagor** in s 3 when he or she has accepted a transfer, assignment or transmission of the mortgaged land upon the basis that the transfer etc is made subject to the mortgage (para 116). It is not necessarily enough, in order that liability arise under the section, that there is a transfer etc of the land. The transferee etc must have expressly or impliedly agreed to be responsible for the mortgage, in the sense that his or her interest is to be subject to the charge. In a few cases the transferee may succeed in proving that a transfer was never accepted



on this basis.

526 However, it is now provided, in subs (2), that the moneys for which the transferee is responsible do not include advances made to a former mortgagor after the mortgagee had notice of a transfer of the land to the current mortgagor or a former intermediate mortgagor, unless the mortgagee was at the time of the transfer obliged to make the advance and remained obliged to make it when it was actually made: subs (2).

527 The section does not extinguish the liability of any former mortgagor: subs (3). It repeats the limitation of the liability of an administrator of a deceased estate, or a trustee, to the assets of the estate or trust which are in that person's hands and which are available for meeting the obligations under the mortgage: subs (4).

528 The Law Commission suggested in para 324 of NZLC PP16 that s 104(3) of the 1952 Act need not be brought forward: submissions touching on this question supported that view and it has been omitted.

## PART 9: LEASES OF LAND

529 The provisions of part 9 apply to leases of land only.

### *Subpart 1—General provisions*

#### **Section 175 Definitions for the purposes of part 9 and interpretation**

530 This section contains certain definitions for the purposes of the part of the Act dealing with leases:

- The **expiry** of the term of a lease includes termination of a periodic or statutory tenancy by expiry of a notice.
- A **lease**, for the purposes of s 180 [Notice by joint tenants], ss 203–214 [in subpart 6—Remedies and relief] and s 219 [Effect of waiver], includes a licence to occupy land in consideration of a rent or a payment in the nature of rent. But if a licensee obtains relief, the licence is not thereby converted into a proprietary interest in the land.
- A **condition** of a lease, for the purposes of ss 203–214 and s 219, includes an act or omission of the lessee or any other person (not being a breach of covenant) or the occurrence of a specified event (other than expiration of the term) which, in either case, is expressly or impliedly a ground for the cancellation of the lease. A breach of a condition includes the commission of such an act or the occurrence

of the omission or specified event. The reference to an *implied* condition will bring within the regime of ss 203–214 the rule whereby a lessee who does anything which prejudices the lessor's title forfeits the lease: see NZLC PP16 para 554.

### *Subpart 2—Duration and effect of leases*

#### **Section 176 Short term leases**

531 In s 49A of the 1952 Act leases of land transfer land for a term of less than 3 years are exempted from the requirements for a writing. In contrast, the new Act will exempt only unregistered leases for a term of one year or less, or periodic tenancies for periods of one year or less, or statutory monthly tenancies (formerly under s 105 of the 1952 Act and now found in s 177). Moreover, in order to prevent the circumvention of the section by the granting of such a lease to take effect in the future, while at the same time preserving some flexibility concerning a commencement date, it is required that, to qualify as a short term lease, the term of the lease must begin not later than 20 working days after the date of the contract to lease.

532 A short term lease may be made orally or in writing: subs (2). When the lessee has entered into occupation (ie, physical possession) of land, the short term lessee will have a legal interest in land: subs (3). However, the legal interest will be defeated by the operation of the Land Transfer Act 1952 in the same manner as an equitable interest. If the possessor of an unregistered interest which is subject to the short term lease later registers under the Land Transfer Act 1952 without fraud, the newly registered interest will prevail.

533 Subsection (4) provides that the legal interest under a short term lease will, where the lessee has given valuable consideration, have priority over

- an unregistered interest created before the lessee entered into occupation (but only if the entry occurred in good faith without actual notice of the unregistered interest and there was no caveat lodged in respect of it at the time of entry), and
- an unregistered interest in the land created after the lessee entered into occupation.

**Registered** and **unregistered** are defined in s 3 in relation to land under the Land Transfer Act 1952 (para 122).

534 Section 115(1) of the Land Transfer Act 1952 is amended by s 265 so that in its entirety it will read as follows:

When any land under this Act is intended to be leased or demised otherwise than by way of short term lease under s 175 of the *Property Law Act [199-]*, the proprietor shall execute a memorandum of lease in Form K in the Second Schedule to this Act, and that instrument shall, for the description of the land intended to be dealt with, refer to the grant or certificate of title, or shall give such other description as may be necessary.

535 The reference to a term of not less than 3 years is to be removed from s 115(1). Subsection (2), which implies that an unregistered lease for 3 years or more is void at law, would be repealed. This will bring the provisions of the Land Transfer Act 1952 in relation to leases into line with those for transfers, mortgages etc: there will be no *requirement* for registration nor any suggestion that an unregistered lease is void. On the other hand, a short term lease will not be able to be registered even though it may be in writing.

536 The provisions of s 176, like the other relevant provisions of part 4 [Form and effect of certain transactions relating to land and other property], apply to residential tenancies. Throughout the Act, the term "lease" includes a tenancy.

#### **Section 177 Implied term of lease where no other term agreed**

537 This section replaces and clarifies s 105 of the 1952 Act which was the subject of comment in paras 602–607 of NZLC PP16. Subsection (1) applies whenever a lessee is in possession of any land under a lease entered into at any time, but no agreement, either express or implied, has been made between the lessee and the lessor as to the duration of the term. The lease is then deemed to be terminable at the will of either party by not less than 20 working days' notice in writing given at any time. The new section omits the reference contained in s 105 to tenancies from year to year, and thus confirms the view taken at first instance in New Zealand decisions, that the operation of the section is not to be confined to situations in which at common law there would have been a tenancy from year to year. (In Australia the opposite position has prevailed.)

538 "Possession" means legal possession; that is, entitlement to the rents and profits: contrast s 176 which is cast in terms of (physical) occupation by a lessee.

539 Whereas s 105 allows termination on one month's notice in writing, the new section requires notice to be calculated in working days, so that a notice will not expire over a weekend, on a public holiday or during the Christmas period: see definition of **working day** in s 3 (para 151).

540 The section operates by implying as a matter of law into tenancy agreements the requisite period of notice if either party wishes to terminate and the section is relevant to all tenancies. However, it is overridden by any express or implied agreement which has been reached by the parties. Thus it will be open to the courts, as it is at present, to find by implication from the facts that the parties must have intended a different arrangement. The factual implication then prevails over the statutory implication.

541 Subsection (2) operates where there has been a holding over with the consent of the lessor after the expiry of the period of an earlier lease. In that case, if the parties have not agreed upon the arrangements for the termination of the holding over, it will be terminable in accordance with subs (1), and the terms of the former lease will continue to apply except in so far as they are inconsistent with the statutory tenancy. Subsection (2) will apply if a notice is given to terminate a periodic tenancy or to terminate a tenancy under subs (1) and, by consent of the lessor, the tenant remains in possession without agreement about when he or she shall go.

#### **Section 178 Lease terminating on the occurrence of a future event**

542 In paras 583–587 of NZLC PP16, the Law Commission drew attention to a problem arising out of the common law rule requiring that the duration of a lease must be certain when it commences. A grant for an uncertain term does not create a lease: only a statutory tenancy results. This has caused difficulty when future circumstances are used to fix the date of termination. It was necessary to pass remedial legislation when it became common in England and New Zealand to let premises for the “duration of the war” during World War II. In *Lace v Chantler* [1944] KB 368 such a grant was held to be invalid because the duration of the war was uncertain. The House of Lords, while reaffirming the rule, has recently said that it is unsatisfactory and without useful purpose: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386.

543 A periodic tenancy is regarded as being sufficiently certain because the maximum commitment of each party can be fixed at any moment by service of notice. Each occupational unit of time, as it is added to the preceding unit of time, is itself of strictly defined duration: *Gray Elements of Land Law* (Butterworths, London, 1987) 437.

544 However, the courts have sometimes found difficulty in determining whether an arrangement for a lease on a periodic basis is truly a periodic tenancy where the landlord’s ability to give notice is fettered,

either absolutely or for a fixed period of time, unless a certain condition is fulfilled, as the following passage from Lord Templeman's judgment in the *Prudential* case shows:

A lease can be made for five years subject to the tenant's right to determine if the war ends before the expiry of five years. A lease can be made from year to year subject to a fetter on the right of the landlord to determine the lease before the expiry of five years unless the war ends. Both leases are valid because they create a determinable certain term of five years. A lease might purport to be made for the duration of the war subject to the tenant's right to determine before the end of the war. A lease might be made from year to year subject to a fetter on the right of the landlord to determine the lease before the war ends. Both leases would be invalid because each purported to create an uncertain term. (395)

The new s 178 would correct the invalidity in the latter two cases by limiting the term and the fetter respectively to a period of 10 years.

545 The section does not apply to leases for life, which are not considered by the law to be for an uncertain term, but rather are classified as freeholds: see discussion in NZLC PP20.

546 Under the section, a lease is not to be invalid by reason only that it provides for termination upon the occurrence of a future event if that event is sufficiently defined in the lease as to be identifiable when it occurs: subs (1). But if the specified event does not occur before the tenth anniversary of the date of commencement of the lease, and the lease is still running on that date, it will terminate on that tenth anniversary, unless the lease itself provides for termination on a later fixed date: subs (2). So a lease granted until a certain event happens will be valid if the event is described in a way which makes it recognisable when it occurs. However, if the event in question does not occur within 10 years of the commencement date, the lease will come to an end under subs (2) (unless it has earlier been surrendered or cancelled). On the other hand, if the lease provides, say, that it is to come to an end on the earlier of the occurrence of the identifiable event or the twentieth anniversary of the commencement date, then, under subs (2), the lease will terminate after 20 years if the event does not occur before that date.

547 In NZLC PP16 the Law Commission suggested that the backstop date could be the fifth anniversary of the commencement date, but this has been changed in light of several submissions suggesting that a longer backstop period would be more suitable.

548 The section applies only to leases coming into operation after the new Act comes into force.

**Section 179 Lessee remaining in possession after termination of lease without consent of lessor**

549 This new section applies when a lessee remains in possession after a lease comes to an end (compare s 177(2), where the lease is continuing without agreement on a new term). In that circumstance, subs (1) confirms that the lessee's obligations under the lease also continue until the lessee ceases to be in possession: see also s 206(2) for the position while time is running under a lessor's notice relating to a breach of lease.

550 Subsection (2) is intended to remove a trap into which many lessors fall. After termination or expiry of the lease and while they are waiting for the lessee to give up possession, they accept rent in respect of a period after the date of termination. The acceptance of rent in these circumstances may by itself create a right in the lessee to remain in possession; it may operate as a waiver of a breach of lease which has given rise to termination by the lessor. The subsection will ensure that acceptance of rent alone will not in these circumstances have this consequence. The lessor will still be able to pursue the right to have the lessee give up possession. However, often conduct of the lessor accompanying acceptance of rent may still preclude the lessor from enforcing the termination.

551 The provisions are adapted from s 60 of the Residential Tenancies Act 1986. That section will, to the extent that it is inconsistent with s 179, govern the situation in relation to residential tenancies: s 7(3).

**Section 180 Notice by joint tenants**

552 This new section confirms the decision of the House of Lords in *Hammersmith & Fulham London Borough Council v Monk* [1992] 1 AC 478, in which it was held that a lease to two or more tenants may be determined by notice to quit given by one of the joint tenants without the concurrence of any other joint tenant, unless the terms of the tenancy provide otherwise. Although this decision has been criticised in England because of its destructive effect upon the protected lease, in New Zealand, where protective provisions for long leaseholds do not exist but where shared joint tenancies (such as among groups of students or other young single people) are commonly found, the result seems appropriate. Each tenant should be able independently to bring the tenancy to an end. The principle seems equally applicable to a termination notice given by one lessor who is a joint tenant. Accordingly, the new

section allows a termination notice to be given by any one or more joint tenants who are lessors or lessees, unless all parties to the lease have agreed otherwise expressly or by implication. The section is to apply also to tenants in common: see definition of **joint tenants** in s 3 (para 151). It is unsatisfactory that there should be a distinction in relation to the termination of leases on notice. If it is desired to restrict the giving of notices, so that they must be given by all lessors or lessees in relation to a particular lease, an express provision can be inserted to override the section. The section has application to licences to occupy land: s 175(2).

### **Section 181 Sublease for term the same as, or longer than, term of superior lease**

553 This topic was discussed in paras 486–493 of NZLC PP16. This new section follows the provisional proposal there. It changes the common law rule that a sublease granted for a term of the same length or longer than the superior lease reserves no reversion in the grantor and consequently operates as an assignment of the entire rights of the sublessor. (A **superior lease** (or a head lease) is defined in s 3 (para 123).) The new section provides that where this occurs then, unless a contrary intention appears, the sublease does not operate as an assignment: subs (2). If the term of the sublease exceeds that of the superior lease, it will be reduced so as to expire at the same time as the superior lease. If subsequently the term of the superior lease is extended or renewed, the term of the sublease will automatically be extended and will then expire *either* at the same time as the extended or renewed superior lease *or* at the earlier time at which the sublease is already expressed to expire: subs (3). The reduction of the term of the sublease is without prejudice to any remedy which the sublessee may have in respect of the reduction. In the circumstances which the section contemplates, the sublessor is to be taken as having a reversion expectant upon the sublease: subs (4).

554 The section applies only to subleases coming into operation after the new Act comes into force: subs (1).

### **Section 182 Surrender to enable new superior lease to be entered into not to affect sublease**

555 This further provision relating to subleases deals with a different circumstance, namely where it is desired to effect a surrender of a superior lease for the purpose of entering into a new superior lease. The section applies only if the express term of the sublease must expire on or before the date on which the term of the new superior lease

expires. If the sublease is a periodic tenancy, it must be possible to terminate it before the date of expiry of the new superior lease. The section ensures that the sublease will continue as if it had been granted out of the new superior lease and that all rights and obligations under the sublease, including those which relate to any period before the surrender, continue to be enforceable—except to the extent that they impose obligations more onerous than under the original sublease. The same rule applies to any person deriving title through the lessee under the surrendered lease—a sub-sublessee.

556 The operation of the new section can be illustrated by this example: if A has granted a superior lease for 10 years to B and B has in turn granted a sublease for 8 years to C, the section will preserve C's sublease in the following circumstance. If A accepts surrender of the superior lease and grants B a new superior lease to expire on or after the eighth anniversary of the commencement date of C's sublease, C's position is entirely unchanged by the transaction.

557 But if, instead, B is granted a new superior lease for a term which will expire before C's sublease will expire, the new section does not apply. In that case, at common law, C's sublease is unaffected by the surrender of the superior lease. C is able to continue to enjoy possession of the premises for the full term of the sublease. The re-grant to B will be a concurrent lease under which B will again become C's lessor until such time as B's lease expires, when A's rights (under s 191) to directly enforce the covenants in the sublease will come into play.

558 The section replaces s 6 of the Landlord and Tenant Act 1730.

### *Subpart 3—Covenants, conditions and powers implied in leases*

#### **Section 183 Covenants, conditions and powers implied in all leases of land**

559 Common law covenants in leases entered into after the new Act comes into force are abolished by s 74(2). Sections 183–185, 186 and 188 create new forms of implied covenants by lessees and lessors under such leases. In relation to the implied obligation to take care of the premises, a distinction is drawn between short term leases and other leases. A **short term lease** is defined in s 176 (paras 531–536). It is an unregistered lease of land for which the term begins not later than 20 working days after the date of the contract to lease, and is for one year or less, or a periodic tenancy (for periods of one year or less), or a statutory tenancy under s 177. It can be made orally or in writing.



560 To the extent that any of the implied covenants, powers or conditions are inconsistent with the Residential Tenancies Act 1986 or any other enactment, they will not apply: s 7(3).

561 Sections 183-185 apply subject to any contrary intention expressed in a manner acquired by s 73(b). That section allows a covenant implied in an instrument by the 1952 Act or any other Act to be negated, varied or extended by the express terms of the instrument or by a written memorandum executed, as the instrument was required to be executed, by the parties to the instrument.

562 A covenant implied *as a matter of law* in a lease may be negated, varied or extended by express or implied agreement of the parties. An implied agreement of the parties is one implied *as a matter of fact* from the arrangements made between the parties. Where there is no express agreement which would contradict the covenant to be implied under s 183 and, in relation to an oral short term lease, the facts do not establish any such agreement, the statutorily implied conditions, covenants and powers will operate.

563 Those terms are set out in part 1 of schedule 5. They can be compared with the implied covenants and powers now found in ss 106(a) and 107 of the 1952 Act. All covenants relate to **premises** which are defined in schedule 5 to include “all land comprised in the lease”: cl 10. This is designed to catch the land proper, as well as all buildings and other improvements and growing plants and trees.

564 *First*, there is an implied covenant for the payment of rent when it falls due under the lease. If the premises are in whole or part destroyed or damaged by certain causes so as to be unfit for occupation and use by the lessee, the rent and contributions to outgoings payable by the lessee are to abate in fair and just proportion to the destruction or damage, until the premises have been repaired and reinstated and are again fit for occupation and use. The circumstances which will give rise to abatement are

- fire, flood or explosion (whether or not caused or contributed to by the negligence of the lessee);
- lightning, storm, earthquake or volcanic activity;
- any other cause against the risk of which the lessor has insured the premises.

565 Negligence on the part of the lessee is irrelevant. This is a change from s 106(a) of the 1952 Act, under which there is abatement only if a

peril which destroyed or damaged the premises occurred without neglect or default of the lessee. The policy of the new Act is that the risk of fire, flood or explosion—the commonest causes of damage to buildings—is to be borne by the lessor. (Indeed, because the lessor's right to claim against a lessee is removed by s 218, for reasons which are discussed in the commentary to that section (paras 666–674) and, in more detail, in paras 455–485 of NZLC PP16, the lessor's insurer is unable to rely upon the right by subrogation. The provisions for abatement can be changed by the agreement of the parties to a lease, but not in a manner which revives the right of subrogation.) Clause 1(3) of part 1 provides that a lessee is not entitled to any abatement if, and to the extent that, any insurance moneys are irrecoverable because of an act or omission of the lessee or an agent, contractor or invitee of the lessee. It goes without saying that the exemption will not protect the lessee if the lessee or someone for whom the lessee is legally responsible intentionally damages the premises. The lessee cannot take advantage of the lessee's own wrong.

566 Abatement applies not only in the event of fire, flood or explosion, but also where the premises are destroyed or damaged by lightning, storm, earthquake or volcanic activity (where questions of lessee negligence are not really relevant) and in the case of destruction or damage by any other cause against the risk of which the lessor is actually insured. The lessor has, under the implied covenant, no obligation to insure. If there is no insurance cover against the particular risk (eg, damage caused by a motor vehicle or an aircraft), there will be no abatement. However, if there is *any* amount of insurance, there will be abatement even if the amount of that insurance cover proves to be inadequate to reimburse the lessor. Thus, if the lessor decides to take out insurance cover, the lessor ought for his or her own protection to ensure that the policy will adequately reimburse abated rent and contributions to outgoings. But, in the case of the perils listed in paras (a) and (b), the existence of insurance cover for the lessor is not relevant to the lessee's right to an abatement—except under cl 1(3).

567 As under s 106(a) of the 1952 Act, disputes concerning payment of rent under these provisions are to be submitted to arbitration: cl 1(4).

568 *Second*, there is an implied covenant by the lessee not to make any alteration to any leased building without the consent of the lessor. Consent is not to be unreasonably withheld. This is a new implied covenant.

569 *Third*, there is a further new implied covenant by the lessee not to do or permit on the leased premises any noisome or offensive act or

thing or any act or thing which is, or is likely to be, or to cause, nuisance, damage or disturbance to the lessor or other lessees or to neighbours.

570 *Fourth*, there is a covenant by the lessee not to commit or to permit any agent, contractor or invitee to commit the tort of voluntary waste in relation to the leased premises. This merely reflects the common law position. For a discussion of voluntary waste, see the commentary on s 31 (paras 211–214).

571 *Fifth*, there is an implied covenant by the lessor not to derogate from the lease. Again, this simply confirms the common law position against derogation from the grant of the lease.

572 *Sixth*, there is a lessor's implied covenant for quiet enjoyment (in limited form). The covenant is limited to the acts and omissions of the lessor and persons through whom the lessor derives title otherwise than by a purchase for valuable consideration and persons who claim or may claim through, under or in trust for the lessor or someone from whom the lessor derived title without giving valuable consideration: s 183(2). There is an area of overlap between a covenant for quiet enjoyment (which relates entirely to questions of title) and the covenant not to derogate from the lease. The latter covenant comes into its own when the disturbance caused or permitted by the lessor is a physical disturbance unrelated to the lessee's title to occupy the premises: the lessor must not do anything which is inconsistent with the purpose for which the premises are let: see *Hinde, McMorland and Sim Land Law* para 5.056.

573 *Seventh*, there is an implied condition in any lease where there is an express or implied term that the leased premises may be used for any one or more specified purposes, that the lessee may terminate the lease, on reasonable notice to the lessor if, at any time during the currency of the lease, the premises cannot be, or can no longer be, lawfully used for any one or more of those purposes. So, if a lease is granted on the basis that it may be used for purposes A or B and it transpires that it cannot be used for purpose B or during the lease the right to use it for purpose B lapses, the lessee may terminate the lease on reasonable notice to the lessor. (If the premises *must* be used for these purposes only, there is, of course, the clear implication that they *may* be so used, so the same consequence will apply if, at any time during the lease, they cannot be used for both purposes.) The implied condition relates to lawful use, not to physical impossibility. It is thus directed only to legal impediments. It also concerns only the premises themselves.

574 *Eighth*, the lessor has implied power to enter the premises for the purpose of inspecting them and carrying out repairs or complying with legal requirements or notices issued by a competent authority. In so doing, the lessor must not unreasonably interfere with the lessee's occupation and use.

575 *Ninth*, the lessor is impliedly empowered to invoke the provisions of s 203 (whereby, after expiry of a warning notice and default not having been remedied, the lessor can take steps to terminate the lease by peaceable re-entry, or obtaining a court order for possession) when rent is unpaid for 15 working days (whether or not there has been a demand), or where the lessee has failed for 15 working days to observe or perform any other covenant, condition or stipulation on the part of the lessee expressed or implied in the lease. Cancellation of the lease by the lessor does not release the lessee from liability for any antecedent breach. The period of 15 working days is the same as that required by s 204 to have elapsed before a lease may be terminated for non-payment of rent. There is no comparable period in s 205, which relates to termination for other breaches; but, where cl 9 of part 1 of schedule 5 operates, the lessor will not be able to terminate the lease for any breach until the breach has continued for at least 15 working days. It should be noted, however, that s 205 may in the circumstances of a particular case require a longer "reasonable" period of notice: the 15 working days in cl 9 is a minimum period.

#### **Section 184 Covenant implied in all leases of land other than short term leases**

576 This section replaces s 106(b) of the 1952 Act. It contains a repair covenant to be implied, unless inconsistent with the express provisions of the lease, in all leases entered into after the new Act comes into force other than **short term leases** (as defined in s 176 (paras 531–536)). The implied covenant is found in part 2 of schedule 5. It requires the lessee to keep and, at the termination of the lease, yield up the premises in the *same* condition as they were in when the term began. The lessee is not bound to repair damage caused by reasonable wear and tear or by

- fire, flood or explosion (whether or not caused or contributed to by the lessee's negligence);
- lightning, storm, earthquake or volcanic activity;
- any other cause against the risk of which the lessor has insured the premises.

577 The lessee is not excused from liability if, and to the extent that, insurance moneys are rendered irrecoverable by an act or omission of the lessee or an agent, contractor or invitee of the lessee.

578 For the policy behind the exclusion of the lessee's liability for negligence, see the discussion on cl 1 of part 1 of schedule 5 in the commentary on s 183 (para 566). The lessee's release from liability to repair is parallel to the provision for abatement of rent when premises have been destroyed or damaged by a peril.

579 The reference currently found in s 106(b) to destruction or damage caused by "accidents" has been omitted: see the criticism of it in para 409 of NZLC PP16.

### Section 185 Covenant implied in short term leases

580 This new section is a substitute, in the case of **short term leases** (as defined in s 176), for the repair covenant now found in s 106(b) of the 1952 Act. As short term leases are those for one year or less or are periodic tenancies or statutory tenancies under s 177, it is inappropriate that a lessee should have imposed, by implication of law, a potentially costly obligation to expend labour and money in carrying out significant items of repair. Consequently, the implied "repair" covenant for short term leases is merely that the lessee must use the leased premises "in the manner of a reasonable tenant". This is a more modern formulation (taken from the Property Law Act 1974 (Queensland) s 106(1)(b)), of the expressions "tenant-like manner" and "husband-like manner". The flavour of the obligation cast by the implied covenant on a tenant under a short term lease is described by Denning LJ (as he then was) in *Warren v Keen* [1954] 1 QB 15:

The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, where necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition he must not, of course, damage the house wilfully or negligently; and he must see that his family and guests do not damage it, and if they do, he must repair it. But, apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time or for any reason not caused by him, then the tenant is not liable to repair it. (20)

581 The new implied covenant will not apply to tenancies of residential properties (because s 40 of the Residential Tenancies Act 1986 governs them: see s 7(3) of the new Act). The above quotation gives an

indication of the nature and extent of the obligations which fall, under the implied covenant, on short term tenants of non-residential properties.

### **Section 186 Meaning of reference to “usual covenants”**

582 The common law “usual covenants” (discussed in paras 395–398 of NZLC PP16) are excluded in relation to leases executed after the new Act comes into force. References in such leases to “usual covenants” are to be taken as references to covenants implied by ss 183–185 unless the context otherwise requires. In the case of a non-residential tenancy, an agreement that there will be the “usual covenants” will be taken to be a reference to these provisions. Where covenants are implied by an enactment other than the 1952 Act, such as the Residential Tenancies Act 1986, reference to “usual covenants” will be to those covenants together with any implied covenants in ss 183–185 which are not inconsistent with them.

### **Section 187 Time for payment of rent**

583 At common law, rent expressed as an annual sum is payable yearly in advance: *Coomber v Howard* (1845) 1 CB 440. This rule is incompatible with modern practice. The new s 187, therefore, provides that, unless otherwise agreed, rent payable under a lease of land is payable monthly in advance, whether or not it is expressed as an annual sum. The section applies only to leases coming into operation after the new Act comes into force.

### **Section 188 Effect of covenant to keep premises in good condition**

584 This new section adopts the proposal in para 408 of NZLC PP16. At present an obligation to keep premises in good condition may include an obligation to put them in good condition if they are not in that condition at the beginning of the term: *Payne v Haine* (1847) 16 M & W 541; 153 ER 1304. This rule is negated in leases coming into operation after the new Act comes into force. A covenant to keep leased premises in good condition (or words to that effect) will not require the lessee to put the premises into good condition if they are not in good condition when the term of the lease begins. However, this limitation can be overridden by express agreement of the parties concerning the repair work which must be done by the incoming lessee.

### **Section 189 Consent not to be unreasonably withheld**

585 This new section relates only to leases of land coming into operation after the new Act comes into force. In them, any covenant by a lessee not to do a thing without the consent of the lessor is to be

construed as requiring that consent not unreasonably to be withheld. However, the parties can exclude this rule of construction. The cross reference to s 190 has the purpose of making it clear that s 189 is a residual rule. If the lease comes within s 190, then the requirement will apply, and that requirement cannot be excluded.

### **Section 190 Consent to assignment etc or change of use**

586 This section re-enacts, with amendments, the substance of ss 109 and 110 of the 1952 Act. It deals with the lessee's right to have the lessor consent to certain forms of disposition of the lease and, conversely, with the lessor's right to refuse consent. The section is now extended also to the right to have or withhold, respectively, consent to a change of use.

587 The section does not apply where the lease contains an absolute prohibition: subs (8). In such case, nothing in the section impinges upon the existing right of the lessor to refuse consent without necessarily having good reason for the refusal.

588 Section 190 applies to applications for consent where a lease contains a covenant that the lessee will not, without the consent of the lessor,

- transfer or assign the lease;
- enter into a sublease;
- part with possession of leased premises;
- change the use of the leased premises from a use which is permitted under the lease;
- do any of these things in relation to any part of the premises or for any part of the term;
- create a mortgage over the leasehold estate or interest.

589 On receiving the application, the lessor must not unreasonably withhold consent—whether or not the covenant expressly says so. The lessor must also, within a reasonable time, either give consent or notify the lessee in writing that consent is withheld: subs (2). Consent is unreasonably withheld where the lessor requires any payment or other consideration as a condition of, or in relation to, the giving of consent. That could include a requirement for the payment of additional rental or payment of a premium or fine. Consent is also unreasonably withheld if the lessor imposes any unreasonable condition or pre-condition in relation to the consent. An unreasonable condition in relation to consent would include, for example, an obligation to do a certain thing, such as making

an offer to surrender the lease, before applying for consent. In *W E Wagener Ltd v Photo Engravers Ltd* [1984] 1 NZLR 412, a distinction was drawn by the Court of Appeal between an attempt to avoid s 110 of the 1952 Act by defining in the lease what might constitute an unreasonable refusal, on the one hand, and the imposition of a pre-condition to any application for consent, on the other. It seems that the latter falls outside s 110. The intention in s 190(3) is to do away with this distinction so that a consent is unreasonably withheld if an unreasonable pre-condition is imposed either in the lease itself or by some other means, where the lessee is entitled, with the consent of the lessor, to dispose of the lease or to change the use or do any of the other things referred to in subs (1).

590 A consent withheld by reason of the bankruptcy, receivership, winding up or liquidation of the lessee is also unreasonably withheld. That does not, however, prevent the withholding of consent if the rent is in arrears.

591 Under s 199(1) the liability of an assignor of a lease for the continuing obligations of the lessee is compulsorily to lapse as from the fifth anniversary of the assignment. In order that this fact may not be used as a justification for the refusal of a consent to an assignment where the lessee is entitled to dispose of the lease with the consent of the lessor, s 190(3)(c) provides that in such a case consent is unreasonably withheld if it is withheld because the transferor or assignor will (after 5 years) be released from liability under s 199. The lessor is entitled to require the lessee to pay reasonable legal or other expenses relating to the consent: subs (4).

592 If a lessor refuses consent or imposes a pre-condition or condition upon a consent, the lessee is entitled to make a request in writing for the reasons for this decision and the lessor must immediately inform the lessee of them in writing: subs (5). A lessee (or someone deriving rights through the lessee) may recover damages for any loss suffered because the lessor unreasonably withheld consent, and did not give consent or notify the withholding of consent within a reasonable time. If any payment has been extracted by the lessor in breach of subs (3)(a), it is recoverable by the payer: subs (6).

593 Under s 109(2) of the 1952 Act, certain dispositions are deemed not to be in breach of covenant unless the contrary is expressly declared in the lease. However, almost universally, leases declare that dispositions coming within s 109(2) are to be breaches of covenant. This provision is accordingly not repeated.



594 Contracting out of s 190 is not permitted: subs (7). The section applies to leases coming into operation both before and after the Act comes into force: s 7(1). However, it applies only to applications made after that time: subs (1).

*Subpart 4—Effect on leases of transactions concerning the reversion*

**Section 191 Merger of reversion not to affect remedies**

595 This section carries forward the substance of s 111 of the 1952 Act (which is discussed in paras 494–500 of NZLC PP16). It refers to a situation in which a sublessor surrenders the head lease to the head lessor. At common law, when the head lease was surrendered, the reversion merged into the fee simple and was extinguished. Because the rent and the sublessee's covenants are incidents of the sublessor's reversion, the extinguishment of the reversion led to the inconvenient result that the head lessor could not claim the rent or enforce the covenants under the sublease. Yet the surrender was ineffective to put an end to the sublease, so the sublessee could remain in possession and enjoy the benefit of the sublease.

596 The section gives a head lessor or other person holding an interest in land into which another interest is merged at a time when the merged interest is already burdened with a lease, the ability to enforce the lease. In the new section there is added a power to give notice of termination to the sublessee where that right exists under the merged lease.

597 Subject to any right of the head lessor under the terms of the sublease to bring the sublease to an end, if the sublessee obeys the covenants in the sublease, the sublessee has the right to remain in possession until the sublease expires: *Ellery v Blair* (unreported, High Court, Auckland, 26 May 1993, CP 2618/88, Blanchard J) noted in (1993) 6 BCB 213.

**Section 192 Burden of lessor's covenants to run with the reversion**

598 This section brings forward the substance of s 113 of the 1952 Act. It enables a lessee to enforce against successors in title of the original lessor (ie, successors to the reversion immediately expectant upon the lease) all of the lessor's covenants. However, while s 113 made covenants run with the reversion only where they related to the subject matter of the lease, the new section applies to all covenants, including those of a purely personal nature, unless it appears from the lease itself that a covenant is not to run. However, in the case of personal

covenants, the new section will apply only to those contained in leases executed after the new Act comes into force.

599 The section in the 1952 Act did not apply to leases executed before 1 January 1906. The Law Commission discussed the position relating to them in NZLC PP16 in paras 426–431, saying that it would like to be able to delete this exception and asking whether there are any informal leases of that age still in existence. No submissions raised any objection. The exception has been deleted.

### **Section 193 Benefit of lessee's covenants to run with the reversion**

600 This section carries forward, with amendments, the substance of s 112 of the 1952 Act. It gives to someone who acquires land which is already subject to a lease the right to enforce the covenants in the lease against the lessee. Included in the rights which run with the reversion are the right to receive the rent, the right to enforce other covenants (including those relating to a subject matter not in existence when the covenant was made), the right to exercise all rights and remedies under the lease (including the right to give notices and take advantage of conditions), and the right to bring about cancellation of the lease for breach. The right to enforce any guarantee given in relation to the lessee's performance also runs with the reversion.

601 As is the case with s 192, the present distinction between covenants relating to the subject matter of the lease and purely personal covenants is dispensed with. But, again, the right of a successor to the reversion to enforce a personal covenant will apply only where the covenant appears in a lease granted after the new Act comes into force.

602 The rights to which this section applies run with the reversion, but may be exercised "by the person who is from time to time entitled to the income of the land". This makes no change to the present section. For practical purposes in New Zealand, the only persons entitled to the income other than a current lessor are a mortgagee in possession or a purchaser of the reversion who has entered into possession but not yet taken title.

603 Subsection (4) puts into statutory form the case law referred to in para 435 of NZLC PP16 and confirms that a successor entitled to the reversion can exercise a right against the lessee under the lease which first became exercisable or accrued before that person acquired the reversion, unless the right had already been waived or the lessee had already been released from the obligation before that time. The current owner of the reversion is also exclusively entitled to exercise the right

in question, unless that person has agreed to the exercise of the right by some other person; in that case the right is exercisable by the other person to the extent so agreed.

604 Like s 192, s 193 applies to leases coming into operation at any time whether before or after the new Act comes into force, except in relation to the enforcement of purely personal covenants. The existing exemption under ss 112 and 113 of the 1952 Act for leases made before 1 January 1906 is dispensed with for the reasons discussed in paras 426–431 of NZLC PP16 (which were supported in submissions received by the Law Commission). Unfortunately, for the reasons given in paras 433 and 434 of NZLC PP16, it is necessary to perpetuate the distinction between covenants relating to the subject matter (or, as sometimes expressed, touching and concerning the land) and personal covenants in relation to leases granted before the new Act comes into force.

#### **Section 194 Rights and obligations under lease after severance**

605 This section brings forward the substance of s 114 of the 1952 Act. It deals with situations relatively unusual in New Zealand in which either the reversion has been divided up amongst two or more owners (severance of reversion as regards the land) or the lease has been terminated as to part of the land (severance of reversion as regards the estate) without, in either case, appropriate arrangements having been made for apportionment of the obligations of the parties. The section provides for an apportionment. Subsection (2) is new and, in substance, is borrowed from s 140(2) of the Law of Property Act 1925 (UK). It enables a lessee who has received a notice to quit, operating as to part only of the premises because there has been a severance, to bring the entire lease to an end by notice to the lessor or lessors of the rest of the reversion. The notice must be given within 20 working days after the date of receipt of the notice given by the lessor and, when this is done, it operates to bring the balance of the lease to an end on the same date that the original notice of termination takes effect: subs (3).

#### **Section 195 Effect of payment by lessee to assignor of the reversion**

606 This section replaces certain provisions of the Administration of Justice Act 1705. It ensures that a lessee who, in ignorance of the fact that the lessor's interest in the land has been transferred or assigned, continues to make payments of rent and other moneys due under the lease to the original lessor, cannot be obliged to pay the same amounts to the transferee or assignee of the lessor's interest.

607 Subsection (2) confirms that registration under the Land Transfer Act 1952 of the memorandum of transfer of the reversion does not amount to actual notice to the lessee. In the case of land under the Land Transfer Act 1952, **registered** is defined in s 3 as meaning registered under that Act (para 122).

608 Subsection (3) nullifies any attempt by the lessee to treat as lessor a person who is not entitled to the reversion unless that action is taken with the consent of the person who is entitled or pursuant to a court order.

#### *Subpart 5—Effect of transfer or assignment of leases of land*

#### **Section 196 Application of this subpart**

609 This subpart governs the rights and obligations of a lessor, an assignor and an assignee, where an existing lease of land is assigned. It applies only to a transfer or assignment of lease where the transfer or assignment happens after the Act comes into force. However, that transfer or assignment, and the consequences which flow from it, can relate to a lease made at any time.

#### **Section 197 Transferee or assignee becomes lessee**

610 Section 197(1) dispenses with the need for any attornment (an acknowledgment of the lessor by the assignee) or the need for the assignee to enter into possession. Regardless of whether or not these things have happened, if there is an effective assignment, the assignee becomes the lessee of the land. However, the assignee must have accepted the assignment in the sense of intending that the lease be assigned with immediate effect: see definitions of **lessor** and **lessee** in s 3 (para 124). The assignment has this effect regardless also of whether any necessary consent of the lessor has been obtained, but the section does not preclude the lessor from taking the point that the assignment was in breach of covenant, so the lessor can still invoke its rights under the lease: s 197(2). In this respect, the section makes no change to the current law: *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397.

611 On becoming the lessee of the land in terms of s 197(1) the assignee must pay the rent and observe the lessee's covenants and may enforce the lessor's covenants unless, in either case, the covenants in question were not binding immediately before the assignment: subss (3) and (5). The effect of these provisions is to create a direct relationship of lessor and lessee between the lessor and the assignee immediately the assignment takes effect, and to dispense with formalities which may pre-

vent it taking effect. As soon as there is an effective assignment, the lessor and the assignee can enforce the lease covenants against one another. This includes enforcement of a covenant relating to any subject matter not in existence when the covenant was made, and of purely personal covenants: subs (4). However, personal covenants in a lease granted before the new Act comes into force cannot be enforced under the subpart against successors in title of the original lessor or successors in title of the original lessee: see ss 192 and 193.

### **Section 198 Transferor or assignor remains liable unless released**

612 Section 198(1) provides for the continuing liability of an assignor of a lease (whether that person was the original lessee or someone who acquired the lease subsequently). However, there is no continuing liability in relation to a covenant which was not binding before the assignment: s 198(2).

### **Section 199 Release after 5 years**

613 An important and significant departure from the present law is that all liability on any lessee's covenant will expire 5 years after the assignment: s 199(1). An assignor of a lease is not to be liable (whether under the lease itself or a separate document, such as an assignee's deed of covenant with the lessor) for breaches of the lease (including non-payment of rent) which occur after the fifth anniversary of the date of the assignment of the lease. The problem of continuing liability of an assignor of a lease and some proposals for reform were canvassed in paras 441–454 of NZLC PP16. While there was support in the submissions to the Law Commission for some of the provisional proposals, none has been widely thought to be satisfactory in New Zealand conditions and, in the end, after further consultation, the Law Commission has concluded that an arbitrary 5-year cut-off is the preferable solution. A lessor will not be able to withhold consent to an assignment solely on the ground that the assignor will be released after 5 years: s 190(3)(c). It will not be possible to contract out of the provision that the assignor's liability will lapse after 5 years: s 199(2).

### **Section 200 Release where lease is subsequently varied**

614 Section 200(1) treats an assignor, who under the present law has concurrent liability with the existing lessee, like a guarantor. A variation in the rent, or in any covenant on the part of the lessee, agreed upon between the lessor and the assignor's successor in title without the consent of the assignor will release the assignor if it would release a guarantor of the obligations of the lessee. However, subs (2) provides that, for this purpose, a lease is not varied merely because it is extended

or renewed under a right of extension or renewal contained in the lease at the date of the assignment. Similarly, under subs (3), rent is not varied solely by reason of an increase under a provision for an increase connected with a right of renewal or extension of this kind which existed in the lease at the date of the assignment, or by reason of an increase pursuant to a review of rent under an existing review provision where the rent is increased in the manner provided for in connection with the review. It is unnecessary for the new reviewed rent to have been fixed by arbitration. If there is a rent review provision in the lease at the time of the assignment, the assignor will be bound by an increased rent agreed upon in good faith under that provision by the lessor and the assignor's successor in title. Subsections (2) and (3) apply to extensions or renewals of lease, but not to a grant of a new lease: see *W E Wagener Ltd v Photo Engravers Ltd* [1984] 1 NZLR 412 and *Mayhew v Robt Jones Investments Ltd* (unreported, Court of Appeal, 20 May 1992, CA 23/91).

615 Section 196(2) provides for the operation of the section where there has been an assignment of part of a lease. Subsection (5) deals with severance or division of the reversion of the leasehold estate after the lease has been assigned.

#### **Section 201 Covenant implied in transfer or assignment of lease of land**

616 This section applies to a transfer or assignment made of any lease after the new Act comes into force. It incorporates both the equitable rule that, where there has been an assignment of a lease, the assignor has an implied indemnity from the current holder of the lease (*Moule v Garrett* (1872) LR 7 Exch 101) and the provisions of s 98 of the Land Transfer Act 1952 which, in relation to registered transfers of leases, implies a covenant by the transferee for payment of future rent and observance of covenants together with an indemnity against breach of those obligations. (Section 98 is repealed, as it is entirely replaced by s 201.) The new section makes it clear that the indemnity does not come to an end when the transferee or assignee in turn ceases to be the current lessee (see the final words of subs (2)), but, as it is merely an indemnity, it has the same limitation of liability as applies to the assignor under s 199.

#### **Section 202 Administrator not personally liable**

617 This section brings forward the substance of s 116 of the 1952 Act. However, its language is adopted from s 64A of the 1952 Act: see now s 228(3).

*Subpart 6—Remedies and relief***Section 203 Cancellation of leases or licences for breach of covenant or condition****Section 204 Notice of intention to cancel for breach of the covenant to pay the rent****Section 205 Notice of intention to cancel for breach of other covenants****Section 206 Consequences of notice under section 204 or 205****Section 207 Powers of court in making order for possession***Introduction*

618 These sections replace s 118(1) of the 1952 Act and contain a code on the manner in which a lease or a licence to occupy land can be cancelled by the lessor or licensor on the grounds of a breach of the lease or licence or because an event has occurred which gives rise to a right of cancellation. In these sections and ss 208–214, all references to a **lease** of land include references to a licence to occupy land: s 175(2). However, the distinction between a lease and a licence, that only the former confers an estate or interest in the land, is preserved: s 175(2). In the commentary on these sections, all references to leases also refer to licences to occupy land.

*Method of cancellation*

619 The right to cancel a lease of land by reason of a breach by the lessee of a covenant or condition of the lease is exercisable only by application to the court for a possession order, or by peaceable re-entry (ie, without committing forcible entry under s 91 of the Crimes Act 1961). In either case, a notice under s 204 or s 205 must first have been given and have expired without the breach having been remedied. The only exception is where the rent has been in arrears for more than 15 working days and the lessor believes on reasonable grounds that the lessee has given up possession of the premises (whether or not that has in fact occurred). Even in this exceptional case, if the lessor is aware of the name and address of any mortgagee of the lease or any sublessee, notice must be given to that person and must have expired with the breach still unremedied: s 204(1).

620 The sections deal with “cancellation” (used in the same sense as it is in the Contractual Remedies Act 1979 and in contra-distinction to a “termination”, which is used in the new Act in the sense of the bringing to an end a lease, including a periodic tenancy, by giving notice to quit).

The cancellation may be on the ground of a breach of the lease by the lessee, or may be based upon the occurrence of an event which gives rise to a right to cancel despite the fact that the event is not in itself a breach of the lease. (This is known under present law as a condition of forfeiture.) So, for example, if the lessor has the right to terminate the lease in the event of the insolvency of the lessee, under the new Act that would be a breach of a condition of the lease if it did not, in terms of the lease document, constitute a default. Section 175(3) defines “a condition of a lease” for the purpose of ss 203–214 and 219 as including an act or omission of the lessee or any other person (other than a breach of covenant) or the occurrence of a specified event which (in either case) is a ground for cancellation of the lease. A breach of the condition means the commission or occurrence of that act, omission or event. The occurrence of a specified event does not include the expiration of the term of the lease. The term of a periodical tenancy or a statutory tenancy under s 175 expires upon the **expiry** of a notice of termination: s 175(1).

621 Under present law, if a lessor is entitled to cancel a lease for breach of a covenant or a condition of forfeiture, the lease comes to an end either when the lessor re-enters or when the court makes an order for possession in an application for possession made by the lessor. In the latter case, the cancellation backdates to the date of the application. This is changed by s 203(2): the cancellation takes effect only on making the possession order or on such *later* date as is specified in the order. So the lease is cancelled at the date of a peaceable re-entry or of the court order, or at a later date specified in the court order.

#### *Warning notice*

622 The form of notice to be given by the lessor differs depending upon whether or not the lessor’s complaint against the lessee relates to non-payment of rent (s 204) or non-observance of some other covenant or condition: s 205. In the case of non-payment of rent, cancellation cannot occur unless the rent has been in arrears for not less than 15 working days. If the lessee is in possession of the premises (in the sense of not having given up the right to legal possession), the lessor must serve a warning notice in terms of s 204(2). That notice must give the lessee a period of time, being not less than 5 working days after the date of service of the notice, in which to remedy the default. The periods of 15 and 5 working days in the notice can run concurrently: s 204(3). So, for example, a 5 working day notice can be given when the rent is one working day in arrears, but the cancellation cannot occur until there are arrears of 15 working days. The notice must also warn of



the right to cancel the lease if the arrears of rent are not paid within the stipulated period, and of the right to relief against cancellation under ss 208–211, together with the expedience of seeking legal advice.

623 If the lessor believes on reasonable grounds that the lessee has given up the right to possession of the premises, the notice complaining of rent arrears can be dispensed with, unless the lessor has actual notice of the name and address of a mortgagee of the lease or a sublessee. Then the notice which would otherwise have to have been served on the lessee must be served on that mortgagee and/or sublessee: s 204(1).

624 Where the breach complained of does not relate to non-payment of rent, a notice complying with s 205(2) must be served regardless of whether or not the lessee remains in possession. (If the rent is still being paid, that is a fairly good indicator that the right to the premises has not been abandoned.) In the case of a notice under s 205, there is no need to specify a particular period within which the breach must be remedied, but the lessor cannot cancel the lease until the expiry of a period that is reasonable in the circumstances, and unless the breach has not been remedied during that period. It is, unfortunately, not possible to specify in the section a satisfactory standard period, as the time needed to remedy breaches of various covenants will differ considerably. A lessor who is uncertain whether sufficient time has elapsed will be unwise to terminate by peaceable re-entry. The better course of action is to seek a court order. In order to encourage lessors to go through the processes of the court and to avoid unfair results caused by this uncertainty, it is provided that the court is not prevented from making a possession order by an application to the court (other than one based on non-payment of rent) being made before the expiry of the reasonable period (ie, it is a premature application), though the effect of the order will be postponed until after the expiry of a reasonable period: s 205(4). When a breach is remedied in due time, there can be no cancellation based upon it. If it is remedied after due time but before cancellation occurs, the lease can in theory still be validly cancelled, but a court is unlikely to so order and would no doubt grant relief under ss 208–211 against a peaceable re-entry in such circumstances.

625 It should be noted that in the implied covenant contained in cl 9 of part 1 of schedule 5, there is a standard period of 15 working days. This period serves a different purpose: it is a contractual minimum period which must elapse. Section 205 is paramount—the fact that 15 working days have passed does not mean that cancellation may take place, if in the circumstances that period is unreasonably short.

626 Section 205(2) requires that the warning notice to be given by the lessor in respect of a breach of covenant (other than a covenant to pay the rent) must inform the recipient adequately of

- the nature and extent of the breach complained of;
- whether the lessor considers that the breach is capable of being remedied in whole or in part by payment, the lessee doing or desisting from doing some act, or paying reasonable compensation (including reimbursing the lessor's reasonable expenses in giving the notice and doing anything else that the lessor has reasonably done in relation to the breach). In this case the notice must specify the act in question or the amount of compensation considered by the lessor to be reasonable, or both;
- the consequence that, if the breach is not remedied at the expiration of a reasonable period, the lessor may seek to cancel the lease;
- the fact that certain matters (mentioned below in connection with s 205(3)) do not invalidate the notice or prevent the lessee from tendering an amount as reasonable compensation for the breach;
- the right to apply to the court for relief against cancellation of the lease (under ss 208–211) and the advisability of seeking legal advice on the exercise of that right.

*Breaches which are incapable of being remedied*

627 Even though the breach may be incapable of being remedied, the lessee must still be given a reasonable period in which to try to remedy it. The purpose of this requirement is to prevent a peremptory cancellation in any circumstances, and to give the lessee an opportunity of considering whether to admit the breach, whether it may in fact be capable of remedy, whether to make an offer of compensation, whether to try to make terms with the lessor and whether to apply for relief.

628 Much time has been devoted by the courts in the United Kingdom to the question of whether a breach is or is not capable of being remedied. In this context, fine distinctions have been drawn between positive and negative covenants: for example, *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340. Sections 205 and 208 make some attempt to limit the situations in which there will be a need to enter upon this ground. Some breaches which are incapable of being remedied by the doing or omission of any act, may nevertheless be capable of being remedied by payment of compensation; and relief may be granted in respect of them: s 208(2). Where the premises have been used

for purposes of immorality or in an illegal manner, the courts have traditionally treated such activity as creating a stigma on the premises, which has been regarded as making the breach incapable of being remedied in any manner. The new sections leave it open to the courts either to confirm or to depart from this attitude.

*Matters not invalidating lessor's notice*

629 Section 205(3) provides that certain matters do not invalidate the notice or prevent the lessee from tendering an amount as reasonable compensation for the breach. These are

- that the notice may not have specified that the breach is capable of being remedied by the payment of reasonable compensation, or
- that the notice may have specified an amount of compensation that is unreasonable, or
- that the notice may have specified that the breach is capable of being remedied by the payment of reasonable compensation, but did not specify the amount which the lessor considers reasonable.

630 The foregoing provisions recognise the wide range of situations which have to be covered by the section, and the need to balance protection for the lessee (who is in any event further protected by the ability to apply for relief if he or she miscalculates the position in connection with the notice or miscalculates the appropriate response) against the need to protect a lessor from being found to be a trespasser because the notice is technically invalid and thus ineffective as a prelude to cancellation.

*Mortgagees, receivers and sublessees*

631 A copy of the lessor's notice which has been served on the lessee must as soon as possible be served on any mortgagee or receiver of the lease and any sublessee of whose name and address the lessor has actual notice (and any mortgagee or receiver of a sublessee): s 206(1). However, as with the present s 118(1A), failure to comply with this subsection does not in itself prevent the lessor from exercising any right to cancel the lease. It may, however, give rise to a right of action in damages by the neglected mortgagee or sublessee, and it will certainly give each of them the right to extend the time for an application for relief under, respectively, s 209(3) or s 212.

### *Acceptance of rent*

632 Section 206(2) reverses the rule that acceptance of rent by a lessor after the warning notice has been served on the lessee waives the notice. It will only be waived if the lessor, in accepting the rent, causes the lessee reasonably to believe that the lessor no longer intends to pursue the right to an order for possession. Acceptance of all the arrears will of course entirely cure the lessee's default, if arrears of rent are the only thing complained of. Acceptance of part of the arrears will generally not do so.

### *Consequential orders*

633 The court is empowered, when making a possession order and by so doing cancelling the lease, to order payment of rent up to the date of cancellation or such later date as the lessee yields up possession. In addition, the court may order payment of reasonable compensation for the breach (including the reimbursement of reasonable expenses): s 207. It may also impose other conditions.

### *Lessor's claim for damages*

634 Section 207(2) provides that nothing in ss 203–206 prevents a lessor from claiming damages arising out of a breach by the lessee (either under the lease or independently), or affects the amount which may be claimed. The intention of this subsection is to reverse the rule exemplified in *Lowe v Ellbogen* [1959] NZLR 103, in which it was held that the lessor had waived all rights to compensation in respect of matters which were not complained of in the notice, but that the lessor could have damages for those which were complained of and not remedied, even though he had not claimed compensation in the notice. The new section attempts to avoid the consequences of this kind of technical slip.

### *No contracting out*

635 Any provision in the lease for automatic cancellation by breach of the covenant or condition or otherwise conflicting with any of the sections or having the purpose or effect of avoiding the need for compliance with them is of no effect: s 214(1). This section will negate devices to circumvent them, such as an attempt to treat the occurrence of a particular event as an alternative expiry date of the lease. It will

also negate a clause which purports to give the lessor the right, in the event of default on any of the lessee's covenants, to convert the lease into a monthly tenancy (held ineffective in *Holden v Blaiklock* [1974] 2 NSWLR 262), or an arrangement whereby the lessee delivers into escrow a signed surrender of the lease to be released to the lessor in the event of a breach of covenant (also held ineffective in *Plymouth Corporation v Harvey* [1971] 1 WLR 549).

#### *Service of notices*

636 Service of notices under these sections must be done in accordance with ss 259 and 260 (paras 754–766).

#### **Section 208 Relief against cancellation of leases or licences for breach of covenant or condition**

#### **Section 209 Application for relief under section 208**

#### **Section 210 Application for relief not to constitute an admission**

#### **Section 211 Effect of an order granting relief against cancellation of a lease**

637 These sections govern the right of a lessee or licensee (as to whom see s 175(2)) to apply for relief against cancellation. They replace s 118(2) of the 1952 Act and s 4 of the Landlord and Tenant Act 1730 which are discussed in paras 543–549 of NZLC PP16. The sections are drawn as a code, excluding the equitable jurisdiction of the court to grant relief against forfeiture: s 214(1).

638 As is the case with s 118(2), the court has been given a very wide discretion to determine whether it is appropriate that relief should be granted and, if it decides in favour of relief, it can do so with or without imposing conditions as to expenses, damages, compensation or otherwise. It has power in its general equitable jurisdiction to grant an injunction to restrain the lessee from repeating the same kind of breach in the future as led to the cancellation of the lease.

639 The following are able to apply for relief against cancellation of a lease: a lessee, a mortgagee of the lease, or a receiver of the lessee's interest. Where two or more persons are entitled to a lease jointly (or as tenants in common: see definition of **joint tenants** in s 3), any one of them can apply for relief on his or her own behalf: s 209(1). However, a joint tenant who is not a party to the application must be served with the application unless the court orders otherwise: s 209(2).

640 An application for relief against cancellation of a lease may be made either before or after cancellation occurs (eg, in respect of a “proposed cancellation”). It can be made in any proceeding brought by the

lessor for an order for possession or in a proceeding instituted by the lessee before an order for possession has been made. If the lessor has not brought proceedings, the lessee's application must be made before the lessor re-enters or within 3 months of re-entry. Where the application is made by a mortgagee who has not been served in accordance with s 206, the mortgagee can apply to the court for an extension of time within which to apply for relief: s 209(3).

641 Section 210 is intended to prevent the making of the application being seen as a waiver of the lessee's right to contest the validity of the lessor's cancellation of the lease. It thus enables the lessee at the same time or, indeed, successively, to challenge the lessor's conduct and to apply for relief: see *Amity Inns Ltd v R H & P L Papps Ltd* (1992) 2 NZ ConvC 191,371 for a discussion of the dilemma in which the lessor is presently placed. Section 210 states that an application for relief is not to be taken as an admission

- of a breach of covenant or condition, or
- that, by reason of such a breach, the lessor has a right to cancel the lease, or
- that notice has been duly served in accordance with s 204 or s 205, or
- that the appropriate period of notice had elapsed before the lessor applied to the court or peaceably re-entered.

642 The fact that the breach alleged against the lessee is one of an essential term of the lease does not prevent relief being granted; nor is relief unavailable where the breach is incapable of being remedied: s 208(2). When relief is granted, there is no need to enter into a new lease. Section 211(2) declares that the lessee then continues to hold the land under the terms of the original lease and any right or interest deriving from a sublease is reinstated. The court order is registrable under the Land Transfer Act 1952 (s 211(1)) and upon its registration operates in respect of a lease of which the re-entry has been notified on the register: s 211(3).

### **Section 212 Protection of sublessee or sublicensee on cancellation of superior lease or licence**

643 This section brings forward the substance of s 119 of the 1952 Act. It applies in a circumstance in which a head lease has been validly cancelled under s 203 and has not been reinstated by a successful application for relief. Any sublessee whose dependent lease has been or will be brought to an end by the valid cancellation of the head lease, is able

under this section to apply to the court for the grant of a new lease direct from the former head lessor to the former sublessee. It is therefore an application for a new lease, not for a new sublease: subs (3). A mortgagee or receiver of a sublessee may also apply under the section.

644 The application can be made in respect of the whole or any part of the premises comprised in the cancelled head lease. Although the section does not limit the grant of the new lease to that portion of the premises comprised in the original sublease, it would be very unusual for the court to order a new lease to be entered into extending beyond the area originally held under the sublease. The section expressly requires that the term of the new lease cannot expire on a date later than the date on which the sublease would have expired, but in its discretion the court can order a new lease for a shorter term. The new lease can be backdated to the date on which the head lease was cancelled: subs (4)(a). The new lease can be ordered upon such conditions as to the execution of any new instrument or payment of rent, or otherwise, as the court thinks fit: subs (4)(b).

645 The application must be brought within the same period as that during which the head lessee could have applied for relief under s 208, namely before the court makes an order for possession or within 3 months of a peaceable re-entry by the head lessor. However, if a warning notice has not been served on a sublessee under s 206, the sublessee can seek an extension of time within which to bring the application under s 212.

646 There is no need for the head lessee to be brought before the court where the sublessee, or its mortgagee, makes an application under s 212, because the form of the relief does not involve reinstatement of the head lease and therefore no new liability is thrown on the head lessee: *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, as confirmed in subs (5). Where a mortgagee applies for relief, the court may order the grant of a new lease in the name of the mortgagee, but in that case the sublessee or mortgagor will still have an equity of redemption, the new lease being held by the mortgagee merely as security: *Chelsea Estates Investment Trust Co Ltd v Marche* [1955] Ch 328.

647 The section is drawn as a code, excluding the equitable jurisdiction of the court: s 214.

**Section 213 Relief against refusal of lessor to enter into a renewal or sell the reversion to the lessee or licensee**

648 This section brings forward (with some slight amendments) the substance of ss 120 and 121 of the 1952 Act. It is a code (s 214), apply-

ing where a lessor has covenanted in writing with the lessee that when the lease expires the lessor will extend the term, renew the lease or enter into a new lease of all or part of the premises to the lessee. It also applies where the lessor has covenanted that on the expiry of the term, or at some earlier time, the lessor will transfer or assign all or part of the reversion to the lessee: in other words, the lessor has given the lessee an option to acquire the lessor's interest in the land or there is a compulsory purchase clause. (In the latter case, there is overlap between this section and subpart 1 of part 5 [Sales and like transactions] (paras 272–283), but the same rules apply under either section.)

649 It is not necessary that the lessor's covenant should be in the lease itself: any binding arrangement of the kind described in the section, made between lessor and lessee, will fall within the section no matter where that arrangement is found.

650 The section applies where the promise made by the lessor depends upon the fulfilment of a condition, certain performance by the lessee, or giving notice within a specified time or in a specified manner (ie, the exercise of an option in accordance with the terms of the option). If the lessee is in breach of the condition or has failed to perform or has failed to give the notice in the requisite time and manner, and the lessor then refuses to carry out its side of the arrangement (whether or not the lessor relies upon the lessee's failure or default), an application can be made to the court for relief: subs (1). The application can be made by the lessee, a mortgagee of the lease, or a receiver of the lessee's interest: subs (2). One joint lessee (including a tenant in common) can apply on its own behalf: subs (2).

651 The application for relief has to be made to the court within 3 months of the date on which the lessor serves notice on the lessee and on any mortgagee of the lease of whose name and address the lessor has actual notice: subs (3). Time does not begin to run against either lessor or mortgagee until the notice is served on both. The ingredients of the notice are set out in subs (3). The notice must adequately and expressly inform the lessee

- that the lessor refuses to extend or renew the lease or grant a new lease or transfer or assign the reversion,
- that the lessee may apply to the court for relief against the refusal,
- that the right to apply for relief lapses if the application is not made to the court within 3 months of the date of service of the notice, and
- that it is advisable for the lessee or mortgagee to seek legal advice on the exercise of the right to apply to the court for relief.



The application can be made in a proceeding brought by the lessor for a possession order or in a proceeding separately brought by the lessee or mortgagee.

652 The court is empowered in its discretion to grant relief, including the making of an order for specific performance, and can impose conditions as to expenses, damages, compensation or otherwise, as it thinks fit: subs (5).

653 If a third party who has been granted an estate or interest in the land would be prejudicially affected by the grant of relief to the lessee under the section, that does not affect the power of the court to grant the relief. The court is empowered to cancel or postpone the third party's estate or interest in the land and can assess damages or compensation to be paid to the third party. The court may order them to be paid by the lessor or the lessee, or to be shared proportionately between the lessor and the lessee: subs (6).

654 An order under this section in respect of Maori land must be confirmed as of right under the Te Ture Whenua Maori Act 1993: subs (7). This carries forward s 120(8) of the 1952 Act. In this respect, the section overrides the provisions of Te Ture Whenua Maori Act 1993.

655 As with all ss 203–213, the new section applies to a licence to occupy land as well as to a **lease**: see s 175(2). Service of notices under this section must be done in accordance with ss 259 and 260 (paras 754–766).

#### **Section 214 Sections 203 to 213 to be a code**

656 This section is intended to prevent the court from granting relief in its equitable jurisdiction which goes beyond what is permitted under ss 203–213. It ensures, for example, that time limits for an application for relief against cancellation of a lease or licence cannot be extended except as provided for in those sections. In subs (1) it is provided that a lease may not be cancelled except as provided for in s 203 and relief may not be granted except in exercise of powers under ss 208–213.

657 Subsection (2) makes the provisions of ss 203–213 mandatory, so that any term expressed or implied in a lease or licence of land, or in any instrument, is of no effect where it provides for an automatic cancellation upon the occurrence of a breach of covenant or condition. Provisions which conflict with the sections or have the purpose or effect of avoiding the need for compliance with the sections (or of s 214) are of no effect.

### Section 215 Right to distrain abolished

658 As is foreshadowed in NZLC PP16 paras 566–569, this section totally abolishes a landowner's right to distrain for rent or other moneys payable under a lease and any right to distrain for a rentcharge. Both common law and contractual rights of distraint are abolished. Enforcement of judgment debts is unaffected. A distress which has been commenced before the Act comes into force can be carried through but, in that connection, the provisions of the Distress and Replevin Act 1908 must be complied with. Subject to that point, the 1908 Act is repealed. So are references to distraint in other Acts, such as s 107 of the Land Transfer Act 1952 (see s 265 and schedule 9). The section does not prevent a lessor from taking security over assets of the lessee to secure rent or other moneys payable under a lease.

659 A **rentcharge** (now shorn of the right of distraint) is defined in s 3 as a rent secured by a mortgage over land (para 119). (A **mortgage** is a species of encumbrance: s 3 (para 118).)

### Section 216 Removal of fixtures by lessee

660 This new section replaces s 3 of the Landlord and Tenant Act 1851. It contains proposals relating to trade, ornamental or agricultural fixtures which were considered in paras 588–597 of NZLC PP16. The new section abolishes the previous distinctions drawn between trade and ornamental fixtures on the one hand and agricultural fixtures on the other. All are now to be governed by the same rules. In the absence of any agreement to the contrary by a lessor and lessee, fixtures of these kinds which were affixed by the lessee (or by a former lessee whose interest was acquired by the lessee, or by a sublessee whose right of removal has expired) may be removed by the lessee while the lessee is in lawful possession of the premises or during a reasonable period after its expiry.

661 The right of removal does not extend to a lessor's fixture, namely one which was affixed in such a manner as to have become part of the structure of a building, or otherwise to be integral to the land. A lessor's fixture includes any fence erected on the land: subs (4).

662 A lessee exercising a right to remove a fixture must cause as little damage as possible, make good any damage which occurs and must also compensate the lessor for any damage which is not made good or for any other loss (which includes indemnification for claims made by a superior lessor): subs (2). The lessee has a right of entry to exercise these rights and carry out obligations under the section: subs (3).

### **Section 217 Effect of unlawful eviction upon lessee's obligations**

663 This new section rationalises the rather confused state of affairs at common law (described in paras 598–600 of NZLC PP16) and implements the proposals made in para 601 of the preliminary paper. Currently, eviction of a lessee contrary to the terms of the lease from *all or part* of the premises suspends the obligations of the lessee in respect of *all* of the premises. The new section provides for an apportioning of the lessee's obligations and suspension only of the appropriate proportion where the eviction is from part only of the premises. Rent and other moneys payable will be reduced proportionately, by the value that the part of the premises from which there has been an eviction bears to the value of the whole of the premises to the lessee. The lessee will also be relieved, while the eviction continues from part of the premises, from having to observe or perform other covenants so far as they relate to that part of the premises: subs (2). The same rule is to apply no matter how the unlawful eviction comes about. There will, for example, be an apportionment where an incoming lessee is unable to obtain possession of the entire premises at the commencement of the lease. Under current law there would not be an apportionment in these circumstances.

664 Any person secondarily liable for the lessee's performance, such as a guarantor of the lessee's obligations or a person who was the lessee but previously assigned the lease to the current lessee, is also released from the obligations during the continuance of the eviction to the same extent: subs (4).

665 Subsection (5) confirms that the lessee's right to cancel the lease and claim damages against the lessor is not affected by the new section. But in any claim for damages, there must be an allowance for the relief granted under the section.

### **Section 218 Exoneration of lessee if lessor is insured**

666 This new section is based upon and extends certain proposals tentatively put forward in chapter XIV of NZLC PP16 (paras 455–485). It was proposed that the new Act should contain a section providing that, where leased premises were destroyed or damaged by fire, flood or any other peril against which the lessor was insured, or had covenanted with the lessee to insure, the lessor would not be entitled to require the lessee to make good the destruction or damage, to indemnify the lessor in respect of the destruction or damage, or to pay damages in respect of it. It was also suggested by the Law Commission that if in these circumstances the lessee was obliged by the terms of the lease to carry out

remedial works, then the lessor must reimburse the cost of so doing. The provision would apply regardless of whether the destruction or damage had been caused or contributed to by the neglect or default of the lessee; but it would not excuse the lessee from liability for wilful damage, nor would it apply if insurance moneys were rendered irrecoverable by the act or default of the lessee or the lessee's agent, contractor or invitee. The proposal was for the new provision to be mandatory. Its intention was, and is, particularly to prevent an insurer of a lessor from exercising by subrogation, a right on the part of the lessor to claim against the lessee in circumstances in which the destruction or damage to premises arose from negligence on the part of the lessee. It therefore removes, or severely restricts, the lessor's right so to claim.

667 In chapter XIV of NZLC PP16, the Law Commission discussed the unsatisfactory state of the case law and its economic unreality, namely that either directly or indirectly the payments made by the lessee under the lease are the source of the lessor's insurance premiums. It drew attention to the exceedingly fine distinctions found in case law, which often turn upon points of construction which are hardly likely to have been appreciated by the parties to a lease or even by their professional advisers.

668 The submissions supported the proposal but urged, in response to a question posed by the Law Commission, that it should go further and impose upon the lessor the risk of destruction or damage caused by some event in respect of which the lessor had *no* insurance cover. In other words, the exoneration of the lessee would apply not only where the lessor had insurance cover (which might or might not be adequate), but also where the lessor had no cover at all. It would therefore impose upon the lessor the burden of making sure that cover was both available and adequate.

669 The Law Commission in NZLC PP16 had not extended its proposal this far because of a concern that there might be unidentified situations in which it was entirely reasonable for a lessor to bargain with the lessee,

- that, in respect of a particular peril, there would be either no insurance cover or cover in an amount likely to be less than adequate in certain circumstances, and
- that the lessee would accept the obligation to indemnify the lessor against its loss in that circumstance and to that extent.

670 Having considered the matter further, the Law Commission has now drafted the section on the extended basis but allowing for a limited form of contracting out.

671 The section applies whether or not there has been negligence on the part of the lessee or someone for whom the lessee is responsible: subs (5). It applies where leased premises are damaged or destroyed by any event other than intentional destruction or damage by the lessee or someone for whom the lessee is responsible. An “event” is fire, flood, explosion, lightning, storm, earthquake or volcanic activity (whether or not the lessor is insured in any of these cases) and any other event against the risk of which the lessor has insured, or covenanted to insure, the premises: subs (1). So the lessor bears the risk of the events which are specifically nominated in the section in all circumstances, and bears other risks where the lessor has *any* amount of insurance cover: subs (2). The lessee cannot be asked to make good the destruction or damage, to indemnify the lessor, or to pay damages in respect of the destruction or damage: subs (2). The only exceptions are where the damage is intentionally inflicted and the lessee would, apart from the section, be liable for it or where any insurance moneys which would otherwise have been payable to the lessor in respect of the destruction or damage are rendered irrecoverable by reason of an act or omission of the lessee or someone for whom the lessee is responsible: subs (3).

672 Except as mentioned below, contracting out is not permitted: subs (6). If the agreement between the lessor and the lessee obliges the lessee to carry out works to make good the destruction or damage, the lessor must indemnify the lessee against the cost of those works, except to the extent that insurance moneys are rendered irrecoverable by an act or omission of the lessee or an agent, contractor or invitee of the lessee: subs (2).

673 The section does, however, permit the lessor and the lessee to enter into a written agreement (an **instrument**: see definition in s 3 (para 112)) whereby the lessee acknowledges that the lessor has no insurance cover or is covered in respect of a particular risk or risks to a limited extent only: subs (4). Where such acknowledgment is made, it is permissible for the parties to agree that the lessee will indemnify the lessor against destruction or damage either entirely (if the lessor has no insurance cover) or to the extent to which the loss arises from the nominated risk(s) and exceeds the nominated level of the lessor’s cover. But to the extent that the lessor actually has, or has covenanted

to have, its own insurance cover, the lessee is exonerated regardless of whether or not the lessee has been negligent.

674 The section applies only to leases coming into operation after the new Act comes into force: subs (1).

### **Section 219 Effect of waiver**

675 This section brings forward the substance of s 115 of the 1952 Act. It applies to a licence to occupy land: see extended definition of **lease** in s 175(2).

## **PART 10: EASEMENTS AND PROFITS AND COVENANTS**

### *Subpart 1—Easements and profits*

### **Section 220 Easements in gross permitted**

676 This section brings forward the substance of s 122 of the 1952 Act and permits the creation of easements in gross; that is, easements which are not attached to or for the benefit of any other land. An example commonly found on certificates of title is a drainage easement in favour of a local authority enabling it to drain water off roads. The section provides that an easement in gross runs with the land and binds the landowner and successors in title, including occupiers. (The word “occupier” has its ordinary meaning.) An easement in gross is assignable by the person who has the benefit of it: subs (3).

### **Section 221 Benefit or burden of easements or profits granted for a term of years**

677 This new section is of limited application, relating only to easements or profits (or other incorporeal hereditaments, of which it appears there are none in New Zealand) *for a term of years*. In practical terms, it applies to easements and profits granted not absolutely but for a term of years and, in essence, it attaches the benefit of such a grant to the land out of which it has been granted and obliges the owner for the time being of the land to observe the obligations of the easement or profit, which may be enforced by the holder for the time being of the easement or profit. Subsection (4) provides for apportionment where there has been severance.

678 The Grantees of Reversions Act 1540 is repealed, having now been completely superseded: see NZLC PP16 para 419.

## **Section 222 Easements or profits may not be acquired by prescription**

679 A prescriptive right is one acquired by use or enjoyment of land during the time and in the manner fixed by law: Hinde, McMorland and Sim *Land Law* para 6.045. In England easements and profits à prendre could be created by prescription in three ways:

- by operation of common law prescription rules; or
- by the fiction of the lost modern grant; or
- under the Prescription Act 1832 (2 & 3 Will 4, c 71).

680 As explained in paras 174–182 of NZLC PP16, the common law rules and the fiction of the lost modern grant have no application in New Zealand, and new prescriptive rights, which have not already matured, cannot be acquired by prescription under the Prescription Act 1832 against land after it has been brought under the Land Transfer Act 1952. Therefore the rules concerning prescription relate only to deeds system land which has not been brought under the Land Transfer Act 1952. The new s 222 has the effect of preventing the maturing of further prescriptive rights. That has very little, if any, practical importance as it is unlikely that any such rights are presently in the course of arising. Subsection (2) formally abolishes the rule of law relating to the fiction of the lost modern grant. Subsection (3) preserves prescriptive rights which have already matured. Subsection (4) is drafted on the assumption that the Law Commission's draft Limitation Defences Act contained in *Limitation Defences in Civil Proceedings* (NZLC R6 1988) will not have been enacted before the enactment of the new Property Law Act and that the question of limitations continues to be governed by the Limitation Act 1950. That Act is not to prevent the bringing of an action for possession of land free of any easement, profit or other incorporeal hereditament if it is possessed or enjoyed in circumstances amounting to trespass.

### *Vehicular rights of way*

## **Section 223 Covenants implied in a grant of a vehicular right of way**

681 This section re-enacts s 126B of the 1952 Act. In a grant of a vehicular right of way, it applies the rights set out in schedule 6. It is subject, first, to the case of vehicular rights of way granted after the new Act comes into force, where any contrary intention is expressed in accordance with s 73(b) (ie, by an instrument, such as a grant of right of way, or a memorandum executed by the parties) or in an easement

certificate registered under s 90A of the Land Transfer Act 1952. Second, in the case of rights of way granted before the new Act comes into force, the rights are implied subject to the instrument, contract or arrangement creating the right of way. Except to the extent that the matter has been so documented, a **vehicular right of way** (as defined in s 3 (para 134)) contains the implied right for the grantee and his or her employees, tenants, agents, contractors, licensees and invitees to pass and repass with or without vehicles, machinery and implements over the area set aside for the right of way. The owners and occupiers of land for the benefit of which, and the land over which, the right of way has been granted, have rights against each other:

- to establish a driveway on the land over which the right of way is granted, to make necessary repairs and to carry out necessary maintenance or upkeep;
- to enter on the land, where necessary, with or without machinery, plant and equipment;
- to have the land kept clear of obstructions at all times, whether caused by parked vehicles, deposited materials, or unreasonable impediment to the use and enjoyment of the driveway;
- to a reasonable contribution towards the cost of establishment, maintenance, upkeep and repair of the driveway to an appropriate standard;
- to recover the cost of repairing any damage done to the driveway made necessary by any deliberate or negligent act of a person bound or that person's tenants, agents, employees, contractors, licensees or invitees: cl 2 schedule 6.

682 Where work is carried out by the person entitled, the person against whom the burden of the right of way is enforced has the right, after the completion of the work, to have the land restored as far as possible to its former condition (except for the existence of the driveway) but subject to the right of the person entitled to enforce the right of way to receive a reasonable contribution towards the cost of the work: cl 3 schedule 6.

683 Where an easement was created before the date on which s 126B came into force (ie, 6 November 1986), a provision of the documentation is to be taken as expressing a contrary intention in terms of subs (1) only so long as it remains legally enforceable as between the person entitled and the person bound: subs (2). This gives effect to positive covenants created before that date while the parties to the original



documentation remain the owners of the respective pieces of land. However, once they have ceased to be so, and the positive covenant is therefore no longer operative in its express terms, the provisions of schedule 6 then apply to the situation. The subsection recognises that, prior to the 1986 amendment, many people created mutual rights of way containing positive covenants relating to repair and other matters in the incorrect belief that successors in title would be bound by those covenants. The subsection ensures that, when such a covenant is not binding on an owner, it is replaced by an implied covenant under schedule 6.

### *Light and air*

#### **Section 224 Grant of easement of light or air**

684 Easements of light or air are enforceable under ss 123–125 of the 1952 Act only in two circumstances. First, they are enforceable where they were in existence by prescription or otherwise before 27 July 1894 (the date the Light and Air Act 1894 came into force). Alternatively, they may be enforced if they were granted after 24 November 1927 (the date the Property Law Amendment Act 1927 came into force), were made by a deed or other instrument which accurately defined the area on or over the subject land, in respect of which the uninterrupted access of light or air was intended to be provided, and were registered under the Land Transfer Act 1952 within 12 months after the date of execution by the grantor. Otherwise easements of light or air are not enforceable. The substance of these provisions is brought forward by s 224. (“Light or air” includes “light and air”: subs (4).)

#### **Section 225 Effect of easement of light or air**

685 This section repeats the substance of s 125 of the 1952 Act. It sets out the effect of easements which are enforceable under s 224. An easement of light or air confers on the person entitled rights to the access of light or air, or light and air, described in the grant in respect of the area on and over the burdened land defined in the grant. These rights are to enure, unless otherwise provided, for the benefit for the person entitled, notwithstanding that any buildings erected on the benefited land may be altered, or may be destroyed and replaced by other buildings. Subsection (2) also provides that the erection on the burdened land of buildings of any height is not an infringement of any right conferred by any easement in respect of the defined area on and over the burdened land if no part of any such building encroaches on that area.

## *Subpart 2—Covenants*

### **Section 226 Construction of covenants relating to land—benefits**

### **Section 227 Construction of covenants relating to land—burdens**

686 These sections relate to the construction of instruments where covenants concerning one piece of land, and for the benefit of another piece of land run with the land.

687 At common law the *benefit* of a covenant made with the covenantee and the covenantee's successors in title runs with the land automatically. The covenant must be made for the benefit of the covenantee's land. A covenant is for the benefit of land if it favourably affects its nature, quality, or value, independently of collateral circumstances, or affects the mode of its enjoyment. The ability to enforce the covenant passes exclusively to the successor in title for the time being: *Chambers v Randall* [1923] 1 Ch 149. At common law the covenant had to be one which touched and concerned the land before its benefit was assignable. However, with the development in equity of the law relating to assignment of choses in action, it became possible to assign expressly all covenants given by the covenantor, whether or not they concerned the land, unless the contract between the covenantor and the covenantee prohibited assignment. Equity also followed the law in allowing automatic assignment of covenants which touched and concerned the land so that, in this case, there was no need for an express assignment of the benefit of the covenants. Neither at common law nor in equity did it make any difference (as against the original covenantor) whether the covenant whose benefit was being assigned was positive or restrictive in nature.

688 At common law the *burden* of covenants did not run with the land. But the equitable rule was that, in general terms, the burden of a restrictive covenant (but not of a positive covenant) made by a covenantor on behalf of the covenantor and successors in title did run with the land without any express acceptance of liability by the successor. By allowing enforcement of a restrictive covenant against successors in title of the covenantor (*Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143), equity invented a new interest in land of a purely equitable character. But the covenant so runs only if it is for the benefit of other land.

689 Because the burden of a restrictive covenant runs against successors in title of the covenantor only in equity, and thus creates only an equitable interest for the covenantee and the covenantee's successors in title, it will be defeated if the covenantor's successor in title is a bona fide purchaser for value of the legal estate. In New Zealand the position of the covenantee and successors in title was formerly even more frag-

ile because the covenant was susceptible to defeat by a registration under the Land Transfer Act 1952 made without fraud. However, the Property Law Act 1952 introduced a provision (now s 126A) by which a restrictive covenant created after 1 January 1953 can be notified on the land transfer register. Notification does not amount to registration and so does not create a legal interest for the person with the benefit of the covenant. The interest remains an equitable one. But it is a means of giving constructive notice of the covenant to any intending purchaser and, of course, registration can take place only subject to acceptance of the burden of the covenant. A notified covenant is an interest within the meaning of s 62 of the Land Transfer Act 1952: s 126A(1)(c) of the Property Law Act 1952 (see now s 229 (paras 703 and 704)).

690 The intention of ss 226 and 227 is to create a legal shorthand, making it unnecessary to stipulate in a covenant that it is made on behalf of or for the benefit of successors in title of the covenantor and the covenantee respectively. The sections bring forward the substance of ss 63 and 64 of the 1952 Act. Those sections altered the position under the general law only insofar as they extended beyond freehold owners the range of persons benefited and burdened by covenants: ss 226(2) and 227(2)(a). These include “occupiers” within the ordinary meaning of that term: compare the definition of **occupier** in s 3 (para 128) where, in some contexts, the term is given a more restricted meaning.

691 One New Zealand case (*S J Allen (South Island) Ltd v Crowe* (1978) 1 NZCPR 1) holds that s 64 permits the running of the burden of *positive* covenants. If so, that would amount to a significant change from the position in equity. But the decision must be doubted in light of statements to the contrary by members of the House of Lords in *Tophams Ltd v Earl of Sefton* [1967] AC 50, and acceptance by text books (eg, Megarry and Wade *The Law of Real Property* (5th ed, Stevens, London, 1984) 742), that the English equivalent of s 64 made no change of this nature to the underlying law.

692 The doubts about the result reached in *S J Allen* are confirmed by the fact that, in 1986, on the recommendation of the Property Law and Equity Reform Committee, Parliament enacted s 64A of the 1952 Act (now to be re-enacted as s 228) making provision for both positive and restrictive covenants entered into or implied after 1 January 1987 to run with land, as well as addressing various points of detail. Section 227 will continue to have a role in the construction of instruments creating both positive and restrictive covenants, in those cases where

they are capable of binding successors in title, taking account of the limits imposed by s 228. The new s 227(2)(b) repeats the existing provision (in s 64(2)) extending the operation of the section to a covenant relating to subject-matter not yet in existence when the covenant is made; for example, an obligation to repair a structure which may be built in the future.

693 It should be noted in relation to ss 226 and 227 that they apply only to covenants “benefiting” and “burdening” the land in question. Only covenants which concern the subject-matter of the land will run under these sections. Purely personal covenants will not. The position in this respect should be compared with that relating to leases (ss 192 and 193), where the distinction between covenants relating to the subject-matter of the land and personal covenants is abolished for all leases coming into operation after the new Act comes into force.

694 In s 227 the reference to land capable of being bound by the covenantor by covenant, which appears in s 64(1) of the 1952 Act, has been omitted, as the Law Commission has not been able to see that it has any operation under New Zealand conditions. It does not appear that it has ever been interpreted where it appears in s 79 of the Law of Property Act 1925 (UK).

#### **Section 228 Legal effect of covenants running with land**

695 This section repeats, with only minor amendments, s 64A of the 1952 Act. It was inserted by the Property Law Amendment Act 1986 as recommended by the Property Law and Equity Reform Committee (PLERC) in its report, *Positive Covenants* (1985). (An error in s 64A(5)(a) where the word “owned” appears instead of “owed” has been corrected.) The section should be read with ss 226 and 227.

696 The running of the burden of covenants in equity, and the provision for notification under the Land Transfer Act 1952, is extended to positive covenants. Section 228 applies only to covenants entered into or implied on or after 1 January 1987, which was the date s 64A of the 1952 Act came into force. The covenant must both relate to the land of the covenantor and be for the benefit of the land of the covenantee. PLERC recommended (1985: 64) against allowing positive covenants in gross to run with the land. There must be no privity of estate between the covenantor and the covenantee, this rule being intended to exclude the application of s 228 to leases: para 28(b) of PLERC (1985). Therefore, the section applies to covenants over one parcel of land in favour of another parcel.

697 The section makes positive and restrictive covenants binding in

equity on persons acquiring the fee simple of the burdened land and on occupiers of that land. (**Occupier** is defined in s 3 to include a lessee in occupation under a lease granted for a term of not less than 10 years certain, a renewal of such a lease, or one validated under s 178, or a lessee holding over under such a lease. Where there is no such lessee, occupier includes a mortgagee in possession.) The new s 229 enables such a positive covenant to be notified in the land transfer register, with the consequences discussed in the commentary to ss 226 and 227 (paras 686–694).

698 Importantly, s 228(2)(b) confirms the equitable rule that obligations under a covenant relating to land of a successor cease to be obligations of the successor when that person stops holding the fee simple estate or being the occupier. The burden passes to the new owner or occupier. Cessation of liability in relation to the successor is without prejudice to his or her liability for any breach of the covenant which occurred while the successor continued to hold the fee simple estate or be the occupier.

699 An original covenantor remains liable on a covenant *as a matter of contract* even after ceasing to have any interest in the land.

700 The administrator of a deceased estate, where the deceased was bound at his or her death by a positive covenant, is bound by that covenant only to the extent of the assets of the estate in the hands of the administrator: subs (3). **Administrator** is defined in s 3 as a person to whom probate of the will of a deceased person or letters of administration is granted, and includes a trustee body corporate (para 146).

701 For purposes of priority as against interests not registered under the Land Transfer Act 1952, rights under a covenant to which s 228 applies are treated as equitable interests, subject to the effect of notification under s 229: subs (4).

702 The section does not affect the obligations of those with interests in land who are not occupiers (within the defined meaning of that term) to observe the terms of *restrictive* covenants, nor does it affect the law relating to restrictive covenants in gross under s 220: subs (5). As to enforcement of positive and restrictive covenants in easements, see s 234 (paras 712–714).

### **Section 229 Notification of covenants**

703 This section brings forward the substance of s 126A of the 1952 Act. It applies to both positive and restrictive covenants, and enables them to be noted against the land transfer register by the District Land

Registrar. This can be done in the case of restrictive covenants only in relation to those which came into operation on or after 1 January 1953 (the date from which noting such covenants was first permitted). In the case of positive covenants, the equivalent date is 1 January 1987. The District Land Registrar also has power to enter on the register notification of an instrument which purports to affect the operation of a notified covenant, and power to enter a notification of a modification or revocation of a notified covenant.

704 The purpose of enabling notification of covenants is to make the rights of those who acquire land transfer land, or any interest therein, subject to the covenant. This is done by subs (3), which makes a notified covenant an interest in land for the purposes of s 62 of the Land Transfer Act 1952. That section provides that a registered proprietor, except in the case of fraud, holds registered land subject to “such encumbrances, liens, estates or interests as may be notified on the folium of the register” but “absolutely free from all other encumbrances, liens, estates or interests whatsoever”, with certain limited exceptions. A notified covenant obtains the protection of this section as if it were a registered interest, and thus a legal interest, in the land. However, subs (4) provides that the notification does not give the covenant any greater operation than it would otherwise have. A notified covenant, therefore, remains an equitable interest only. This is consistent with the origin of such covenants, discussed in the commentary on ss 226 and 227 (paras 686–694).

### **Section 230 Person entitled may give notice of work required**

705 This section re-enacts subss (1), (2) and (3) of 126c of the 1952 Act using the new defined terms **person entitled** and **person bound**: s 3 (para 130). The section applies only to a positive covenant (including one in a vehicular right of way) where the person bound has an obligation to undertake work or contribute to the cost of work. It enables a person entitled to serve a notice on a person bound calling on the latter to undertake or contribute to the cost of undertaking any work required to be done under the terms of a positive covenant.

706 A **person bound** is an **owner** or **occupier** of land (all terms are defined in s 3 (paras 128–130) against whom an easement or a **positive covenant** or a **restrictive covenant** (both terms are defined in s 3 (para 131)) burdening the land is enforceable. A **person entitled** is a person who is entitled to enforce such a covenant: see s 3 (para 130). A positive covenant is one under which the covenantor undertakes to do something in relation to the covenantor’s land which would beneficially affect the value or enjoyment of the covenantee’s land by any person

occupying it.

707 Subsection (2) states the matters which must be covered in a notice:

- work to be undertaken;
- the basis of the claim;
- those amongst whom the cost of work is to be shared and their respective shares;
- the purpose, extent and duration of any proposed entry upon the land of the person bound (other than upon land actually comprised in a vehicular right of way); and
- the consequences of the failure of the person bound either to comply with the notice or serve a cross-notice under s 231.

### **Section 231 Person bound who does not agree may serve cross-notice**

708 This section re-enacts the substance of s 126D of the 1952 Act and enables a **person bound** (as defined in s 3: see commentary on s 230 (paras 705–707)) who is not in agreement about the requirement that work be done or contributed to, the nature and extent of the work, the sharing of the cost or the need for entry on to his or her land (all as specified in a notice served under s 230) to serve a cross-notice setting out objections. The cross-notice may also contain counter-proposals in the same detail as is required for a notice under s 230. It must be served on the person entitled (who has given the original notice) within 15 working days after the service of the original notice. If a counter-notice is not served in due time, the person bound is to be taken to have agreed with the proposal in the notice given under s 230. For enforcement of the agreement, see ss 233(2) and s 234.

### **Section 232 Circumstances in which person bound is not liable**

709 This section re-enacts the substance of s 126C of the 1952 Act. It provides that, unless there is agreement to the contrary, a person bound is not liable to contribute to the cost of any part of the proposed work if the work is done after a notice has been served under s 230 and before the earlier of the date of service of a cross-notice under s 231 on the person entitled or the expiration of the 15 working day period which is allowed for the service of cross-notices. The person bound is also not bound to contribute to the cost of any part of the proposed work if it is done after a cross-notice has been served and before the differences

between the parties have been settled either by agreement or by the court. The parties can, however, reach agreement on cost contribution before the time specified: subs (2).

### **Section 233 Person entitled or person bound ceasing to be owner or occupier**

710 This section re-enacts the substance of s 126E of the 1952 Act and provides for the lapsing of notice and cross-notice if, before the question of undertaking or contributing to the cost of the proposed work is settled by agreement or court order, either party ceases to be the owner or occupier of the land in question. In that event it is necessary for the procedure to be started again by a fresh notice under s 230. If there has been no cross-notice or if that matter has been settled, and a change in the legal ownership or leasehold occupation of the burdened land (ie, the land of the person bound), then occurs before or after the work is done, the new owner or occupier will not be liable to pay a contribution to the cost. That burden will continue to remain with and may be enforced against the former owner or occupier; but, if the benefited land changes hands, the benefit of the right to claim contribution pursuant to the notice given under s 230, or pursuant to the agreement or court order, passes to the transferee of the benefited land: subs (2). A settlement is not binding upon anyone who is not a party to it (subs (3)), but may be enforced by a new owner or occupier of the benefited land: subs (2).

711 Because the definitions in s 3 of **owner** and **occupier** are, respectively, in terms of holding the fee simple estate or life estate or being in occupation under a lease, there will be no lapsing of notices merely because an agreement for a disposition is entered into.

### **Section 234 Court may enforce easements and positive or restrictive covenants**

712 This section is based upon s 126F of the 1952 Act and provides for the powers of the court in determining any question or dispute concerning the existence or effect of an easement or a positive or restrictive covenant. The court can make an order, with or without conditions, concerning

- the existence of the right,
- the enforceability of the right,
- whether any work is required to be done and its nature and extent,



- the reasonable and proper costs of any such work, including interest upon outlay, survey costs and reasonable remuneration for the superintendence or work of a person entitled or person bound who is or has been personally engaged on the work,
- the cost sharing,
- the date on or before which, and the manner in which, work is to be undertaken,
- entry on any land for the purpose of doing work, including the right to use means of transport and equipment, and
- any other matter arising in relation to a question or dispute.

713 The court must assume, in the absence of evidence to the contrary, that every person entitled makes full and reasonable use of the right of way but must also take into account any disproportionate (but reasonable) use of a **vehicular right of way** by any **person entitled**: these two terms are defined in s 3 (paras 130 and 134 respectively).

714 A District Court has jurisdiction to exercise the powers conferred by this section: s 262(1)(a).

### **Section 235 Court may modify or extinguish easements or covenants**

715 This section brings forward the substance of s 126G of the 1952 Act. It applies to all easements and positive or restrictive covenants. It expressly extends to implied covenants, so it applies to those found in schedule 6. It enables an application to be made to the court for modification, or whole or partial extinguishment, of an easement or covenant. This can only be done where the court is satisfied that,

- by reason of a change, since the creation of the right, in the nature or extent of the use being made of either parcel of land, or in the character of the neighbourhood, or in any other relevant circumstance, the right ought to be modified, or wholly or partially extinguished; or
- the continuance in force of the right in its existing form would impair the reasonable use of the burdened land in a way, or to an extent, different from that reasonably foreseen by the original parties at the time of creation; or
- every person entitled who is of full age and capacity has agreed to the modification or extinguishment, or may be reasonably considered to have abandoned or waived the right to the easement or

covenant (wholly or in part); or

- the proposed modification or extinguishment will not substantially injure any person entitled.

716 The application must be served on the territorial authority (unless the court orders otherwise) and such other persons as the court directs: subs (4). An order under this section which has been registered under the Land Transfer Act 1952 is binding on every person entitled or subsequently becoming entitled, whether or not the person was of full age and capacity at the time the order was made or was a party to the proceeding: subs (5). A memorandum of an order made in respect of any easement or covenant not registered under the Land Transfer Act 1952 must be endorsed on such of the instruments of title as the court directs: subs (6).

717 A District Court has jurisdiction to exercise the powers conferred by this section: s 262(1)(b).

## PART 11: SPECIAL POWERS OF THE COURT RELATING TO LAND

### *Subpart 1—Entry on neighbouring land*

#### **Section 236 Court may authorise entry for purpose of erecting or repairing buildings etc**

718 This section re-enacts the substance of s 128 of the 1952 Act and is largely in accordance with the Law Commission's proposals in para 627 of NZLC PP16. An owner or occupier of land is enabled to apply to the court for an order authorising entry on or over neighbouring land for the purpose of carrying out construction, repair, additions, painting or demolition on the applicant's land or doing any other necessary or desirable thing in relation to the applicant's land. **Occupier** is defined in terms of s 3 but, for the purposes of this section, the period of an applicant's lease can be as short as one year: subs (3) (compare the definition of **short term lease** in s 176 (para 531)). An occupier of neighbouring land is anyone who holds *any* lease of it: s 3.

719 Five working days' notice of intention to apply for an order under this section must be given to the owner or occupier of the neighbouring land in respect of which the order is sought. The intention of this provision is to give the recipient of the notice the opportunity of responding affirmatively or making counter-proposals before court proceedings

get under way. It is hoped that this, together with proper legal advice, may lead to a negotiated settlement in many cases.

720 The court may, under subs (3), permit

- entry by the applicant and his or her employees, agents or contractors,
- use on or over the neighbouring land of various means of transport, including aircraft (which would incorporate a helicopter) and the use of plant, machinery, cranes and other equipment, and
- storage on the neighbouring land of materials required for the purposes of the work.

721 **Neighbouring land** is defined in subs (5) so that it is not restricted to land which is adjoining that owned or occupied by the applicant. This may be of particular relevance where an applicant wishes to use a tower crane and the boom may protrude, for example, across a road and into the air space of neighbouring land on the opposite side of the road. This section can be used to obtain a court order to enable this occurrence, subject to whatever safeguards are thought appropriate by the court.

722 The safeguards which the court can impose are referred to in subs (4). The non-exhaustive list includes such matters as

- the period during which entry is authorised,
- the hours of the day or night during which work may be done,
- preservation of safety of persons or property on the affected neighbouring land,
- maintenance of adequate access to the neighbouring land,
- restoration of the neighbouring land to its former condition, and
- provision for security or indemnity to secure performance of the conditions of the order, particularly relating to the making good of damage or reimbursement for costs, expenses or loss. The reference to “loss” will enable a claim for consequential losses as, for example, might be suffered by the neighbouring owner in relation to a business carried on, upon or from the land which is adversely affected by the entry.

723 A District Court has jurisdiction to exercise the powers conferred by this section: s 262(1)(c).

### *Subpart 2—Wrongly placed structures*

**Section 237 Definitions for the purposes of subpart 2****Section 238 Court may grant relief where structure is on wrong land or there is an encroachment****Section 239 Application for relief under section 238****Section 240 Relevant considerations****Section 241 Orders which may be made**

724 The subpart combines the substance of ss 129 and 129A of the 1952 Act. Section 129 relates to cases of encroachment; that is, where a building or other structure straddles the boundary between properties in different ownerships. Section 129A is directed to the situation of a building entirely erected, because of a mistake as to boundaries or identity of land, on the “wrong” land. The new subpart deals both with encroachments and with buildings or other structures which are entirely on the “wrong” land. In either case the structure is referred to in the subpart as a **wrongly placed structure** (defined in s 237). **Structure** is defined in s 3 as meaning any form of improvement, including a building, driveway, fence, plantation, path or a retaining wall. For the purposes of the subpart, a **structure** includes a partially built structure and any part of a structure: s 237. A structure includes a fence, but fencing problems between neighbours which fall within the Fencing Act 1978 are to continue to be dealt with exclusively under that Act: s 238(2).

725 A **wrongly placed structure** is one situated on or in the airspace over the “land affected” instead of being situated on or over the “land intended” (where it was intended as the site of the structure): s 237. The two parcels of land could be a considerable distance apart. A structure can also be wrongly placed when there was no land intended; that is, it was intentionally placed on the land affected, but *not* by the owner of the land affected, or under contract with or by way of gift to the owner for the time being of the land affected.

726 Section 239(1) enables an application for relief to be made to the court by the owner, occupier, mortgagee, or encumbrancer of the land affected or the land intended, or by the person who placed the structure on or over the land affected, or by someone with an interest in the structure. Application can also be made by the territorial authority: s 239(1)(d). As to the definition of **occupier**, see s 3. An application can be made whether the wrongly placed structure was placed before or after the fixing of any boundary of the land affected or the land intended. The application can also be made whether the structure was placed on the land affected before or after the Act comes into force: s 239(2).

727 The court is, by s 238(1), given a general discretion to grant relief

where that would be just and equitable in the circumstances, having regard in particular to the conduct of the parties and the extent to which there has been any unjust enrichment of the owner of the land affected: s 240.

728 It is not a bar to relief that the applicant knew the true boundaries of the land affected at the time of placement, or when that person became the owner of the land affected or the structure, or acquired an interest in either of them. The purpose of the section is to extend the statutory discretionary jurisdiction of the court to grant relief to situations in which the expectation of the applicant in relation to the structure has been defeated in whole or in part, and the owner of the land on which the placement occurred has been unjustifiably enriched: see generally Sutton, "What should be done for mistaken improvers?", *Essays on Restitution* (Finn, The Law Book Company Ltd, Sydney, 1990).

729 In s 241(1) the orders which the court may make are detailed:

- an order vesting the site (ie, the land or airspace actually occupied by the wrongly placed structure together with a curtilage and access) in the owner of the land affected or the land intended or in another person with an interest in either piece of land. (**Owner** is defined in s 3. It means the holder of a freehold estate or life estate and of certain licences to occupy analogous to ownership and, in relation to a public reserve, includes the local authority, trustees or persons having control of the reserve);
- an order granting an easement over the site;
- an order giving a right of possession in respect of the site;
- an order granting possession of the whole or part of the structure;
- an order allowing or directing removal of the whole or part of the structure and any specified fixtures or chattels from the site;
- an order that any person to whom relief is granted must pay to any person specified in the order reasonable compensation as determined by the court.

Such orders may be registered: s 241(4).

730 Granting relief under this section does not deprive any person of a claim for damages which that person would otherwise have in relation to the events with which the application is concerned: s 238(3).

731 A District Court has jurisdiction to exercise the powers conferred

by this section: s 262(1)(d).

*Subpart 3—Landlocked land*

**Section 242 Definitions for the purposes of subpart 3**

**Section 243 Court may grant reasonable access to landlocked land**

**Section 244 Application for an order under section 243**

**Section 245 Relevant considerations**

**Section 246 Effect of an order under section 243**

732 The subpart re-enacts the substance of s 129B of the 1952 Act. The definitions of **landlocked land** and **reasonable access** are brought forward from that Act: s 242. (For the definitions of **owner** and **occupier**, see s 3.) The only change made to the substance of these sections is to enable the court to dispense with the need to join the owner of every piece of land adjoining the landlocked land as a defendant to the application. The phrase “piece of land” was interpreted by the Court of Appeal in *Cleveland v Roberts* [1993] 2 NZLR 17 as requiring that land is to be regarded as landlocked if, in a practical sense, it does not have reasonable access. It is not referring to the land as defined by title boundaries, but it is a reference to a distinct and separate whole defined by the nature of the contours or the terrain: *Cleveland v Roberts* 23.

733 In general terms, the subpart enables someone whose land does not have reasonable access to make an application to the court for such access to be granted. The court looks at the nature and quality of the access when the applicant purchased or acquired the land, the circumstances in which it became landlocked, the conduct of the parties (including their negotiations over access), the relative hardship to the parties, and any other relevant matter: s 245. The court is empowered to order the vesting of land in the owner of the landlocked land or the granting of an appropriate easement for its benefit. An order can be made upon conditions, which may include payment of reasonable compensation and building and maintaining fencing: s 246.

*Subpart 4—Trees and unauthorised improvements on neighbouring land*

**Section 247 Application of subpart 4 and definition**

**Section 248 Court may order removal or trimming of trees or removal or alteration of structures**

**Section 249 Application for an order under section 248**

**Section 250 Relevant considerations****Section 251 Further considerations relating to trees****Section 252 Effect of an order under section 248****Section 253 Completion of work required by an order under section 248**

734 The subpart brings forward the substance of s 129C of the 1952 Act but, whereas s 129C relates only to land on which is erected any building used for residential purposes, this subpart extends to all land. However, as will be seen, certain orders which can be made by the court under the subpart, relating to the maintenance or restoration of views from the applicant's property, can only be made in respect of a residential property.

735 This subpart enables an owner or occupier whose property is adversely affected by a tree (including a shrub or plant) on a neighbouring property to apply to the court to have that tree removed or trimmed. (An **occupier** is defined in s 3 as a person in occupation under a lease for a term of not less than one year certain or a renewal thereof, or a lease validated under s 178, and includes a person who holds over under such a lease and, if there is no such lessee, any mortgagee in possession or receiver.) The subpart also relates to structures erected on land where a building permit was unnecessary for their erection (or, in the case of structures erected by the Crown, would have been unnecessary if the structure had been erected by someone other than the Crown). **Structure** is defined in s 3 as "any building, driveway, path, retaining wall, fence, plantation or other improvement". Such structures can, under this subpart, be the subject of an order for removal, repair or alteration.

736 The court must examine certain matters before making an order. These include Maori cultural values: s 250(1). In relation to the removal or trimming of a tree, they include

- the interests of the public and the maintenance of an aesthetically pleasing environment,
- the desirability of protecting public reserves containing trees,
- the value of the tree as a public amenity,
- the historical, cultural or scientific significance (if any) of the tree, and
- the likely effect (if any) of removing or trimming the tree on ground stability, the water table or run-off: s 251(1).

737 The court must also take into account the fact that any risk, obstruction or interference complained of by the applicant may have already existed when the applicant became the owner or occupier of the land. However, an order may still be made notwithstanding that fact, if, in all the circumstances, the court thinks fit: s 250(2).

738 Having looked at these matters, the court can then only make an order in relation to a tree or structure where that is “fair and reasonable” (s 250(1)(a)) and the order is necessary to remove or prevent, or prevent the recurrence of

- an actual or potential risk to the applicant’s life, health or property, or that of some other person lawfully on the applicant’s land;
- an undue obstruction of a view from the applicant’s land—but only if that land may be used for residential purposes under the district plan—or from any building erected on that land and used for residential purposes;
- an undue interference with the use of the applicant’s land for the purpose of growing any trees or crops;
- an undue interference with the use or enjoyment of the applicant’s land by reason of the fall of leaves, flowers, fruit or branches;
- an undue interference with any drain or gutter on the applicant’s land by reason of its obstruction by fallen leaves, flowers, fruit or branches, or by the root-system of a tree;
- any other undue interference with the reasonable use or enjoyment of the applicant’s land for any purpose for which it may be used under rules in the district plan: s 250(1)(b).

739 Further, the court may only make an order if the hardship that would be caused to the applicant, or to any other person lawfully on the applicant’s land, by a refusal to make the order is greater than the hardship that would be caused to the defendant or any other person by making the order: s 250(1)(c). The court may not make an order other than one directed to removing or preventing actual or potential danger to life, health or property, relating to any tree which is the subject of a requirement lawfully made by a heritage protection authority under the provisions of Part VIII of the Resource Management Act 1991: s 251(2).

740 Where no building intended for residential purposes has been erected on land which may be used for residential purposes under the district scheme, the court is not to make an order under the subpart



unless satisfied that such a building will be erected on the land within a reasonable time. Then, unless the court otherwise determines, the order is not to take effect until and unless such a building is erected and, if it is not erected within a reasonable time, the order may be vacated: s 248(3).

741 It is not necessary, before an order can be made under this subpart, that there be a legal nuisance or that proceedings could be brought otherwise than under the subpart: s 248(2). Orders can be made on such conditions as the court thinks fit, including conditions for making good any damage to the applicant's land or any property on the land, or for payment of compensation in lieu, caused in the course of removing or trimming any tree or doing any other work required to be done to eliminate or reduce the risk, obstruction or interference complained of. There may also be a condition for giving security in respect of expenses or damage: s 252(1).

742 Usually the reasonable cost of the work necessary to give effect to an order is borne by the applicant unless the court is satisfied, having regard to the conduct of the defendant, that it is just and equitable to require the defendant to pay the whole or a specified share of the cost of the work and so directs as a condition of the order: s 252(2). However, if an order is not duly complied with, the applicant, with the agreement of the defendant or the leave of the court, may enter and carry out the work. In that circumstance, unless the parties otherwise agree or the court otherwise orders, the applicant is entitled to recover from the defendant the whole of the reasonable cost of the work necessary to give effect to the order: s 253(3) and (4). In practice, the parties often agree that the applicant may enter and do the work at his or her own expense.

743 Work necessary to carry out an order must be completed not later than 20 working days after the order has been made unless, in the order, the court specifies a longer time, or subsequently allows a longer time for completion of the work: s 253(1). Further, an order may specify that a tree must be kept trimmed, or a structure must be kept in good repair, or that any other work required to eliminate or reduce the risk, obstruction or interference complained of must be done as often as is necessary, or at such intervals as may be specified in the order: s 253(2). The court may impose conditions as to security or indemnity, the avoidance or making good of injury or damage, the disposal of all or any part of the tree or structure, or as to any other relevant matter: s 253(5).

744 A District Court has jurisdiction to exercise the powers conferred by this section: s 262(1)(e).

## PART 12: DIVISION OF PROPERTY AND APPORTIONMENT

### **Section 254 Court may order division of property**

### **Section 255 Application for an order under section 254**

### **Section 256 Relevant considerations**

### **Section 257 Further powers of the court**

745 These sections replace ss 140–143 of the 1952 Act. They were discussed in paras 167–173 of NZLC PP16. They relate to all kinds of property, both real and personal. They enable a **co-owner** (who may be a joint tenant or a tenant in common: see definition in s 3), or a mortgagee of a co-owner (where the mortgagee is entitled to exercise a power of sale), or a creditor who has obtained a charging order over the interest of a co-owner, to apply to the court for an order

- for the sale of the property and division of the proceeds among the co-owners, or
- for the division of the property in kind among the co-owners, or
- for one or more co-owners to purchase the share in the property of one or more other co-owners at a fair and reasonable price.

The court has a discretion and may choose not to make any order at all.

746 All co-owners, unless the court directs otherwise, must be served with notice of the application: s 255(2). The court is empowered to order the property to be valued and direct how the cost of the valuation is to be borne: s 255(3).

747 In considering whether to make an order and the nature of the order to be made, the court must have regard to

- the extent of the share in the property of the co-owner who has made the application (compare s 140 of the 1952 Act under which the court *must* make an order if the applicant has a one half or greater share in the land that is the subject of an application. While there is now a discretion, it is likely that the court will not ordinarily refuse to make an order upon the application of such a co-owner),
- the nature and location of the property,
- the number of other co-owners and the extent of their shares,

- any legal requirements or restrictions relating to the division of the property in kind; this would require the court to consider, for example, town planning restrictions on subdivision,
- the relative hardship to the applicant and any other person caused by the refusal or making, respectively, of an order,
- the value of any contribution made by co-owners to the cost of improvements to or maintenance of the property, and
- any other matter considered by the court to be relevant: s 256.

748 The court is empowered to make ancillary provision for

- payment of compensation,
- fixing a reserve price,
- directing how expenses of sale or division are to be borne,
- directing how proceeds of sale or interest on purchase moneys are to be divided or applied,
- allowing a co-owner to make an offer for the property on terms considered reasonable by the court; such terms may include non-payment of a deposit or setting off or accounting for the price instead of payment of cash,
- payment of a fair occupation rent for all or part of the property, and
- any other matter the court considers necessary or desirable as the consequence of making an order: s 257.

749 Unless the court orders otherwise, every co-owner (whether or not a party to the proceeding) is bound by an order made under the section: s 254(2). An order may be made under the section notwithstanding anything to the contrary in the Land Transfer Act 1952, and the order is registrable: s 254(3) and (4).

### **Section 258 Apportionments in respect of time**

750 This section replaces ss 144–148 of the 1952 Act (which were discussed in paras 162–166 of NZLC PP16). Section 258 applies to all kinds of property. It provides for the apportionability as between vendors and purchasers of **periodical payments** (defined in s 3 (para 151) in respect of a fixed or ascertainable period), such as rent, dividends and interest. The apportionment may be of an outgoing payable by the owner of the property which is being bought and sold, or it may be something due to the owner of that property on a periodical basis. Therefore, rents receivable by property owners are apportionable where the property

changes hands, and rents payable by a lessee are apportionable where the lease changes hands. Thus the apportionment relates to both the liability to make the payment and the right to receive it.

751 Periodical payments, whether or not reserved or made payable under an instrument in writing, are considered to be accruing from day to day: subs (1). An apportioned part of a periodical payment is due by the person liable for it only when the entire payment becomes payable and recoverable. Where the payment ceases because of death, re-entry or other cause, the apportioned part is payable and recoverable only when the entire payment would have been payable and recoverable if the right to payment had not ceased: subs (2).

752 Subs (3) is new, providing for the apportionment as between vendor and purchaser of rent payable in advance. Such rent is not apportionable as between the landlord and the tenant, but only as between the parties to the transfer of the interest.

753 A person entitled to an apportioned part of a periodical payment has the same remedies for recovery of that part, when the entire payment becomes payable and recoverable, as would have been available in relation to the entire payment, subject to bearing the apportioned part of any allowance properly payable in respect of the entire payment: subs (4). There is an exception for proceedings for the recovery of rent, which may only be brought by the person entitled to the entire instalment of rent, but that person is then liable for the apportioned part to the person entitled under the apportionment: subs (5). So where rent is payable in advance, the outgoing lessor is the person entitled to bring proceedings for its recovery where the rent fell due before settlement date. If rent is payable in arrears and the settlement date comes after the rent date, the proceedings must be brought by the new lessor. In either case, the amount received is apportionable.

## PART 13: SERVICE OF NOTICES

### Section 259 Service of notices

754 Sections 259–261 replace s 152 of the 1952 Act. They generally follow the scheme suggested in paras 650–665 of NZLC PP16.

755 Subsection (1) of s 259 stipulates the occasions when service pursuant to the new Act *must* be carried out in accordance with s 260 or, in the case of a company or other body corporate, as provided in the Companies Act 1955 or the Companies Act 1993. This must be done in relation to notices, cross-notices or other documents pertaining to

- relief against cancellation of an agreement for sale and purchase of land (s 51);
- calling up a mortgage over any kind of property where interest has been accepted after expiry of the term (s 104);
- the intention of a mortgagee of land or goods to exercise a power of sale or a power to enter into possession or a right to call up mortgage moneys under an acceleration clause, including a notice to a covenantor (ss 105, 106, 110 and 111);
- the intention of a lessor or licensee to cancel a lease or licence relating to land for breach of covenant or condition (ss 204 and 205);
- the lessor's notice of refusal to grant a renewal or sell a reversion to a lessee or licensee of land (s 213).

756 Notices, cross-notices or other documents pertaining to the above matters must be served, when the intended recipient is

- a company under the Companies Act 1955, in accordance with s 460(1) (excluding para (e)) or s 460A of the Companies Act 1955;
- a company under the Companies Act 1993, in accordance with s 387(1) (excluding para (e)) or s 388 of the Companies Act 1993;
- an overseas company, in accordance with s 389(1) (excluding para (e)) or s 390 of the Companies Act 1993.

Other bodies corporate can be served as if they were companies under the Companies Act 1993 or by serving a **director** (defined in s 3) in accordance with s 260.

757 Service upon the Crown *must* be effected by delivery to or receipt by the Chief Executive of the relevant government department or office, or an agent of the Chief Executive, at the head office of the department or office, in a manner provided for in s 260: s 259(1)(d). Any other notice given to or served on any person pursuant to the new Act is adequately served if done in terms of ss 259 and 260 unless another means of service has been agreed upon: subs (2). In these cases, service in accordance with the sections is not mandatory, so the parties are free to agree upon some other mode of service.

758 In s 259(3) there are some special rules which apply to service (otherwise done in accordance with ss 259(1) and 260) in particular cases. Where a person is out of New Zealand, an agent in New Zealand of that person *may* be served. The following rules are *mandatory*:

- Where the person to be served has died, his or her administrator must be served.
- Where the person to be served is bankrupt, the Official Assignee must be served.
- Where the person to be served is subject to a property order under the Protection of Personal and Property Rights Act 1988, the manager of the property must be served.
- Companies in liquidation must be served by serving their liquidator.
- A company or other body corporate which has been dissolved or removed from the register must be served by serving the Secretary to the Treasury or an agent of the Secretary to the Treasury.
- Where the property concerned belongs to the Crown as bona vacantia, service must be on the Secretary to the Treasury or an agent of the Secretary to the Treasury.

759 Under subs (4) the court is given power to dispense with service or to give directions for service and, in the latter case, service in accordance with the directions is adequate notwithstanding anything in the new Act or any other enactment. The District Court has power to make orders under the subsection: s 262(1)(f).

760 For the purposes of s 259, an **agent** is a person who has actual or ostensible authority from another person to receive notices etc required or authorised to be given or served under the new Act: subs (5). (This relates only to an agent of a person who is overseas or of the Secretary to the Treasury or a Chief Executive of a government department or office.) In contrast to the definition of **agent** in s 260, the authority in this section must relate to notices, cross-notices or other documents required or authorised to be given or served under the new Act; that is, the person must have actual or ostensible authority to receive Property Law Act notices.

761 Section 259 does not apply to service of a document in a legal proceeding, whether under the new Act or otherwise: subs (6).

### **Section 260 Manner of giving or serving notices**

762 This section provides for the manner in which notices must (under s 259(1)) or may (under s 259(2)) be given for the purposes of the new Act when an individual (ie, natural person) is to be served. This includes service on a director of a body corporate under s 259(1) and service under s 259(3).

763 Section 260 provides for two methods of service. They may be carried out in New Zealand or elsewhere. The first is by what is called “acknowledged delivery” (ie, delivery in an envelope or package directed by name to the person to whom it is to be delivered at that person’s address). The delivery must be by someone who conducts the business of delivering letters and packages (or an employee of such a person) independently of the person on whose behalf the service is carried out (eg, New Zealand Post Ltd, a courier service or a process server). (**Address** is defined in s 3 as the person’s last actual or known place of residence or business.) Further requirements of an “acknowledged delivery” are that the delivery of the envelope or package must have been made to the person to whom it is to be delivered or to that person’s agent and a written acknowledgement of receipt and the date of the delivery must have been obtained from that person or the agent.

764 An **agent** under s 260 is a person with actual or ostensible authority to take delivery of an envelope or package directed to the person giving the authority by name and purporting to contain a document: subs (3). The authority need not specifically extend to notices etc under the Act, but it must expressly or implicitly authorise receipt of such envelopes or packages. As an example, one member of a household will usually have implied authority to receive them for another member.

765 The alternative method of service is ensuring actual personal receipt in any other way. Under subs (1)(b) a notice, cross-notice or other document is given or served upon a person under the new Act when received by that person. It is sufficient if the person being served personally receives the document by whatever means that is achieved. This could be done, for example, by sending a fax (if and when the person actually gets it) or by forwarding a document through an intermediary, such as a solicitor (but, again, only if and when the person actually gets it).

766 Subsection (4) declares that a document is “received” by a person when it is handed to and accepted by that person. A document which is not so accepted, but is put down in the presence of that person and drawn to his or her attention, is also deemed to be received, without requiring any form of acknowledgement. A document is also received when it is otherwise received, however receipt occurs.

#### **Section 261 Time of service when more than one person required to be served**

767 Where a notice has to be served on more than one person, time of giving or service runs from the date on which the document is given to

or served on the last of the persons concerned or the last member of the relevant class or classes of persons who have to be served.

## PART 14: GENERAL

### **Section 262 Jurisdiction of a District Court**

768 The term **court** is defined in s 3 to mean the court by which the matter falls to be determined; that is, under the ordinary jurisdiction of that court (para 149). In the case of a District Court, that jurisdiction is found in the District Courts Act 1947 and its general application to the new Act is again recognised by s 262(2) and (3).

769 Subsection (1) lists six sections where the District Courts are given jurisdiction beyond that which they might otherwise ordinarily have. These are ss 234 [Court may enforce easements and positive or restrictive covenants], 235 [Court may modify or extinguish easements or covenants], 236 [Court may authorise entry for purpose of erecting or repairing buildings, etc], 248 [Court may order removal or trimming of trees or removal or alteration of structures] and 259(4) (relating to orders dispensing with service of notice or providing for substituted or modified service). The subsection also confers jurisdiction on a District Court under s 238 [Court may grant relief where building is on wrong land or there is an encroachment], but here the jurisdiction applies only when the value of the land on which the wrongly placed structure or any part of it is in fact situated (excluding the value of the structure) does not exceed the limit in s 31 of the District Courts Act 1947.

770 The only extension of the present jurisdiction of the District Courts under the comparable section of the 1952 Act is in that conferred by s 259(4).

771 Subsection (2) applies the provisions of the District Courts Act 1947 to the jurisdiction conferred by subs (1) as if it had been conferred under that Act.

### **Section 263 Regulations**

772 Orders in Council may be made in relation to forms of notices required by ss 105 and 110, the information to be contained in the reports required by ss 134 and 135, conditions for Registrar's sales under s 159, fees under s 164(a) and (c), and other matters contemplated by or necessary for giving effect to the new Act or for its due administration.

### **Section 264 Repeals and savings**

773 The commentary on schedule 7 describes how the Imperial enactments listed in that schedule are being replaced or why their replacement



is thought to be unnecessary or undesirable. Schedule 8 lists New Zealand statutes to be repealed, including, of course, the 1952 Act. The Distress and Replevin Act 1908 is repealed as a result of the abolition of distress for rent: s 215. The Contracts Enforcement Act 1956 is replaced by ss 38–41. Repeal of the principal Act automatically repeals all amendment Acts that are declared to be part of the principal Act. For that reason, amendment Acts are not listed separately.

774 Actions taken or proceedings brought under the 1952 Act before the new Act comes into force are able to be finalised under the new Act; and a time period under the 1952 Act continues to run despite the repeal of the 1952 Act but is not extended by the new Act: subs (3). By way of example, if, before the coming into force of the new Act, a notice to a lessee has been validly given under s 118 of the 1952 Act, it will give rise to a right of cancellation of the lease if the default complained of is not remedied in compliance with the notice. It will not matter that the form of the notice differs from that required by s 205. However, if cancellation has not occurred before the commencement date it must, in all respects other than the requirement for a warning notice, be done in accordance with ss 204 or 205. Further, s 208 will apply so as to give the lessee a right to apply for relief under the new Act.

775 In a case where under the existing law an application had, prior to the new Act coming into force, been properly made to the court for a possession order and thus under the existing law the lease would, upon the making of the order, be deemed to have been terminated as at the date of the application (ie, the effect of the order would backdate), that will continue to be the situation when, after commencement, an order is made. The new rule, whereby an order for cancellation of a lease does not backdate, will not apply to this situation because the proceeding was begun before the new Act has come into force.

776 Alterations made by the new Act to the general law or to any statute do not, unless the new Act so specifies, affect rights already accrued or obligations already incurred before the Act comes into force; documents in operation before the Act comes into force which create or affect rights or liabilities (ie, instruments) will not be invalidated or otherwise affected by the new Act, except as expressly provided in the new Act: subs (4). For an example of such an express provision, see para 162. On the other hand, an instrument intended to come into operation before the new Act came into force, but actually invalid, will not be validated. (For the meaning of “coming into operation” in this context, see s 4(2) and (3) and commentary (para 153)).

777 Again by way of example, a lease which was valid before the new Act comes into force remains valid but, if it contains a covenant prohibiting a change of use of the premises without the lessor's consent, s 190 will apply to any change of use for which consent is sought from the lessor after the new Act comes into force. Subpart 5 of part 9 will apply to any assignment of a lease made after the new Act comes into force even if the lease came into operation before that date. On the other hand, if a purported grant of a lease is already, at the coming into force of the new Act, invalid because of failure to stipulate an expiry date which was sufficiently certain, s 178 will not validate it. Similarly, an instrument which is in operation, in terms of s 4, before the new Act comes into force, and which does not meet the requirements of the law existing immediately before the new Act comes into force, for validity as a deed, will not after the new Act comes into force be treated as a deed even if it complies with the requirements of s 9: subs (5).

### **Section 265 Consequential amendments**

778 Amendments to, or repeals of, the following enactments reflect the abolition of distraint by s 215, and, where relevant, the abolition of foreclosure of the equity of redemption in mortgaged property by s 103: ss 4 and 5 of the City of Christchurch Loan Act 1871; s 13 of the Oamaru Gasworks Act 1875; s 8(3) of the Agricultural and Pastoral Act 1908; ss 32 and 95 of the District Courts Act 1947; ss 24(1)(e) and 84(4) of the Land Act 1948; ss 2(5), 19, 20(3) and 25(1) of the Limitation Act 1950; s 107 of the Land Transfer Act 1952; the First Schedule to the Maori Land Administration Act 1954; the Second Schedule to the Maori Reserved Land Act 1955; Schedule 8C to the Companies Act 1955; s 10 of the Innkeepers Act 1952; ss 24(4)(g) and 50(5) of the Insolvency Act 1967; s 43 of the Administration Act 1969; s 27(1)(b) of the Unit Titles Act 1972; s 8(1)(d) of the Cornish Companies Management Act 1974; s 42(2)(d) of the Trustee Companies Management Act 1975; s 7(d) of the Trustee Companies Management Amendment Act 1978; s 6(1)(d) and (e) of the Public Service Investment Society Management (No 2) Act 1979; s 40B(2)(d) and (e) of the Life Insurance Amendment Act 1983; s 57(1)(c) and (d) of the Protection of Personal and Property Rights Act 1988; s 42(1)(d) and (e) of the Corporations (Investigation and Management) Act 1989; s 122(1)(d) and (g) of the Reserve Bank Act 1989; s 92(3) of the Defence Act 1990; and the Seventh Schedule to the Companies Act 1993.

779 Section 3(1) of the Chattels Transfer Act 1924 also contains a reference to distress for rent, but the assumption is that that Act will already have been repealed and replaced by a new Personal Property

Securities Act: see para 12.

780 The other repeals of, or amendments to, sections in the Land Transfer Act 1952 have been made for the following reasons:

- s 96 is replaced by s 79 and part 5 of schedule 3;
- s 98 is replaced by s 201;
- s 104 is replaced by s 155;
- s 105 is amended as a consequence of the repeal of s 104;
- s 106: the power to go into possession in respect of mortgages coming into operation after the coming into force of the new Act is to be found in an express provision of the mortgage or in the power implied by cl 10 of part 1 of schedule 4. In respect of mortgages which come into operation before the coming into force of the new Act, see s 91(2) which replaces s 106;
- s 108: subs (1) is replaced by s 119. Subsection (2) is not to be replaced: see discussion in para 318 of NZLC PP16;
- s 110 is replaced by s 117;
- s 115: subs (1) is amended so as to limit the exception to short term leases under s 176; that is, leases for one year or less. Subsection (2) is repealed: see NZLC PP16 paras 90–93;
- s 121L(2)(b): s 174 replaces s 104 of the 1952 Act and the cross-reference is changed accordingly;
- s 141(1): s 166 replaces s 101 of the 1952 Act, requiring the cross-reference to be changed;
- s 244 has been rewritten to refer to the new Act instead of the 1952 Act, but in terms that are consistent with s 7(3) of the new Act;
- in the Third Schedule, para (2) and the Fourth Schedule, cross-references to provisions of the 1952 Act have been amended to refer to the corresponding provisions of the new Act.

781 The amendment to s 14 of the Trustee Act 1956 is to give effect to the recommendation in para 649 of NZLC PP16. Sections 132 and 133 of the 1952 Act are not replaced.

782 The amendment to s 4 of the Minors Contracts Act 1969 transfers s 134A of the 1952 Act to that Act. Likewise s 149 of the 1952 Act is transferred to s 36 of the Administration Act 1969.

783 Section 15(g) of the Contractual Remedies Act 1979 provides that nothing in that Act is to affect ss 117–119 of the 1952 Act. The comparable provisions in the new Act are ss 51–54 and 208–212 which are substituted accordingly.

784 To enable the re-opening of “oppressive” loan contracts, where a security over property is involved but there is no credit element in the relationship between the person giving the security and the person with the benefit of it (a mortgage securing a guarantor’s liability), the definition of “credit contract” is, for the purposes of Part I of the Credit Contracts Act 1981 only, extended to any mortgage or charge, whether or not it would otherwise be a credit contract as defined in s 3 of that Act.

785 In para 670 of NZLC PP16 it was recommended that s 13 of the Insurance Law Reform Act 1985 be extended so as to give the purchaser of land the right to have the property reinstated by the insurer where the vendor has that right under an insurance policy and damage or destruction has occurred between the making of the sale and purchase contract, on the one hand, and the earlier of possession or settlement pursuant to the contract, on the other. The amendments proposed to s 13 are for this purpose.

786 Section 6 of the Residential Tenancies Act 1986 now prevents that Act from applying to long fixed term tenancies (for terms of 5 years or more). It is to be repealed and the Residential Tenancies Act 1986 made applicable to residential tenancies of any length. This means that ss 104A to 104E, 107A and 107B, and 116A and 116M do not need to be re-enacted. But the parties to a long fixed term tenancy will be able to include in their agreement a provision which is inconsistent with the Residential Tenancies Act 1986 and any such provision will have effect in accordance with its terms. In other words, parties to long fixed term residential tenancies will be entitled to opt out of the new Act in whole or in part. This provision will not, however, affect existing tenancies, to which the provisions of Part VIII of the 1952 Act will continue to apply notwithstanding its repeal.

787 Section 142 presently excludes the operation of Part VIII of the 1952 Act in relation to residential tenancies. Similarly, part 9 of the new Act will not apply to residential tenancies, except where the Residential Tenancies Act 1986 itself provides otherwise. Section 142 of that Act has been amended to permit tenancy tribunals to look to that part as a source of general principles of law when deciding disputes in accordance with the requirements of s 85. The supremacy of the Residential Tenancies Act 1986 reflects the general policy of the new Act as stated in

s 7(3).

788 Section 142 also provided that Part VII of the 1952 Act would continue to apply to fixed term tenancies and service tenancies in existence immediately before the Residential Tenancies Act 1986 came into force. The section is amended to provide that the corresponding provisions of the new Act will apply to them (if any remain in force), but in the event of a conflict between the new Act and the Residential Tenancies Act 1986, the latter will prevail.

789 Sections 33A, 33B and 40A of the 1952 Act are transferred to the Human Rights Act 1993. The new s 65A is drafted so as to apply regardless of the sex of the co-habiting persons.

790 The rules found in s 9 of the Receiverships Act 1993 are now to be replaced by ss 105 and 106. The definition of **receiver** is also amended to conform with the provisions of s 115 governing a mortgagee's exercise of a power to enter into possession of mortgaged property.

791 By an amendment to s 36 of the Administration Act 1969, s 149 of the 1952 Act is preserved in relation to wills made before 1 January 1971.

792 Section 3 of the Law Reform (Testamentary Promises) Act 1949 and s 14 of the Contracts (Privity) Act 1982 have been amended to replace cross-references to the Contracts Enforcement Act 1956 with cross-references to ss 38–41 of the new Act. Rule 183 of the High Court Rules needs to be similarly amended, and we recommend accordingly.

793 The remaining consequential amendments made by schedule 9 substitute, in a number of enactments, cross-references to the new Act for the existing cross-references to the 1952 Act, so far as the relevant provisions of that Act are to be carried forward. Where they are not to be re-enacted, the cross-reference has been deleted. Adaptations to accommodate the language of the new Act have been included where necessary. Section 50(4) of the Motor Vehicles Securities Act 1989, which also contains a cross-reference to the 1952 Act, has not been amended because the new Act assumes that that Act will have been absorbed by a new Personal Property Securities Act: see para 12.

794 The New Zealand Parliament cannot amend the law of the Cook Islands to substitute a reference to the new Act for the reference to the 1952 Act in s 637(1) of the Cook Islands Act 1915. Nor can it (except at the request and with the consent of the Legislative Assembly of Niue) make a corresponding amendment to s 700(1) of the Niue Act 1966. While Parliament retains the power to make laws for Tokelau, it

would not be appropriate in that way to substitute a reference to the new Act for the reference to the 1952 Act in the Tokelau (New Zealand Laws) Regulations 1969 (SR 1969/109). It will be for the authorities in all three jurisdictions to consider whether the new Act should be adopted, in the place of the 1952 Act, as part of the law of that jurisdiction. The Law Commission therefore recommends that the Ministry of Foreign Affairs and Trade should bring this report to their attention.

*Some 1952 Act provisions not brought forward*

795 Here mention is made of certain provisions of the 1952 Act which are not to be brought forward in the proposed new Act or transferred to other statutes.

796 The proviso to s 21 of the 1952 Act is omitted. It provided that no person was empowered by the Act to dispose of an expectancy he or she might have as next of kin or under the Administration Act 1969. To the extent that any such arrangement is thought to be improper, the equitable jurisdiction of the court in relation to unconscionable bargains is available to deal with the problem.

797 Sections 45 and 46 of the 1952 Act are omitted. Section 45 provides that, where land is conveyed directly and immediately to any person, the whole legal and equitable ownership of the land vests in that person, and s 46 provides that, where a conveyance of land is to any person in trust, the land vests in that person subject to the trust. According to *Garrow's Law of Real Property* (1961: 184), these provisions, originally introduced in the Conveyancing Ordinance 1842, had the effect of reversing provisions of the Statute of Uses, so that in New Zealand the legal estate did not pass by the intervention of uses. The Statute of Uses was repealed in New Zealand by the Property Law Amendment Act 1905. The work for which ss 45 and 46 was intended has thus long since been achieved. Moreover, the provisions in the form in which they appear in the 1952 Act are misleading. The statement that the whole legal ownership of land vests on conveyance is, of course, subject to the operation of s 41 of the Land Transfer Act 1952. The word "conveyed", if read strictly in terms of the definition of "convey" in s 2 of the 1952 Act, would include a lease, but it cannot have been intended that a lease would vest the whole legal and equitable ownership of the land in the lessee.

798 Section 61 of the 1952 Act [Voluntary alienation of land with intent to defraud purchaser] is omitted for the reason given in paras 255–258 of NZLC PP16.

799 Section 62 of the 1952 Act [Purchase in good faith of reversion not to be set aside for undervalue only] is omitted as it has done its work of abolishing the old common rule.

800 Sections 131 and 132 of the 1952 Act (relating to the implied powers of trustees of marriage settlements) are to be omitted as suggested in the tentative proposal contained in paras 641–649 of NZLC PP16. They are absorbed into s 14 of the Trustee Act 1956, by a minor amendment to be made in that section: see para 781.

801 Section 153 of the 1952 Act is not repeated. The interests which it ensured were not validated will not be validated by the new Act.

802 Section 154 of the 1952 Act is omitted. It contains a declaration that powers given under, or implied by, the Act are deemed in law proper powers, covenants, provisions etc for the purpose of documents, contracts and transactions (which rather seems to be a statement of the obvious) and that a solicitor is not guilty of neglect or breach of duty or in any way liable because of omitting in good faith to negative any of them or to substitute express powers. Where a solicitor is acting for trustees, executors or other persons in a fiduciary capacity, those persons are similarly protected (and also where they act without a solicitor). It seems to the Law Commission that protections of this kind are inappropriate and that solicitors and other persons should, whether or not they have relied upon or used powers in the new Act or implied covenants, have their decisions scrutinised in the same way as would be done in relation to the express provisions of documents.

#### SCHEDULE 1—PROVISIONS APPLYING TO LAND NOT UNDER THE *LAND TRANSFER ACT 1952*

803 It is necessary to bring forward some of the provisions listed in the First Schedule to the 1952 Act. They do not apply to land transfer land or to land which is owned by the Crown: s 8. They only apply to those rarely found parcels of land which are in private ownership but still under the deeds system. Where a parcel of this kind is located, it is normal practice to bring it under the Land Transfer Act 1952 before dealing with it. It is therefore unlikely that the provisions in schedule 1 will be relied upon in practice. Accordingly no commentary is offered.

#### SCHEDULE 2—CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY

804 A certificate of non-revocation of power of attorney in the form set out in schedule 2 is conclusive proof, operating in favour of persons

dealing with an attorney in good faith and without contrary notice and those deriving title through them, that the power of attorney has not been revoked as at the date of the certificate: see s 17 (paras 183–186).

805 An attorney who is an individual is required to certify, as to the details of his or her appointment,

- date of the instrument creating the power of attorney, and
- full name, place and country of residence of the donor,

and must also certify that no notice of any event revoking the power of attorney has been received.

806 A person signing on behalf of a body corporate which has been appointed as an attorney must certify as to

- the date of the instrument creating the power,
- the name, place and country of residence of the donor,
- the name of the body corporate which has been appointed attorney and its registered office or principal place of business,
- the fact of that person's authorisation to give the certificate on behalf of the body corporate, and
- the capacity in which the certificate is given—director, officer or other capacity,

and must further certify that notice of an event revoking the power of attorney has not, to the best of that person's knowledge and belief, been received by the body corporate or any servant or agent of the body corporate.

807 A certificate in terms of schedule 2 is not required to be witnessed.

### SCHEDULE 3—COVENANTS IMPLIED IN CERTAIN INSTRUMENTS

808 For commentary on the covenants contained in parts 1–5 of schedule 3, see the commentaries to ss 75–79 (para 338–352).

### SCHEDULE 4—COVENANTS, CONDITIONS AND POWERS IMPLIED IN MORTGAGES

809 Part 1 contains the covenants, conditions and powers implied in mortgages over land. Part 2 contains those implied in fixed mortgages over goods. These covenants are implied respectively by ss 91 and 92:



see the commentaries on those sections (paras 373–375). The implied covenants can in both cases be negated, varied or extended by the express terms of the mortgage documentation or by a written memorandum executed as the mortgage document was required to be executed by the parties to it: s 73(b).

810 The land mortgage covenants in part 1 reflect modern New Zealand conveyancing practice and are intended to be applicable (except those in cls 13–15 which relate to particular situations) to all situations involved in a mortgage of land. For this reason, specialised provisions which do not necessarily appear in all mortgages, such as provisions for penalty rates of interest, are not included. Many of the provisions are taken or adapted from those found in the commonly used standard form of mortgage published by the Auckland District Law Society. The Law Commission gratefully acknowledges the co-operation of that Society in permitting its use.

811 As the majority of the implied covenants in both of the parts are, it is hoped, virtually self explanatory, this commentary is restricted to those points which it is thought may require some explanation or which depart significantly from some older mortgage forms.

### **Part 1 Covenants, conditions and powers implied in mortgages over land**

#### *Insurance*

812 In cl 2 insurance under a comprehensive insurance policy by the mortgagor is required in respect of all buildings and other improvements which are insurable. The insurance is to be against loss or damage by fire. It is also required that there be insurance, but only to the extent possible, against loss or damage by natural disaster or any other event normally covered by an insurance policy in respect of buildings and improvements of the relevant kind; that is of the kind found on the mortgaged land. The drafting of this clause has been influenced by the Law Commission's consultations with people in the insurance industry concerning likely changes in practice consequent on the enactment of the Earthquake Commission Act 1993. Insurers now look on fire and natural disasters as two distinct insurable risks which may be covered by separate policies.

813 The insurance policy is to be effected in the joint names of the parties in an insurance office in New Zealand of which the mortgagee approves. It must be for the full insurable value of the buildings and improvements. If the mortgagee stipulates full replacement insurance,

the mortgagor must arrange insurance on that basis and on normal replacement terms. Recognising the modern practice whereby the insurance company does not necessarily issue a receipt, the mortgagor's obligation to prove the existence of insurance is restricted to supplying a certificate or other confirmation from the insurer that premiums, valuation fees and other sums payable to keep the insurance on foot have been paid.

814 Under cl 3, in the event of a claim on a policy the mortgagee may choose whether to take the insurance moneys in or towards repayment of the mortgage or to apply them in rebuilding or reinstatement. The mortgagee may choose to apply the money in repayment regardless of the fact that moneys owing under the mortgage have not fallen due for payment; but in that case the mortgagor may then, within 2 months after the date of such application of the insurance money, pay off the whole amount owing under the mortgage, with interest ceasing to be payable as from the date of that payment.

#### *Obligations in respect of the mortgaged land*

815 The mortgagor has a generalised obligation to meet rates, taxes and charges in respect of the land, to perform all duties and obligations imposed on the owner or occupier (including those under the Resource Management Act 1991 or the Building Act 1991) and to comply with all notices and demands relating to the land under any other enactment, ordinance or bylaw.

#### *Repairs*

816 The mortgagor's obligation is not only to keep improvements in good and substantial repair, but to put them into such state of repair if they are not in that condition when the mortgage is executed. The mortgagee may remedy defaults of the mortgagor. Moneys payable under cl 8 are secured by the mortgage: s 88.

#### *Power to call up mortgage moneys*

817 This power is triggered by the mortgagor's default or, if the mortgagor is a body corporate, by the effective management or control of it becoming materially different from that when the mortgage was executed because of changes in shareholding, issue of new capital or alteration of voting or other rights attaching to shares.

*Power of entry into possession or to appoint a receiver*

818 A power for a mortgagee to enter into possession or appoint a receiver in the event of the mortgagor's default is not conferred under the implied provisions now found in the Fourth Schedule to the 1952 Act. Where the mortgage is registered, the mortgagee has a power to go into possession by virtue of s 106 of the Land Transfer Act 1952. That provision is to be repealed. It will therefore be necessary for mortgages to contain either an express or an implied power of this kind. The manner in which the power may be exercised is governed by subpart 4 of part 8 of the Act.

819 There is a further power conferred under cl 10, in the event of the mortgagor's default, for the mortgagee to appoint a receiver or receivers of the land. They are to act as the agent of the mortgagor to receive rents and profits payable by a lessee or occupier of the land, or income from any business carried on by the mortgagor on the land. Subpart 7 of part 8 of the Act applies to the appointment of a receiver in respect of mortgaged land under a fixed or specific charge. In that part are to be found provisions relating to the remuneration of the receiver, the application of the income received and, where the receiver is given power of sale, certain ancillary powers are conferred and there are directions about the application of the proceeds of sale of the mortgaged land by the receiver. A power of sale is conferred upon a receiver, as well as upon a mortgagee, under cl 11.

**Part 2 Covenants, conditions and powers implied in fixed mortgages over goods**

820 The new Act is drafted on the assumption that, prior to its enactment, the draft Personal Property Securities Act (NZLC R8) will have been enacted. In that event the Chattels Transfer Act 1924 will have been repealed. The provisions of part 2 apply to fixed mortgages over goods (ie, do not apply to floating charges or to mortgages or charges over other forms of personal property). They are intended to replace the implied covenants in relation to securities over goods now found in the Third and Fourth Schedules of the Chattels Transfer Act 1924. Where appropriate they parallel the provisions relating to mortgages over land in part 1. They are intended to be covenants appropriate to all forms of mortgages over goods. Specialised provisions relating to mortgages of stock, crops and wool have not been included as it is thought that mortgagees taking securities of this kind will ordinarily prefer to use their own documentation of a relatively detailed nature. **Goods** include ships: see definition in s 3.

## SCHEDULE 5—COVENANTS, CONDITIONS AND POWERS IMPLIED IN LEASES OF LAND

821 In this schedule are covenants, conditions and powers implied in leases of land. They are discussed in the commentaries to ss 183–185 (paras 559–581).

## SCHEDULE 6—COVENANTS IMPLIED IN GRANTS OF VEHICULAR RIGHTS OF WAY

822 This schedule contains the covenants implied in grants of vehicular rights of way: see the commentary to s 223 (paras 681–683).

## SCHEDULE 7—IMPERIAL ENACTMENTS CEASING TO BE PART OF THE LAW OF NEW ZEALAND

823 This schedule contains the Imperial enactments ceasing to be part of the law of New Zealand.

824 All of the enactments relating to property listed in the First Schedule of the Imperial Laws Application Act 1988 together with the remaining provisions of the Fires Prevention (Metropolis) Act 1774, s 6 of the Statute of Frauds Amendment Act 1828, and s 3 of the Wills Act 1837 (which are listed under “Other Enactments” in that Schedule) are to be repealed. The texts of all of these enactments are set out in *Imperial Legislation in Force in New Zealand* (NZLC R1). The reasons for the repeals are given below.

### ***The Statute of Marlborough 1267 (52 Hen 3, c 23)***

825 This statute is replaced by s 31.

### ***Quia Emptores 1289–90 (18 Edw 1, St 1, c 1, c 3)***

826 This statute is replaced by s 20.

### ***Partition Act 1539 (31 Hen 8, c 1) and Partition Act 1540 (32 Hen 8, c 32)***

827 This statute is replaced by s 254.

### ***Grantees of Reversions Act 1540 (32 Hen 8, c 34)***

828 This statute is replaced by ss 192, 193 and 221.

### ***Distress Act 1689 (2 Will and Mar, Sess 1, c 5)***

829 The right to distrain is abolished by s 215.

***Administration of Justice Act 1705 (4 and 5 Anne, c 3) ss 9 and 10***

830 Sections 9 and 10 are replaced by s 195.

***Landlord and Tenant Act 1709 (8 Anne, c 18) ss 1, 4, 6 and 7***

831 Sections 1, 6 and 7 are repealed consequent upon the abolition of the right to distrain. Section 4 was passed to remove the common law restriction upon bringing an action for debt to recover arrears of rent from a life tenant. Section 20(f) of the Acts Interpretation Act 1924, together with s 3(4) of the Imperial Laws Application Act 1988, prevents revival of the common law rule, so that s 4 does not need to be re-enacted.

***Landlord and Tenant Act 1730 (4 Geo II, c 28) ss 2, 4, 5 and 6***

832 Sections 2 and 4 are replaced by subpart 6 of part 9. Section 5 is repealed consequent upon the abolition of the right to distrain, and s 6 is replaced by s 182.

***Distress for Rent Act 1737 (11 Geo II, c 19) ss 1, 2, 7, 8, 11, 14, 16 and 17***

833 Sections 1, 2, 7, 8, 16 and 17 are repealed consequent upon the abolition of the right to distrain. Section 11 is replaced by s 195(3). Section 14 overcame certain former procedural difficulties in the recovery of rent by an action where the evidence disclosed that there had been agreement on a rent. For the reasons given in paras 610 and 611 of NZLC PP16, the procedural assistance is no longer necessary and s 14 is not replaced.

***Fires Prevention (Metropolis) Act 1774 (14 Geo 3, c 78) ss 83 and 86***

834 Section 83 is repealed for the reasons given in paras 666–677 of NZLC PP16.

835 Section 86 provided a defence to an action for damage resulting from a fire which began “accidentally” on premises. At common law a tenant could be found liable for waste where a building had been destroyed by fire or lightning, without fault of the tenant, but the tenant had not reinstated the premises within a reasonable time. The common law rule having been abolished by the section, it need not be re-enacted: s 20(f) Acts Interpretation Act 1924 and s 3(4) Imperial Laws Application Act 1988.

***Statute of Frauds Amendment Act 1828 (9 Geo 4, c 14) s 6***

836 In NZLC R1 (para 90) it was recommended that this provision be preserved because of the possibility that it might be relevant to the

evolving law of liability for negligent misrepresentation. However, further research reveals that the abuse to which it was directed was that juries were, at that time, in the habit of casually finding fraud as alleged by a plaintiff. Furthermore, people who had failed to comply with the requirements of the Statute of Frauds, that guarantees be in writing, were avoiding that inconvenient point by pleading that there had been an oral misrepresentation, made fraudulently, by the defendant (guarantor) concerning the credit worthiness of the principal debtor. Allegations of this kind are now able to be dealt with routinely as a matter of evidence by a judge sitting alone and do not present any particular difficulty. Such cases are in practice not heard by juries in New Zealand. Moreover, the section also creates an anomaly. If the plaintiff alleges, not that the defendant had been guilty of fraud in relation to a representation concerning the character of a third party, but that the defendant has been negligent in the representation, the section does not interfere with the plaintiff's cause of action. But it bars an action alleging a fraudulent misrepresentation, which seems quite wrong. The Law Commission therefore now proposes the repeal of s 6. For case law relevant to the question, see *Banbury v Bank of Montreal* [1918] AC 626; *R T Turnbull & Co v McKay & McDonald* [1932] NZLR 1300 and *W B Anderson & Sons v Rhodes (Liverpool) Limited* [1967] 2 All ER 850, 862–865.

***Prescription Act 1832 (2 and 3 Will 4, c 71) ss 1, 2, and 4–8***

837 These sections assisted the obtaining of easements and profits à prendre by prescription. Section 222 now provides that in future easements or profits may not be acquired by prescription.

***Wills Act 1837 (7 Will 4 and 1 Vict, c 24) s 3***

838 This section is replaced by s 25.

***Landlord and Tenant Act 1851 (14 and 15 Vict, c 25) ss 1–4***

839 At common law a limited interest in land could be determined suddenly and without warning; for example, in the case of a subtenancy from a life tenant who died. This created a problem for the owner of a limited interest in agricultural land who might lose the right to possession before crops could be harvested. The common law right to emblements offered a solution by entitling limited owners to harvest crops after determination of their estate. Section 1 created a substitute for the right to emblements by extending the right of occupancy to the end of the current year of the tenancy following the event by which the limited interest is determined. Limited interests of this kind in land in New Zealand are now unusual. Life tenancies mostly arise in the con-

text of wills and family trusts, and trustees have the power to lease the premises beyond the term of the life tenancy under s 14(1)(e) of the Trustee Act 1956. Life tenants may themselves grant extended leases in certain circumstances: s 88 of the Trustee Act 1956. In accordance with the recommendation of PLERC in its *Final Report on Legislation Relating to Landlord and Tenant* (1986), it is considered that the use of the Trustee Act 1956 provisions is preferable to reliance upon s 1 of the 1851 statute, which can therefore be repealed.

840 Sections 2 and 4 are repealed consequent upon abolition of the right to distrain. Section 3 is replaced by s 216, which treats agricultural fixtures in the same manner as trade and ornamental fixtures.

#### SCHEDULE 8—ENACTMENTS REPEALED

841 This schedule lists the enactments repealed by the new Act: see the commentary to s 264 (paras 773–777).

#### SCHEDULE 9—ENACTMENTS AMENDED

842 This schedule contains the enactments amended by the new Act: see the commentary to s 265 (paras 773–777).

## APPENDIX A

## Comparative Table

<b>Property Law Act 1952</b>	<b>Property Law Act 199–</b>
long title.....	1
1.....	2
2.....	3
3(1).....	7(3)
3(2).....	7(1)
3(3).....	8
4(1).....	9(2), 9(3), 9(6)
4(2).....	no equivalent
4(3).....	9(1)
4(4).....	9(1)
4(5).....	7(1)(c)
5(1).....	9(4)
5(2).....	no equivalent
5(3).....	no equivalent
5(4).....	no equivalent
6.....	11
7.....	already repealed
8.....	12
9.....	13(2)
10.....	schedule 1
11.....	13(1)
12.....	14
13(1).....	19(a)
13(2).....	6
14.....	no equivalent
15.....	21(1)(c)
16(1).....	21(1), 21(2)



16(2).....	no equivalent
16(3).....	no equivalent
16(4).....	no equivalent
17.....	no equivalent
18.....	22
19.....	24
20(1).....	26(1), 26(2), 26(3)
20(2).....	26(4)
21.....	25
22(1).....	21(3)
22(2).....	no equivalent
23(1).....	27(1), 27(2)
23(2).....	no equivalent
24.....	already repealed
25.....	already repealed
26.....	no equivalent
27.....	already repealed
28.....	30
29.....	no equivalent
30.....	no equivalent
31.....	34(1), 34(2)
32(1).....	35(1)
32(2).....	35(2)
33.....	already repealed
33A.....	no equivalent
33B.....	no equivalent
34(1).....	36(1), 36(3)
34(2).....	36(2), 36(3)
34(3).....	36(4)
34(4).....	no equivalent
35(1).....	29(1)
35(2).....	29(1)
35(3).....	29(2)
36(1).....	no equivalent
36(2).....	no equivalent
37(1).....	28(1), 28(5)
37(2).....	28(4)
38(1).....	28(2), 28(3), 28(5)
38(2).....	28(4)
39.....	already repealed
40(1).....	37(1)
40(2).....	37(2)
40A.....	no equivalent

41.....	already repealed
42.....	already repealed
43.....	schedule 1 cl 2
44.....	schedule 1 cl 3
45.....	no equivalent
46.....	no equivalent
47.....	schedule 1 cl 4
48.....	48(1), 48(2)
49.....	49
49A(1).....	39(1), 39(4)(b) and (c)
49A(2).....	39(2)
49A(3).....	39(1)(b)
49A(4).....	39(4)(a)
49A(5).....	39(3), 39(4)(b)
49A(6).....	no equivalent
50.....	51, 52, 53, 54
51.....	57
52(a)–(b)(iv).....	schedule 1 cl 5
52(b)(v).....	58
53.....	already repealed
54(1).....	59(1)
54(2).....	59(2)
55.....	no equivalent
56(1).....	62(1), 62(2)
56(2).....	no equivalent
57(1).....	no equivalent
57(2).....	schedule 1 cl 6
58.....	schedule 1 cl 7
59(1).....	61(1)
59(2).....	61(2)
60(1)–(3).....	64–69
61.....	no equivalent
62.....	no equivalent
63(1).....	226(1)
63(2).....	226(2)
64(1).....	227(1)
64(2).....	no equivalent
64(3).....	227(2)
64A(1).....	228(1)
64A(2).....	228(2)
64A(3).....	228(3)
64A(4).....	228(4)
64A(5).....	228(5)

65(1).....	71
65(2).....	no equivalent
66(1).....	72
66(2).....	7(1)(c)
66A(1).....	72
66A(2).....	7(1)(c)
67.....	70
68.....	73
69.....	no equivalent
70.....	19(c) and (d)
71.....	no equivalent
72(1).....	75(1), 75(2), 78(2)
72(2).....	75(1), 75(3), 78(3)
72(3).....	no equivalent
72(4).....	no equivalent
73(1).....	79(1)
73(2).....	schedule 3 part 5
74.....	76(1), 76(2), schedule 3 part 2
75(1).....	75(1), 75(2), 75(3)(a)
75(2).....	schedule 3 part 4
75(3).....	75(3)
76(1).....	schedule 1 cl 9
76(2).....	no equivalent
77.....	81
78.....	91
79(1).....	82(1), 83(1), 84(1), 84(2), 84(3), 84(4), 84(5)
79(2).....	82(2)
79(3).....	82(2)
79(4).....	82(2)
79(5).....	82(2), 83(2), 84(1), 84(2), 84(3), 84(4), 84(5)
80(1).....	85(1), 85(2)
80(2).....	85(3)
80(3).....	85(4)
80A(1).....	87(1), 87(2)
80A(2).....	89(6)
80A(3).....	89(2), 89(6)
80B(1).....	no equivalent
80B(2).....	90
81(1).....	93(1), 93(2)
81(2).....	93(3)
81(3).....	93(4), 93(5)
81(4).....	93(3)
81(5).....	93(1)

81(6).....	no equivalent
82(1).....	94(1)
82(2).....	7(1)(c), 94(4), 94(5)
83.....	94(1), 94(2), 94(3)
84.....	96(1), 96(2)
85.....	97
86(1).....	98(1)
86(2).....	98(2), 98(3)
86(3).....	98(3), 98(4)
86(4).....	98(6)
87(1).....	99(1), 100(1)
87(2).....	100(2)
87(3).....	100(1)
87(4).....	100(2)
87(5).....	99(1), 99(2), 101(1)
87(6).....	101(1)
87(7).....	101(2)
87(8).....	102(2)
87(9).....	101(3)
88.....	no equivalent
89.....	103
90.....	104(1)
91(1).....	118(1), 118(3)
91(2).....	118(6)(a)
91(3).....	118(8)
91(4).....	118(3)(c)
91(5).....	118(2)(b)
91(6).....	no equivalent
91(7).....	no equivalent
91(8).....	no equivalent
91(9).....	no equivalent
91(10).....	118(4)
91(11).....	119(b)
91(12).....	3
91(13).....	118(9)
91(14).....	119(a)
91(15).....	3
92(1).....	105(1)
92(1A).....	107
92(2).....	105(2)
92(3).....	no equivalent
92(4).....	105(5)
92(4A).....	105(5)

92(5).....	109
92(6).....	106(1), 106(2)
92(7).....	105(7), 106(3)
92(8).....	no equivalent
92(9).....	no equivalent
92(10).....	no equivalent
93.....	150
94.....	151
95.....	121
96(1).....	no equivalent
96(2).....	no equivalent
97(1).....	118(10), 152
97(2).....	118(10), 152
97(3).....	7(1)(c)
98(1).....	131, 153(1), 153(2), 154(1), 154(2)
98(2).....	no equivalent
99(1).....	159(1), 159(2), 160(1), 160(2)(a), 161(1), 161(2)
99(1A).....	160(2)(b)
99(2).....	162(1), 162(3)
100.....	165(1), 165(2), 165(3)
101(1).....	166(1)
101(2).....	166(3)
101(3).....	166(2), 166(3)
101(4).....	167(1)
101(5).....	166(3)
101(6).....	167(2)
101(7).....	no equivalent
102.....	154(1), 154(2)
102A(1).....	158(1)
102A(2).....	158(2)
102A(3).....	158(4)
102A(4).....	158(3)
102A(5).....	158(2)(c), 158(3)
103(1).....	164
103(2).....	164
103A.....	146(1)
103B.....	147
104(1).....	174(1), 174(3)
104(2).....	174(4)
104(3).....	no equivalent
104(4).....	no equivalent
104(5).....	no equivalent
104A.....	3

104B .....	6
104C.....	no equivalent
104D.....	no equivalent
104E.....	no equivalent
104F.....	no equivalent
104AA.....	263
104BB(1).....	116(1), 128(1), 134(1)
104BB(2).....	116(2)
104BB(3).....	no equivalent
104BB(4).....	no equivalent
104BB(5).....	135(4), 135(5)
104BB(6).....	144(2)
104CC.....	3
104DD(1).....	128(2)
104DD(2).....	128(2), 128(3)
104DD(3).....	128(3)
104DD(4).....	128(4)
104EE(1).....	no equivalent
104EE(2).....	130
104FF(1).....	131(1)
104FF(2).....	131(2)
104GG(1).....	132(1)
104GG(2).....	132(2)
104HH(1).....	133
104HH(2).....	no equivalent
104II(1).....	134(2), 134(3)
104II(2).....	134(4)
104II(3).....	134(5)
104II(4).....	134(6)
104JJ(1).....	135(1)
104JJ(2).....	135(2)
104JJ(3).....	135(3)
104JJ(4).....	135(6)
104KK.....	136
104LL(1).....	137(1)
104LL(2).....	137(1)
104LL(3).....	137(2)
104LL(4).....	137(3)
104LL(5).....	137(4)
104MM.....	138
104NN(1).....	139(1)
104NN(2).....	139(2)
104OO(1).....	144(1)

104OO(2).....	144(3)
104PP(1).....	142(1)
104PP(2).....	142(1)
104PP(3).....	142(2)
104PP(4).....	142(3)
104PP(5).....	142(4)
104PP(6).....	142(5)
104PP(7).....	no equivalent
104QQ.....	145
105.....	177(1)
106(a).....	183 schedule 5 part 1 cl 1
106(b).....	184, 185, schedule 5 part 2 cl 1, schedule 5 part 3 cl 1
107(a).....	schedule 5 part 1 cl 8
107(b).....	schedule 5 part 1 cl 9
107(c).....	no equivalent
107A.....	215(1)
107B.....	no equivalent
108.....	no equivalent
109(1).....	190(3)(a)(i), 190(4)
109(2).....	196(13)
109(3).....	no equivalent
110(1).....	190(2)(a), 190(4)
110(1A).....	no equivalent
110(2).....	3
111.....	191
112(1).....	193(1)
112(2).....	193(2)
112(3).....	193(3), 193(4)
112(4).....	no equivalent
112(5).....	no equivalent
112(6).....	no equivalent
113(1).....	192
113(2).....	no equivalent
114(1).....	194(1)
115.....	219
116.....	202
116A–116M.....	no equivalent
117.....	175
118(1).....	203(1)
118(1A).....	206(1) and (2)
118(2).....	208–221
118(3).....	no equivalent
118(4).....	no equivalent

118(5).....	214(2)
118(6).....	no equivalent
118(7).....	no equivalent
118(8).....	214(1)(b) and (c)
119.....	212(1), 212(3), 212(4)
120(1).....	175(2)
120(2).....	214(1)
120(3).....	213(1)
120(4).....	213(4)
120(5).....	213(4)
120(6).....	already repealed
120(7).....	213(6)
120(7A).....	already repealed
120(8).....	213(7)
121(1).....	213(3)
121(2).....	no equivalent
122.....	220(1), 220(2)
123(1).....	224(2), 224(3)
123(2).....	7(1)(a)
123(3).....	7(3)
124.....	224(1)
125(1).....	225(1)
125(2).....	225(2)
126.....	3
126A(1).....	229(2), 229(3), 229(4)
126A(2).....	229(1)
126B(1).....	223(1)
126B(2).....	223(2)
126B(3).....	223(1)
126B(4).....	no equivalent
126B(5).....	223(3)
126C(1).....	230(1)
126C(2).....	230(2)
126C(3).....	230(2)
126C(4).....	232(1), 232(2)
126D(1).....	231(1)
126D(2).....	231(2)
126E.....	233
126F(1).....	234(1)
126F(2).....	234(2)
126F(3).....	234(1)
126F(4).....	234(1)
126G(1).....	235(1), 235(2), 235(3)



126G(2).....	235(1)
126G(3).....	235(2)
126G(4).....	235(4)
126G(5).....	235(5)
126G(6).....	no equivalent
126G(7).....	235(6)
127.....	already repealed
128(1).....	236(1)
128(2).....	236(3), 236(4)
128(3).....	no equivalent
128(4).....	3
129(1).....	239(1), 239(2)
129(2).....	238(1)
129(3).....	241(2)
129(4).....	241(3)
129(5).....	239(3)
129(6).....	261(d)
129(7).....	already repealed
129(8).....	241(4)
129A(1).....	239(1), 239(2)
129A(2).....	239(2), 241(1)
129A(3).....	no equivalent
129A(4).....	241(2)
129A(5).....	241(3)
129A(6).....	239(1), 239(3), 240
129A(7).....	261(d)
129A(8).....	already repealed
129A(9).....	no equivalent
129B(1).....	242(1)
129B(2).....	244(1)
129B(3).....	244(2)
129B(4).....	244(2)
129B(5).....	244(2)
129B(6).....	245
129B(7).....	243(1)
129B(8).....	246(1)
129B(9).....	246(2)
129B(10).....	246(3)
129B(11).....	no equivalent
129B(12).....	246(5)
129B(13).....	243(3)
129B(14).....	243(3)
129B(15).....	246(4)

129c(1).....	247(1)
129c(2).....	no equivalent
129c(3).....	248(1)
129c(4).....	248(1)
129c(5).....	250(1), 251(2)
129c(6).....	251(1)
129c(7).....	252(1)
129c(8).....	250(1)
129c(9).....	248(3)
129c(10).....	252(1)
129c(11).....	250(2)
129c(12).....	252(2)
129c(13).....	253(3), 253(4), 253(5)
129c(14).....	6, 7(1)(a)
130(1).....	44(1), 44(2), 44(3)
130(2).....	45(1)
131.....	no equivalent
132.....	no equivalent
133.....	already repealed
134(1).....	16(1)
134(2).....	7(1)(c)
134A.....	no equivalent
135(1).....	17(1), 17(2)
135(2).....	no equivalent
135(3).....	17(3)
135(4).....	17(3)
135(4A).....	no equivalent
135(4B).....	17(4)
135(5).....	7(1)(c)
136(1).....	7(1)(c), 18(1), 18(2), 18(4)
136(2).....	no equivalent, see 7(1)(c)
137(1).....	18(1), 18(3)
137(2).....	no equivalent, see 7(1)(c)
138.....	7(1)(c)
139(1).....	17(2)(a)
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143(2).....	no equivalent
144.....	no equivalent
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146.....	258(2)
147.....	258(4), 258(5)
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148(2).....	no equivalent
149.....	no equivalent
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153.....	no equivalent
154.....	no equivalent
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Fifth Schedule.....	no equivalent
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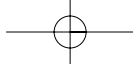
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<b>Property Law Act 199–</b>	<b>Property Law Act 1952</b>
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3.....	2
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5.....	no equivalent
6.....	no equivalent
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7(3).....	3(1)
8.....	3(3)
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9(3).....	4(1)
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9(6).....	4(1), 5(1)
9(7).....	no equivalent
9(8).....	no equivalent
9(9).....	no equivalent
9(10).....	no equivalent
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12.....	6
13(1).....	11
13(2).....	9
14.....	12
15.....	no equivalent

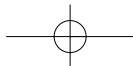
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18(2).....	136(1)
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20(a).....	no equivalent
20(b).....	no equivalent
20(c).....	no equivalent
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22.....	18
23.....	no equivalent
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25.....	21
26(1).....	20(1)
26(2).....	20(1)
26(3).....	20(1)
26(4).....	20(2)
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31(2).....	no equivalent
32.....	no equivalent
33.....	no equivalent
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43(2).....	no equivalent
43(3).....	no equivalent
43(4).....	no equivalent
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50(3).....	151c(3)
50(4).....	151c(4)
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53(2).....	50

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53(4).....	no equivalent
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104(4).....	no equivalent
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118(7).....	no equivalent
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128(3).....	104DD(2), 104DD(3)
128(4).....	104DD(4)
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131(2).....	104FF(2)
132(1).....	104GG(1)
132(2).....	104GG(2)
133.....	104HH(1)
134(1).....	104BB(1)
134(2).....	104II(1)
134(3).....	104II(1)
134(4).....	104II(2)
134(5).....	104II(3)
134(6).....	104II(4)
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139(2).....	104NN(2)
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142(3).....	104PP(4)
142(4).....	104PP(5)
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147.....	103B
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162(3).....	99(2)
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162(6).....	no equivalent
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163(3).....	no equivalent
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174(4).....	104(2)
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177(1).....	105
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178.....	no equivalent
179.....	no equivalent
180–182.....	no equivalent
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184.....	106(b)
185.....	106(b)
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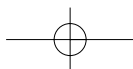
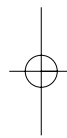
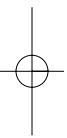
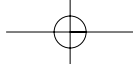
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193(2).....	112(2)
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221.....	no equivalent

222.....	no equivalent
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223(2).....	126B(2)
223(3).....	126B(5)
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224(3).....	123(1)
224(4).....	no equivalent
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225(2).....	125(2)
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226(2).....	63(2)
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227(2).....	64(2)
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228(3).....	64A(3)
228(4).....	64A(4)
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231(2).....	126D(2)
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235(5).....	126G(5)
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236(3).....	128(2)

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236(5) .....	no equivalent
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238(2) .....	no equivalent
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251(2) .....	129C(5)
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260(1).....	152(1)
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