CONVEYANCING

LECTURE ON 16 JULY 2007

Note: Students should read the Chapters in Lang & Skapinker and the cases referred to in the Guide. These notes are NOT a substitute for reading the text and considering the cases.

Statutory duty of disclosure

This topic was touched on in the lecture on 21 May under ‘Vendor’s statutory duty of disclosure’. We now need to look at the obligations of vendors in more detail before dealing with issues arising from that duty.

To remind you, section 52A of the Conveyancing Act is in the following terms:

SECTION 52A CONTRACTS FOR THE SALE OF LAND

(2) [Vendor’s obligations] A vendor under a contract for the sale of land:

(a) shall, before the contract is signed by or on behalf of the purchaser, attach to the contract such documents, or copies of such documents, as may be prescribed; and

(b) shall be deemed to have included in the contract such terms, conditions and warranties as may be prescribed.

(4) [Section cannot be excluded] Except in so far as the regulations may otherwise provide, a provision, whether in a contract for the sale of land or any other agreement:

(a) which purports to exclude, modify or restrict any provision of this section or a regulation made for the purposes of this section; or

(b) which would, but for this subsection, have the effect of excluding, modifying or restricting any such provision, is void.
The result is this:

Before the contract is signed by the purchaser, the vendor shall attach to the contract the prescribed documents, and, the contract has in it the implied terms conditions and warranties set out in the regulation (whether written in the contract or not), and the vendor can’t attempt to exclude these terms conditions or warranties.

The Prescribed documents are:

1. A section 149 certificate (unless the land is not within a local government area).

2. A diagram for the land from a recognised sewerage authority (if available from the authority in the ordinary course of administration), indicating the location of the authority’s sewer in relation to the land.

3. If the contract relates to land under the provisions of the Real Property Act 1900 (including any land that is the subject of a qualified or limited folio, but not including land the subject of a contract referred to in item 5, 6, 7, 9, 11, 12, 13 or 14):
   (a) a property certificate, and
   (b) a copy of a plan for the land issued by the Department of Lands, or any of its predecessors, or the office of Land and Property Information (except in the case of land that is the subject of a limited folio).

4. Copies of all deeds, dealings and other instruments lodged or registered in the office of Land and Property Information that are shown on the relevant property certificate and that create or purport to create:
   (a) easements, or
   (b) profits a prendre, or
   (c) restrictions on the use of land, or
   (d) positive covenants imposed under Division 4 of Part 6 of the Conveyancing Act 1919, burdening or benefiting or purporting to burden or benefit any part of the land, together with copies of all Memoranda referred to in any such instrument.

(There are also documents 5 -16 but I have not reproduced them here.)

Implied term

Clause 5 of the Regulation ‘prescribes’ a term for all contracts. The term is set out in clause 1 of Schedule 2 and is in the following terms:
1 Objections and requisitions

Nothing in this contract or any other agreement prevents the purchaser, expressly or by implication, from making any objection, requisition or claim that the purchaser would otherwise be entitled to make in respect of:

(a) any encroachment onto any adjoining land by any building or structure on the land, other than a dividing fence as defined in the *Dividing Fences Act 1991*, or

(b) any encroachment onto the land by any building or structure on any adjoining land, other than a dividing fence as defined in the *Dividing Fences Act 1991*,

unless the encroachment is disclosed and clearly described in this contract and the contract contains an express term precluding the purchaser from making such an objection, requisition or claim.

(Clauses 2 and 3 deal with units bought ‘off the plan’ and ‘land and house’ packages. While I have not quoted these clauses here, they are examinable!)

Prescribed warranty

Clause 8 of the Regulation prescribes a warranty that is included in every contract for the sale of land. The warranty is set out in Schedule 3 in the following terms:

**SCHEDULE 3 – Prescribed warranties**

(Clauses 8 and 15)

**Part 1 - Warranty in contract**

1

The vendor warrants that, as at the date of the contract and except as disclosed in the contract:

(a) the land is not subject to any adverse affectation, and

(b) the land does not contain any part of a sewer belonging to a recognised sewerage authority, and

(c) the section 149 certificate attached to the contract specifies the true status of the land the subject of the contract in relation to the matters set out in Schedule 4 to the *Environmental Planning and Assessment Regulation 2000*, and
(d) there is no matter in relation to any building or structure on the land (being a
building or structure that is included in the sale of the land) that would justify the
making of any upgrading or demolition order or, if there is such a matter, a
building certificate has issued in relation to the building or structure since the
matter arose, and

(e) if the land is burdened or purports to be burdened by a positive covenant
imposed under Division 4 of Part 6 to the *Conveyancing Act 1919*, no amount is
payable under section 88F of that Act in respect of the land.

2

For the purposes of this warranty:

(a) land is "subject to an adverse affectation" if anything listed in Part 3 of
Schedule 3 to the *Conveyancing (Sale of Land) Regulation 2005* applies in respect
of the land, and

(b) a public or local authority has a proposal in respect of land if, and only if, the
authority has issued a written statement the substance of which is inconsistent
with there being no proposal of the authority in respect of the land, and

(c) without limiting the way in which it may otherwise be disclosed, an adverse
affectation is taken to be disclosed in a contract if any of the following is attached
to the contract:

(i) a document stating or illustrating the effect of the adverse affectation,

(ii) a document, issued by a public or local authority, to the effect that the
authority, or another such authority, has a proposal referred to in Part 3 of that
Schedule,

(iii) a copy of the order, notice, declaration or other instrument giving rise to the
adverse affectation,

(iv) a copy of the page of the Gazette in which the order, notice, declaration or
other instrument giving rise to the adverse affectation was published, and

(d) "upgrading or demolition order" means any of the following:

(i) order No 2 in the Table to section 121B of the *Environmental Planning and
Assessment Act 1979*, being an order made in the circumstances referred to in
paragraph (a) or (d) relating to that order,

(ii) order No 12, 13 or 14 in the Table to section 121B of the *Environmental
Planning and Assessment Act 1979*,
(iii) order No 1 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (d) relating to that order,

(iv) order No 3 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (c) relating to that order.

When preparing a contract it is important to consider whether any of the matters listed as ‘adverse affectations’ might apply to the property. If they do, then attach one of the documents set out in 2(c).

What are ‘adverse affectations’ are listed in Schedule 3 Part 1 below:

**Part 3 - Adverse affectations**

1

A proposal for realignment, widening or siting, or alteration of the level, of a road or railway by the Roads and Traffic Authority, Rail Corporation New South Wales, Transport Infrastructure Development Corporation or Rail Infrastructure Corporation.

2

A proposal by or on behalf of the Minister for Education and Training to acquire the whole or any part of the land.

3

A proposal of TransGrid or an energy distributor (within the meaning of the *Energy Services Corporations Act 1995*) to acquire any right or interest in the whole or any part of the land.

4

An interim heritage order, listing on the State Heritage Register or other order or notice under the *Heritage Act 1977*.

5

A proposal to acquire any right or interest in the whole or any part of the land by reason of the *Pipelines Act 1967*.

6
A proposal of the New South Wales Land and Housing Corporation to acquire the whole or any part of the land.

7

A notice to or claim on the vendor by any person, evidenced in writing, in relation to:

(a) any common boundary or any boundary fence between the land and adjoining land, or
(b) any encroachment onto any adjoining land by any building or structure on the land, or
(c) any encroachment onto the land by any building or structure on any adjoining land, or
(d) any access order, or any application for an access order, under the *Access to Neighbouring Land Act 2000*.

8

A order under section 124 of the *Local Government Act 1993* to demolish, repair or make structural alterations to a building which has not been fully complied with.

9

A notice to or claim on the vendor by any person, evidenced in writing, in relation to a failure or alleged failure to comply with a positive covenant imposed on the land under Division 4 of Part 6 of the *Conveyancing Act 1919*.

10

If the contract relates to land that comprises or includes a lease of a lot as defined in the *Strata Schemes (Leasehold Development) Act 1986* —a notice to or claim on the vendor by the lessor, evidenced in writing, in relation to a breach or alleged breach of a term or condition of the lease of the lot concerned.

11

A right of way under section 164 or 211 of the *Mining Act 1992*.

12

A licence under section 13A of the *Water Act 1912*.

13

Any:

(a) order under section 7 (1) (c) or (d), 8 (1) (a), (b), (c1), (d) or (f), 13 (2) or 17 (1), or
(b) notice under section 8 (1) (c), or
(c) declaration under section 10, 11A or 15 (1), or
(d) undertaking under section 11, or
(e) appointment under section 12 (a), or
(f) authorisation under section 12 (b),
of the Stock Diseases Act 1923.

14
Any:

(a) order under section 5 (1) (d) or (e) (ii) or 11 (1) or (2), or
(b) requirement under section 7 (1) or 8 (1), or
(c) undertaking under section 7A (1), or
(d) restriction or prohibition under section 12 (1),
of the Stock (Chemical Residues) Act 1975.

15
Any:

(a) requirement under section 15A (1) or 22 (1), or
(b) notification under section 17 (1) or (7) (c) or 20 (1), or
(c) notice under section 18,
of the Soil Conservation Act 1938.

16
Any direction under section 47 (1) of the Native Vegetation Conservation Act 1997 or section 38 (1) of the Native Vegetation Act 2003.

Purchaser’s right to rescind

A purchaser’s right to rescind and the effect of such a right is set out in clauses 19, 20 and 21 of the Regulation. These clauses are as follows:

Circumstances under which purchaser may rescind contract or option

19 Circumstances under which purchaser may rescind contract or option

(1) The purchaser under a contract for the sale of land may rescind the contract:

(a) for the vendor’s failure to attach to the contract the documents (referred to in clause 4 and Schedule 1) prescribed under section 52A (2) (a) of the Act, or

(b) for breach of the warranty (referred to in clause 8 and Part 1 of Schedule 3) prescribed under section 52A (2) (b) of the Act.
(2) The purchaser under an option to purchase residential property to which a proposed contract for the sale of the land concerned is attached may rescind the option for breach of the warranty (referred to in clause 15 and Part 2 of Schedule 3) prescribed under section 66ZA (1) of the Act.

(3) A contract or option may not be rescinded on the grounds referred to in subclause (1) (b) or (2) unless:

(a) the breach constitutes a failure to disclose to the purchaser the existence of a matter affecting the land, and

(b) the purchaser was unaware of the existence of the matter when the contract or option was entered into, and

(c) the matter is such that the purchaser would not have entered into the contract or option had he or she been aware of its existence.

(4) Further, a purchaser may not rescind:

(a) a contract for the sale of land for a breach of so much of the warranty prescribed under section 52A (2) (b) of the Act as is set out in item 1 (d) of Part 1 of Schedule 3, or

(b) an option to purchase residential land for a breach of so much of the warranty prescribed under section 66ZA (1) of the Act as is set out in item 1 (d) of Part 2 of Schedule 3,

if a building certificate in respect of the building (or part of the building) to which the warranty relates has issued since the date of the contract or option concerned.

(5) A contract for the sale of land may not be rescinded on the ground of any inaccuracy in the document referred to in clause 15 of Schedule 1.

**Method of rescinding contract or option**

**20 Method of rescinding contract or option**

(1) A purchaser rescinds a contract for the sale of land by notice in writing served on the vendor:

(a) if the purchaser’s right to rescind arises from the vendor’s failure to attach the prescribed documents—at any time within 14 days after the making of the contract, unless the contract has been completed, and

(b) if the purchaser’s right to rescind arises from the vendor’s breach of the prescribed warranty—at any time before the contract is completed.

(2) A purchaser rescinds an option to purchase residential property by notice in writing served on the vendor at any time before the option is exercised or ceases to be exercisable, whichever is the earlier.
(3) A notice under this clause may be served as provided by section 170 of the Act or in such other manner as the contract or option may specify.

**Effect of notice of rescission of contract or option**

**21 Effect of notice of rescission of contract or option**

(1) A notice of rescission of a contract for the sale of land rescinds the contract as from the time the contract was made and, in that event, the deposit and any other money paid by the purchaser to the vendor under the contract is to be refunded.

(2) A notice of rescission of an option to purchase residential property rescinds the option as from the time the option was granted and, in that event, any consideration paid in relation to the option, and any deposit paid in relation to the purchase of the property, are to be refunded.

(3) The rescission of the contract or option does not render the vendor liable to pay to the purchaser, or the purchaser liable to pay to the vendor, any sum for damages, costs or expenses.

(4) However, subclause (3) does not affect any liability under the contract or option in relation to:

   (a) the payment of damages, costs or expenses arising out of a breach of any term or condition of the contract or option, or
   
   (b) the payment of damages, costs or expenses arising out of a breach of any warranty contained in the contract or option (other than a warranty prescribed by clause 8 or 15), or
   
   (c) an adjustment between the vendor and a purchaser who has received the benefit of possession of the land, or
   
   (d) the reimbursement of the purchaser for expenses incurred by the purchaser in complying with the requirements of any order, direction or notice in connection with the land.

**Limitations on purchaser's right to rescind**

The extent to which a purchaser’s right to rescind exists because of an ‘adverse affectation’ is largely dealt with in a series of cases, some from many years before the Regulation, but nevertheless dealing with how the courts have considered various issues concerning whether ‘proposals’ were real (and therefore now adverse affectations) or still just possibilities (or inchoate proposals) that do not fall within the adverse affectation definition.
An ‘inchoate’ right is defined as ‘just begun’ or ‘rudimentary, undeveloped, unformed’.¹ Thus an ‘inchoate’ affectation is one that has not yet become a proposal, although in some cases it may subsequently become one. This concept needs to be appreciated when reading the cases for this section of the notes.

In *Champtaloup v Thomas* [1975] 2 NSWLR 38 the Supreme Court considered the effect of provisions contained in the 1972 standard contract. While the form of contract has changed significantly over the years, the principles set out in this case have not been altered by those changes.

The contract described the zoning of the land as:

> The property is zoned in such a manner as to enable the dwelling erected on the land to be used for residential purposes.

Champtaloup’s solicitor discovered that the property was within a Foreshore Scenic Protection Zone and that the Department of Main Roads was proposing an expressway close to the property so that the property would be accessed by a pedestrian and road overpass near, but not on, the property. The purchaser’s solicitor gave notice of rescission claiming this right because the property was affected by a provision of the Manly Planning Scheme and because the property was affected by a proposal for realignment etc.

(Remember that the right to rescind arose out a contractual term, not because of the Regulation which didn’t exist at the time.)

In his judgement, Wootten J made the following comments²:

> Under the relevant Ordinance the inclusion of the land in a Foreshore Scenic Protection Area brings into operation a number of restrictions on its use, and it follows that the property was affected in a manner other than as disclosed in the Fourth Schedule to the contract. ... It follows, in my view, that the plaintiffs have made out the first ground on which they relied in their notices of rescission on 26th June, 1974.

Dealing then with the road widening aspect.

> The evidence discloses that the property was not directly affected by such proposal, but that the road on which the property was situated, and over which it was necessary to pass in order to reach the property, would be

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² Pages 42-47
affected by such a proposal at a point a considerable distance from the property.

... In my view, cl. 17 of the contract is only brought into operation where the actual property is itself directly affected by one or more of the matters mentioned in cl. 17. For example, a party could not take advantage of cl. 17 (a) because he found that a planning scheme permitted the erection of factories on the opposite side of the road, and this was not disclosed in an attached 342AS certificate, which dealt only with the property itself. Equally, it is not sufficient that a proposal should involve the realignment, widening, siting or alteration of the level of a road or railway used to travel to the property, if the property itself is not physically affected by such realignment, widening, siting or alteration of level.

His Honour then dealt with the issue of election and said:

Emphasis was placed on the fact that the plaintiff's solicitor sent requisitions after he knew of the zoning position, but, when he did so, he was still unaware of the full position in regard to matters arising under cl. 17. He was investigating them with reasonable diligence, and he informed the defendant’s solicitor of these facts and reserved his clients’ rights. Election to affirm the contract could not be inferred from, these facts.

It is clear from Champtaloup that the affectation must directly affect the property. It is not sufficient for it to affect other property even if that property is nearby or even adjoining. The cut off point is the boundaries of the property the subject matter of the sale. Any other matter is one which needs to be ascertained prior to exchange of contracts.

To what extent a solicitor can make useful inquiries prior to exchange depends on what information the solicitor has concerning the property being purchased. The nature and location of the property, and other information concerning adjoining properties, can impact on the inquiries a solicitor either makes, or advises a client to make, prior to exchange.

It is sometimes better to have a client make inquiries of council so that any information is obtained first hand by the client and not second hand from the solicitor. There is also an inherent danger in this, as a client might not appreciate the problems that council might bring to their attention.

In *Jones v Assef* [1976] 1 NSWLR 467 the Court of Appeal considered the same provision from the 1972 standard contract as it related to a proposal by the Department of Main Roads to ‘drive’ a tunnel under the land. After exchange the purchasers’ solicitor received a reply from the DMR as follows:
I refer to your enquiry dated 2nd April 1974 and advise that property, No. 172 Glebe Point Road, Glebe is situated above the proposed ‘driven tunnel’ section of the North-Western Freeway.

It is envisaged that it will not be necessary to acquire the properties above the ‘driven tunnel’ but height restrictions may be imposed on any further re-development.

In his judgement Moffitt P said:

It was also argued that the letters did not establish that the land was affected by the proposal at the date of the contract, because no detriment then applied to the land. However, any proposal in essence relates to future action. A property is affected by a proposal at the date of the contract, if the proposal is then in existence, and, if carried into effect, will affect the subject property. I do not think that this case falls for any precise examination of the meaning of “affected”, because, on any view, it is beyond argument that the building of a road in a tunnel driven under land affects the land.

This was developed by Samuels J A as follows:

It remains open to the purchaser to contend that “the property” referred to in the proviso extends “usque ... ad inferos”. The proposal was to drive a tunnel under the property, and thus through its sub-surface soil. I think that such an operation must affect the property.

*Champtaloup* was referred to by Powell J in his decision in *Little v Piccin* (1983) NSW ConvR 55-152. In this case the vendors sold a property at Ashfield adjacent to a property that was potentially marked for construction of a road. The zoning certificate attached to the contract referred to this possibility and suggested that further information should be obtained from the Department of Main Roads. The agent delivered an enquiry to the purchaser’s solicitor, prior to exchange, advising:

No part of the property is required for the Department’s road proposals. However, access will be denied across the northern boundary onto the proposed County road.

Contracts were exchanged and the purchaser’s solicitor made a further inquiry of the DMR. The reply was different and attached a sketch of the site of the proposed road. The purchaser did not wish to proceed and purported to rescind the contract.

In his judgement Powell J dealt with the issues as follows:

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3 Page 470  
4 Page 472
It seems to me that there are four questions which require, or may require, an answer in the present case, they being:

1. what is the meaning to be attributed to the words “the property” in cl. 17?

2. what is the meaning to be attributed to the word “affected” in cl. 17?

3. was “the property” relevantly “affected” as at the date of the contract?

4. if so, was the manner of its being “affected” sufficiently disclosed in the Fourth Schedule and the certificate?

... the words “the property” are to be construed as meaning the lands comprised in certificate of title registered vol. 14526 folio 241, which lands have a frontage to William Street, Ashfield, and upon which lands is erected the semi-detached cottage known as No. 27 William Street, Ashfield.

... The question then is: what is the meaning to be given to the word “affected” in the context provided by this contract? It seems to me that the following matters bear on that question:

(His Honour then set out 4 questions.)

... These matters suggest to me that, in the context of this contract:

1. A property is relevantly “affected” if one of the enumerated matters has – as in the case of a prescribed scheme, or residential district proclamation – an effect in law or in fact, or would – as in the case of a prepared, but not prescribed, scheme or a road proposal – if certain steps were taken, have an effect in law or fact.

2. A property is not relevantly affected unless the actual or potential effect of the particular one of the enumerated factors is a legal or factual prohibition of, or limitation upon, what, subject to any limitations imposed by the general law, would otherwise be the rights of the owner for the time being to alienate, or to use, the subject matter of the contact in any manner which he saw fit.

... If this be the correct view of the meaning of the word “affected” then, so it seems to me, “the property” was not relevantly affected by the Main Roads Department proposal shown ... for, even if that proposal were given effect to, no part of the land ... would be resumed, the land would retain its frontage, and direct access to, William Street, and no prohibition of, or additional limitation on, the use of the land, or of the

5 Pages 57,102 – 57,104
cottage would come into effect; it following that the plaintiff was not entitled to rescind the contract ...

In *Arias v Brigden* (1986) NSW ConvR 55-278 a purchaser contacted to purchase land under a 1982 standard contract. The contract contained the then standard cl 12 providing for the purchaser to be able to rescind if the property was at the date of the contract affected by matters other than as set out in Part II of the Fourth Schedule. Clause 12 provided for the property to be “deemed” to be affected if the purchaser produced a written statement from an authority the substance of which was other than that property was not affected by a proposal of the authority.

After exchange the purchaser made an inquiry of the Electricity Commission and received a reply that the property lay within an area under investigation for the acquisition of a major transmission line easement of some 60 metres in width.

In his judgement Powell J dealt with the issues as follows:

(Quoting from the Commission letter:

...It is advised that a search of Commission records indicates that at tis time there are no Commission works on the property in question however, the parcel lies within an area under investigation for a major high voltage transmission line proposed to be constructed between Tomago and Taree as shown on the attached copy of DP 576347.

... It is emphasised that until such time as a determination is reached by the Department of Environment and Planning and field work and ground surveys have been undertaken a more definitive reply cannot be given.

(After setting out the submissions of Counsel and other matters Hi Honour went on)

... It seems to me, that despite its less than elegant language, what the letter, in substance sought to convey to the plaintiff’s solicitors was the following:

1. there were then no existing installations upon the subject land;

2. nor did the Commission then have the benefit of any existing easement over the subject land or any part of it;

3. the Commission, as part of its future planning, had determined that, at some time in the future, there should be established

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6 Page 56,602 – 56,607
a new major transmission line between the switching station at Tomago and the substation at Taree;

4. having made that determination, the Commission had set in train the necessary investigations which needed to be undertaken before a final decision on the site of such a transmission line can be taken;

5. as a result of those investigations, it had been established that there were at least two, if not more, alternative routes over which such a transmission line could be constructed;

6. one of those alternative routes might traverse the subject land;

7. whether or not it did so would depend on final survey;

8. if that route were adopted, and if, on final survey, it was found that it would cross the subject land the Commission would then, either, negotiate for, or, if need be, resume, an easement for a transmission line;

8.(sic) such easement would be for an area sixty meres in width over the distance for which the proposed transmission line would traverse the subject land.

... whether ... it can properly be said that, at the date of the agreement for sale, the subject land was affected by “any proposal of the Electricity Commission to acquire any right or interest affecting any part of the property”.

... If this be so, then it must follow that, as I have held that the Commission’s letter of 13 August 1984 showed that the Commission had not, as at the date of the agreement for sale, adopted any “proposal” which would, or might, affect the subject land, Mr Hosking’s second submission must be rejected.

Breach of prescribed warranty

The cases we have just discussed relate to the issue of whether proposals affecting properties are ‘adverse affectations’ under clause 1(a) of Schedule 3 Part 1 of the Regulation. The case of Marinkovic v Pat McGrath Engineering Pty Limited [2004] NSWSC 571 (10 June 2004; (2004) ANZ ConvR 413 deals with the effect of clause 1(d) of Schedule 3 Part 1.

Marinkovic (the plaintiff) constructed a factory building with council approval in about 1990. In 1992 he added a mezzanine floor without
obtaining council consent. The council became aware of the addition and wrote advising Marinkovich that he would have to demolish the unauthorised addition. He wrote the council advising that he wasn’t aware that consent was required to the addition and that a council officer had advised that the mezzanine was satisfactory if a second staircase was added to it. He had ordered the staircase and it was to be installed.

Council responded in writing saying that:

“Council has decided to take no further action in regard to the unauthorised construction of the timber/metal framed storage area within the existing warehouse, subject to satisfactory construction of the egress stairs in accordance with the requirements of ordinance 70 and a satisfactory inspection by Council’s district building surveyor.”

The plaintiff installed the additional stairs and it is assumed that they were satisfactory as there was no further correspondence from the council.

In November 2000 the plaintiff sold the property to the defendant after discussion with a Ms Seymour, a director of the defendant. In answer to her inquiry concerning the mezzanine the plaintiff advised that he ‘had a letter’ from the council but no copy was ever produced. In December and January 2000 and 2001 the defendant’s solicitors made inquiries from the council and found that the mezzanine was not approved. After some correspondence between the solicitors, the defendant’s solicitors wrote to the plaintiff’s solicitors in the following terms:

“Further to our letter of 31 January 2001, our client has made independent inquiries at Randwick Council and has been advised that the mezzanine floor level of the above property has been constructed without development approval from the Council. In these circumstances, there has not only been a breach of a pre-contractual representation by the vendor, but there is also a breach of the implied warranty contained in section 52A of the Conveyancing Act and in accordance with instructions from our client we enclose herewith notice of rescission and we require immediate return of a cheque for $79,000 in favour of our clients in return of the deposit.”

A notice of rescission was served by the defendant and a caveat lodged. In August 2001 both solicitors applied for building certificates from the council. On 8 November 2001 the council issued both certificates. After discussing the statutory provisions His Honour said:

20 Each of the certificates issued by the Council on 8 November 2001 was in similar form. Their form was ambiguous in that they did not make
clear whether the Council was saying that there was nothing which would entitle the Council to order the building to be demolished, altered, added to or rebuilt, or to take proceedings concerning that matter, or whether it was saying that there was such a matter, but in the circumstances the Council did not propose to make any such order or take any such proceedings. Notwithstanding that uncertainty of construction, it is at least clear that, following the issue of that certificate, the Council would not have been entitled to require demolition of the mezzanine floor.

In December 2001 the plaintiff resold the property and his solicitors wrote to the defendants solicitors asking for a withdrawal of caveat. As the deposit had not be refunded to the defendant purchaser, this was not forthcoming. Considerable correspondence followed concerning whether the defendants rescission of the contract in early 2001 was effective and valid. It was clear that the defendants entitlement to a refund of the deposit hinged on this point. His Honour considered the provision of the warranty in Schedule 3 Part 1 and said:

**Defendant Entitled to Rescind?**

45 In the present case, the existence of the mezzanine floor was, in my view, a matter that would justify the making of an upgrading or demolition order. It had that characteristic even though the Council, in its 1992 letter, had stated an intention to do nothing about the matter. The Council has statutory responsibilities, which it cannot prevent itself from exercising by any estoppel: *The New South Wales Trotting Club Limited v The Council of the Municipality of Glebe* (1937) 37 SR (NSW) 288; *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1. Thus, even if that letter had been acted upon by the plaintiff, it could not estop the Council from later deciding that it should require the removal of the structure which had been erected without consent. If the Council issues a building certificate, however, it does so under statutory authority, and with the consequences which section 149E *Environmental Planning and Assessment Act 1979* lays down so far as fettering its future discretions is concerned.

46 In construing the warranty, it is appropriate to bear in mind the purpose for which the legislation was introduced. It was introduced in 1988, motivated by a desire on the part of the legislators to promote candour on the part of vendors. The means that was chosen to deal with that problem was to require the vendor of property to make extensive disclosure of matters relating to the property. The vendor doing this would speed up the conveyancing process and give a purchaser a greater degree of assurance, at the time of contracting, that he or she knew the information about the property which a purchaser would wish to know. In *Timanu Pty Ltd v Clurstock Pty Ltd* (1988) 15 NSWLR 338 at 339-40 Kirby P said:
“The plain object of the legislation is to reduce disputes concerning representations about the land which are made by the vendor to the purchaser, to facilitate a proper judgment about the bargain at the time of the signing of the contract and to provide, at that time, a clear indication of the terms, conditions and warranties upon which the parties agree to contract. Effectively, the new procedure shifts the obligation from the purchaser to the vendor, so that the latter has to supply, rather than the former to discover, certain basic information about the subject land. The provision is clearly a remedial one with a reformatory object. The courts should not frustrate the attainment of that object by a narrow construction of the legislation, and the subordinate regulations made under it. On the contrary, the courts should endeavour to facilitate the attainment of the purpose which clearly emerges from the legislation, understood in the context of the practices which preceded it.”

47 I recognise that there is always a discretion in a Council about whether, when the circumstances exist which would entitle it to make an order or make an upgrading or demolition order, it will actually make any such order. When one considers the context in which the warranty implied under section 52A comes to operate in a conveyancing transaction, one should recognise that it could be a serious problem for a purchaser if it had entered a contract to purchase a property concerning which there was a risk that a Council might make such an order.

48 The purpose of the legislation in implying this warranty is to assist a purchaser in having certainty about what it is that he or she is acquiring. Thus, the expression “matter... that would justify the making of any upgrading or demolition order” ought be construed, in my view, in a way which applies to any situation where the Council has power, in the exercise of its discretion, to make such an order. The existence of the mezzanine floor was a matter concerning which the Council had that power. It had not been disclosed by the plaintiff prior to contract.

49 There is express evidence from Ms Seymour that she would not have entered into the contract if she had known that the mezzanine floor might be liable to being demolished. This is consistent with the contemporaneous documentation, and also with her express evidence that the bottom level of the factory was about the same size as the property which she had already sold, and that she was looking for something bigger. I accept Ms Seymour’s evidence. In these circumstances, the defendant was justified in terminating the contract, by reason of breach of the implied warranty.

50 While a building certificate was obtained later in 2001, that is not something which can retrospectively cure the deficiency or the breach of warranty which existed at the time that the contract was entered into, nor take away the entitlement which the defendant had, at the time the defendant terminated the contract, to do so.
51 It follows from this that the defendant is entitled to receive back its deposit.

Although not a Court of Appeal decision, it is important in examining the effect of the prescribed warranties and the need to carefully deal with issues in a contract and examine the parties rights once a problem surfaces.

Election

The doctrine of election is extremely important in conveyancing as a right that might have arisen out of either a provision in the contract or the discovery of an ‘adverse affectation’ pursuant to the Regulation may be lost if no action is taken to take advantage of the discovery and a party (usually the vendor) can show that the purchaser has taken steps since the discovery that amount to an election to proceed.

It seems that the doctrine applies alongside the Regulation. While the provisions of clause 20 allow the purchaser to rescind at ‘any time before the contract is completed’, it is essential that if a right arises a decision is made as soon as possible to either rescind or proceed.

While the following cases arose before the current Regulation, the principles remain.

In _Sargent v ASL Developments Limited_ (1974) 131 CLR 634 the High Court dealt with an appeal arising out of contracts for the sale of land by instalments. The standard form of contract at the time anticipated a planning certificate being attached but for some reason it was not. The land was affected by the provisions of a planning scheme and the clause in the contract allowed either party to rescind for the vendors failure to provide or disclose zoning information.

The vendors purported to rescind the contract 32 months after the date of the contract and after monies were paid, under the contract, by the purchaser. The purchaser argued that although the vendor had a prima facie right to rescind under the clause, that right had been lost by the vendor’s election to proceed and receive the monies.

In considering the matter, Stephen J said:

> It is not by mere delay that it is said that the right of rescission was lost but rather by conduct evincing an intention to keep the contracts on foot at a time when the alternative, but inconsistent, right of rescission had

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become available. The vendors having two inconsistent rights were, it is said, bound to elect as between them and having elected to treat the contracts as subsisting they were thereafter bound by their election and thus forfeited their right of rescission.

The doctrine of election as between two inconsistent legal rights is well established but certain of its features are not without their obscurities. The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence.

... For the doctrine to operate there must be both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election as between the two inconsistent rights which he possesses.

... In the present appeals I conclude that, contrary to the appellants’ contentions, all that need be established in order for the doctrine of election to apply is knowledge by the vendors of the facts giving rise to inconsistent legal rights; the appellants are to be taken to know of their rights of rescission conferred by cl. 16 and, of course, of their right to enforce the contracts according to their terms. If they then knew of the relevant facts giving rise to the rights of rescission, that is, the existence of a planning scheme affecting the lands sold, that is enough to invoke the doctrine.

... The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other; ...

There need be no expressed intention to elect, nor will an express disclaimer of such an intention be of any avail in preserving one right if in fact there be an exercise of another inconsistent right. ... For an election there need be no actual, subjective intention to elect, and election is the effect which the law attributes to conduct justifiable only if such an election had been made.

... In these two cases the vendors knew at the date of the contract that the lands they were selling were affected by a planning scheme, being zoned as “rural and non-urban” or “non-urban”.

... Their two inconsistent rights were either to insist on continued performance by the purchaser of its obligations under the contracts of sale or instead to rely upon the right of rescission under cl. 16. Their conduct which amounted to an election in favour of the former right consisted of the receipt over a period of some thirty-two months of
quarterly interest payments under the contracts, ..., and their involvement in the steps taken by the purchaser to have the lands brought under the provisions of the Real Property Act.

The court concluded that while the vendors had a right to rescind because of the lack of a zoning certificate attached to the contract, this right was lost as the actions of the vendors amounted to an election to proceed with the contracts.

A similar decision was delivered on the same day in *Turner v Labafox International Pty Ltd* (1974) 131 CLR 660.

The last case I intend to deal with on election is the case of *Zucker v Straightlace Pty Ltd* (1987) 11 NSWLR 87. Zucker was a solicitor acting or himself on a purchase of property at Woollahra. After exchange of contracts he applied for a new 149 certificate and received one on 4 August 1986. He did not read the certificate but placed it in the file and read it until 6 September 1986. He then discovered a material difference in the information that would have entitled him to rescind under the 1986 Regulation and purported to do so. The vendor argued that if he had such a right he had elected to proceed with the purchase by his actions between exchange and 6 September 1986. The matter came before Young J. His Honour said:

> Were it not for the problems with the common law doctrine of election there would be no answer to the purchaser’s claim to have validly rescinded the contract. The doctrine of election however raises very serious problems.

> In order to outflank these problems, purchaser’s counsel submitted that the words in the regulation “at any time prior to completion” meant that the legislature had displaced the doctrine of election and it was just not relevant to consider its application at all where there was a statutory right to rescind during this time.

> Although I was initially attracted by this argument, on more mature consideration I have rejected it. ... the very same argument was put to Helsham J in connection with cl. 16 of the then form of contract and decisively rejected by his Honour. As Helsham J held the clause simply gives the right to rescind up to the very moment of completion provided that the right to rescind has not otherwise been lost.

> ... His Honour then went on to hold that the solicitors and thus their clients must be taken to have known at the time of receipt of the 149 certificates that the property was subject to a road proposal.

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... The form of the *Conveyancing Act*, section 52A makes the warranties contained in the regulation part of the contract and it seems to me that this means that the prescribed warranties must be treated in the same way as any other term of the contract permitting rescission and indeed the way the warranties are incorporated into cl 12 of the standard form reinforces this.

... Whether a party has elected to affirm a contract is a question of fact.

... However when the earlier matters to which I have referred and the demanding of proper answer to requisitions is taken together with the purchaser’s conduct with respect to objecting to the vendor’s building application with respect to No 20 Raine Street, Woollahra, it seems to me that a whole picture emerges of a person acting as the equitable owner of the property and indicating that to the council and to the tenants as well as to the vendor and that on the whole of the facts the activities of the purchaser during the month of August amounts to an election to affirm the contract.