CONVEYANCING

LECTURE ON 23 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.

Adjustments between vendor and purchaser

Clause 14 of the 2005 Contract commences with 14.1 as follows:

Normally, the vendor is entitled to the rents and profits and will be liable for all rates, water, sewerage and drainage service and usage charges, land tax and all other periodic outgoings up to and including the adjustment date after which the purchaser will be entitled and liable.

Under this clause adjustments will need to be made in:

• council rates
• water rates, sewerage and drainage rates
• water usage
• land tax

Under clause 23 some additional provisions are included to deal with particular issues relating to strata or community title properties.

Council rates

Councils are given the power to raise rates by the Local Government Act 1993. Section 494 provides that:

A council must make and levy an ordinary rate for each year on all rateable land in its area.

Section 603 provides for councils to issue certificates setting out the amounts due and payable to the council.

(1) A person may apply to the council for a certificate as to the amount (if any) due or payable to the council, by way of rates, charges or otherwise, in respect of a parcel of land.

(2) (Approved form and fee).
(3) The council is to issue a certificate to the applicant stating:

(a) the rates, charges or other amounts due or payable to the council in respect of the land and when they became due or payable, or that no such rates, charges or other amounts are due or payable, and

(b) ...

(c) the work carried out on the land by the council and the cost that may be recovered from the owner or occupier for the work, or that no such work has been carried out, and

(d) ...

(4) The production of the certificate is taken for all purposes to be conclusive proof in favour of a bona fide purchaser for value of the matters certified.

(5) ...

Calculating an adjustment of council rates

As one of the ‘normal’ conveyancing inquiries obtain a section 603 certificate from the local council. Check that it relates to the correct property and that the land your client is purchasing is the only land in the certificate. (It is possible for council’s to issue certificates for adjacent lots that are rated together.)

Check the amount outstanding and whether any instalments have been paid. While rates are levied for a whole year they are payable in full or by instalments and it is important to check the correct position.

Council rates are levied for the financial year and thus for the period 1 July to 30 June in the following year.

Assume the council rates are $900.00 for the whole year and settlement takes place on 1 August (before the rates in full or the first instalment is due.)

As the purchaser will be responsible for the rates from 2 August (the vendor is liable up to and including the day of settlement) then the vendor is responsible for the rates from 1 July to 1 August. There are 31 days in July and we have 1 day in August so the vendor is liable for 32 days.

The adjustment is:
900 ÷ 365 × 32 = 78.90.

This is the amount the vendor should pay so the purchaser should deduct this amount from the settlement monies payable to the vendor.

Whether you then tell your purchaser client that he, she or it is liable for the full years rates or for the first instalment on 31 August is a matter of personal preference. Provided someone pays the rates there will be no problem. My preference is to ask my purchaser clients for a cheque for at least the first instalment and pay it to the council. This avoids the possibility of a late payment and the imposition of interest.

So what if the council rates are partly paid? The adjustment will look like this:

Assume rates of $900.00 with settlement due on 5 May. The first 3 instalments totalling $675 have been paid with the final instalment of $225 due on 31 May.

The purchaser is liable to the vendor for the period from 5 May to 30 June, but is entitled to have the vendor pay the outstanding amount.

So:

\[ 900 \div 365 \times 56 \text{ (the number of days from 6 May to 30 June)} = 138.08 \]

Purchaser allows 138.08
Less amount outstanding by vendor 225.00
Net deduction from settlement monies 86.92

It is always important to be consistent in the way you calculate the adjustments and the way you set the figures out on your settlement sheet. There is no one way to do this, but if you are consistent then you will soon learn to notice figures that do not appear correct. Always think about the figures, it is easy to use a program to calculate the figures and not notice a result that couldn’t possibly be correct.

If the figures you receive from another solicitor are confusing or do not make sense, write them out in the format you normally use, you will soon either agree or disagree with the result.
Some general hints:

- think about what you are doing
- always reconcile your figures. Check that the amount you have to pay and the amount of money you have balance. Without a reconciliation it is very easy to make a mess of the numbers.
- always check your settlement figures (the numbers setting out the adjustments between your client and the other party) with the amount of money you have and the settlement statement you send your client.
- do figures early
- adopt a general practice of either paying outstanding rates or advising your client and stick to it. This avoids rates being forgotten and very unhappy clients. If you don’t agree with the figures submitted to you, amend them and send them back.
- calculate rates over the whole year. There is a tendency for rates to be adjusted in quarterly payments, but this is not correct. Councils levy rates yearly, they are payable by instalments. To calculate in quarters can produce significantly different results.

Water rates

Section 46 of the Hunter Water Act 1991 enables the Hunter Water Corporation to levy rates. There will be a similar provision in the Sydney Water legislation. In areas where the local council provides water and sewerage services, the council is entitled to levy rates and charges for these matters.

Section 47 of the Hunter Water Act provides for a certificate to issue setting out the amounts owing to the corporation.

47 Certificate as to amounts due

(1) The Corporation must, on written application being made to it, and on payment of the fee determined by the Corporation, issue to the applicant a certificate:

(a) containing particulars of any amounts payable to the Corporation in respect of a parcel of separately assessed land with those particulars distinguishing between any amounts charged on the land and any amounts that are not so charged,
(b) to the effect that there are no such amounts.

(2) ...

(3) ...

(4) ...

(5) A certificate is conclusive proof, in favour of a purchaser in good faith and for value of the land to which the certificate relates, that, at the date of its issue, no amounts were payable to the Corporation in respect of that land other than the amounts specified in the certificate.

Hunter Water levies its rates 3 times a year and this needs to be considered when calculating adjustments. I am not sure what Sydney Water does, but think it levies rates 4 times a year.

If the rates are levied 3 or 4 times a year then it is proper to adjust them on this basis. The adjustment is calculated as for council rates.

Water usage

This is a reasonably recent development. As a significant part of the water charges relate to usage it must be taken into account where it is charged on this basis. Hunter Water and Sydney Water provide details of average usage on the certificates issued. The calculation is similar to that for rates.

Days since last usage account = 50
Average use = 0.12 kl per day
Charge per kl = $1.25

Vendor allows:

\[ 50 \times 0.12 \times 1.25 = 7.50 \]

This amount should be deducted from the vendor at settlement.

Amounts for water usage can be quite small but can also be very large. If the premises are commercial and consume large amounts for water usage then careful adjustment is essential. For example, hotels use large amounts of water as do hairdressers, car washes, and many other commercial premises. As well, many residential properties seem to use large amounts of water.

Land tax
Adjustments of land tax are subject to some additional matters. If a vendor requires a land tax adjustment then the box on the front page needs to be marked ‘Yes”. If it is not, then the ‘NO’ response is automatically selected and no adjustment will be made.

A solicitor acting for a vendor should always consider whether land tax should be adjusted. For commercial property it is safer to assume that land tax will be payable by the vendor and mark the box. This can be reversed by agreement between the parties. For residential property the question of payment of land tax depends on value and whether the house or unit is owner occupied.

In addition to the box on the front page being marked, clause 14.4 has additional provisions concerning the adjustment of land tax.

14.4 The parties must adjust land tax for the year current at the adjustment date –

14.4.1 only if land tax has been paid or is payable for the year (whether by the vendor or a predecessor in title) and this contract says that land tax is adjustable;

14.4.2 by adjusting the amount that would have been payable if at the start of the year –

- the person who owned the land owned no other land;
- the land was not subject to a special trust or owned by a non-concessional company; and
- if the land (or part of it) had no separate taxable value, by calculating its separate taxable value on a proportional area basis.

What is land tax? This question is answered in the Fact Sheet for Land Tax issued by the Office of State Revenue for 2006. It is a tax levied by the state on all land owned by you at midnight on 31 December of the previous year. (The date was previously 31 October and this needs to be kept in mind when reading the cases.)

Land tax is payable on all land but there are then a series of exemptions. Generally your principal place of residence is exempt, but this can only apply to one property.

There is a rather longer Land Tax Information Booklet that you should download from the Office of State Revenue website at www.osr.nsw.gov.au.
One of the essential inquiries is a certificate from the Office of State Revenue advising whether there is land tax payable for the current year and the amount. The certificate won’t disclose the amount of any charge but if such a response is received it should immediately be referred to the vendor’s solicitor for advice and for the charge to be removed if land tax is not adjustable or if an adjustment needs to be made.

The provisions of the particular contract will then need to be examined to determine whether the purchaser has any obligation to make an adjustment. If an adjustment is required it is calculated as for council rates but the land tax year is the calendar year.

In *Lynch v Olympic Bowling Centres Pty Ltd* Helsham J considered whether land tax was a “rate, tax or charge” within clause 9 of the 1965 standard contract. While he determined it was not, the case is now of limited value as the 2005 Contract specifically deals with land tax to ensure that similar problems do not arise.

One matter that remains of significance is that his Honour determined on the authority of an earlier High Court case that¹:

> The charge in this case therefore arose and became a charge as at midnight immediately before 1st November, 1961. It did not arise after the defendant became the owner in 1962.

In *Dainford Limited v Yulora Pty Limited* (1984) NSW ConvR 55-185 the Court of Appeal considered various issue arising out a problem settlement where the vendor offered an undertaking to pay land tax and the purchaser rescinded the contract for failure by the vendor to remove the charge for land tax. In his judgement Mahoney J A said²:

> The defect in the vendor’s tender of performance lay in the failure to remove the land tax charge to which I have referred. There was offered only an undertaking to pay the land tax when assessed and no time was specified for this purpose. This was a substantial default and no offer was made to rectify it appropriately.

Some further points concerning land tax:

- land tax remains a first charge on the land. If it isn’t dealt with adequately in the contract or at settlement then the purchaser can become liable regardless of whether the purchaser would be liable at all.

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1 Page 445  
2 Page 57,309
• all land tax owing by an owner attaches to all land of that owner, not just to the separate parts of it. So, if an owner owns several parcels of land and is only liable for land tax as a result of the aggregate value, then all parcels are charged with the whole amount.

• always apply for a land tax certificate. Because of the problem with all land tax for an owner being a charge on all land, you cannot assume that a parcel of land that would not be liable to tax by itself is not liable for tax in the hands of the vendor.

Vacant possession

The front page of the contract allows the vendor to mark whether the property is sold with vacant possession or subject to existing tenancies. This should always be discussed with a vendor and with a purchaser so that the correct notation is made.

If the property is tenanted under an expired residential tenancy agreement then the vendor may wish to sell with vacant possession and arrange for the tenant to vacate after exchange and prior to completion. The problems with this were discussed in an earlier lecture.

It is more important if the property is commercial and occupied under a lease.

So what is vacant possession? Firstly the property must be free of any tenancy arrangement and secondly the property must be physically vacant.

The question of a tenancy arrangement is usually dealt with prior to exchange and it is not often that this is an issue at settlement. The question of the property being physically vacant has been the subject of many cases over the years.

Clause 12 of the 2005 Contract entitles the purchaser to make ‘one inspection of the property in the 3 days before a time appointed for completion.’ The opportunity to inspect should always be utilised to ensure that the property is as the purchaser expects.

Some problems arise from vendors moving on the morning of settlement but if a vendor is clearly in the process of moving out then this is usually satisfactory. It is common for vendors and purchasers to make their own arrangements for the actual time of vacating and the handing over of
keys. As long as an arrangement can be confirmed I am reluctant to interfere with these arrangements.

In **Cumberland Consolidated Holdings Limited v Ireland** [1946] 1 KB 264 the English Court of Appeal considered a dispute concerning goods left in a warehouse. The goods were present at the time the sale was negotiated but the vendor agreed to remove them prior to completion. The premises consisted of a warehouse with a cellar beneath the whole building. The cellar was largely filled with old drums and hardened bags of cement. Without removing the goods the cellar could not be used. The purchaser arranged removal and sued the vendor for this cost on the basis that the vendor had failed to deliver vacant possession on completion.

In his judgement Lord Greene M R said:\footnote{Pages 269 -271}

A vendor, who between contract and conveyance deposited on the property sold rubbish of his own which he desired to abandon, would clearly commit a breach of his obligations if the presence of the rubbish caused a substantial detriment to the property. In the present case the rubbish was on the property at the date of the contract, and was not deposited subsequently as in the example given. But at the date of the contract the rubbish still belonged to the vendor since admittedly no abandonment had then taken place.

... Subject to the rule de minimis a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment.

... the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession.

... It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property.

In **Point Glebe Pty Ltd v Lidofind Pty Ltd** (1988) NSW ConvR 55-412 Needham J considered the issue of whether relatively small amounts of rubbish and other material constituted a failure to give vacant possession. In his judgement Needham dealt with the issue as follows:\footnote{Pages 57,776-7}:

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\footnote{3 Pages 269 -271}
\footnote{4 Pages 57,776-7}
There are photographs in evidence taken by Mr Anstee which show that there was a stove, an oven, in a corner apparently of one of the residential properties in the backyard, and also there was other material ...

Inside No. 143 there was a mattress on the floor of one of the rooms and in the corner a packet of cornflakes and a bag and what looks like some wooden portion of a bed or some piece of furniture.

... In the present case, what was found inside No. 143, in my opinion, could not be under any circumstances described as a substantial impediment to the undisturbed enjoyment of the properties. Nor, in my opinion, could the material left in the vacant area constitute such a substantial impediment.

In his judgement his Honour quoted extensively from Cumberland Consolidated Holdings Limited v Ireland (above). A further case that quoted extensively from Cumberland Consolidated Holdings Limited v Ireland (above) is Smilie Pty limited v Bruce (1999) NSW ConvR 55-886. In Smilie a vendor was to complete at 2.00 pm. At 1.30 pm an inspection took place and found that while the property was not vacant the vendor was actively engaged in removing her possessions from the property and that it was expected to be vacant by about 2.10 pm. For other reasons the purchaser failed to complete and in the subsequent case argued that vacant possession could not be given at completion. The judge found that it could and the failure to complete was not caused by this.

In the Court of Appeal Handley J A referred to Cumberland and to a special condition in the contract which allowed the vendor “... prior to completion, remove from the property in her discretion the improvements including the fixtures and fittings.”

The Court found that the minor extent to which any goods were left on the property could not constitute a failure to give vacant possession.

The result of these cases is that you need to be careful if you intend to argue that a vendor has failed to give vacant possession. The starting point should always be Cumberland and the requirement for a vendor to give vacant possession. What constitutes a failure to deliver vacant possession to a purchaser is not entirely clear and must be more than a packet of cornflakes.