

## Best Practice Guide

# Release of the Deposit

This Guide has been prepared jointly between the Property Law Section of the New Zealand Law Society and the Real Estate Institute of New Zealand to remind lawyers and real estate licensees of the process around release of the deposit.

### A. When a Real Estate Agency is holding deposit monies as a stakeholder:

1. Under the ADLSi/REINZ Agreement for Sale and Purchase of Real Estate the agent is holding the deposit as a stakeholder which can be released when:
  - (a) The requisition procedure under clause 5 is completed without either party cancelling the agreement; and
  - (b) All conditions expressed in the agreement have been fulfilled or waived.

**Note:** Different procedures apply where the property is a unit title – see the deposit clause 2 in the Agreement for Sale and Purchase. Licensees can refer to REINZ Guidelines on how to handle deposits when selling a unit title.
2. Under the Real Estate Agents Act 2008, all monies received by an agent in respect of any real estate transaction must not be released for at least 10 working days after the date on which the monies were received (s123).
3. Exceptions to the 10 working day rule in s123 apply only where:
  - (a) there is an authority signed by all the parties to the transaction allowing the money to be released before the expiry of the 10 working days; or
  - (b) the court orders early release.
4. After the requirements set out in 1(a) and (b) above have been satisfied and the deposit has been held in accordance with s123, there is no need for the licensee to obtain a written confirmation from the lawyers in order to release the deposit, unless:
  - (a) There is any doubt, on reasonable grounds, as to who is lawfully entitled to the money (s122(2)); or
  - (b) The agency has received written notice of any requisitions or objections in respect of the title (s123(3)).

### B. When requesting authority for early release of the deposit, real estate licensees should:

1. Be mindful that lawyers are generally not required to grant such authority in absence of specific instructions from their clients. Lawyers should not be expected to persuade the parties to provide that instruction.

2. Be mindful that the purchaser would usually not consent to an early release. This is because once the deposit has been released the purchaser loses the protection of having the monies held in trust should any complications arise.
3. State their reasons clearly as to why an early release, in the particular case, is necessary. For example, the vendor may need the balance of the deposit monies early in order to use it as a deposit for their own purchase.
4. Not make the request solely for the reason that the licensee would like to receive the commission early. The Real Estate Agents Complaints Assessment Committee has ruled against a licensee when the early release of the deposit was of greater advantage to the licensee than to his client vendors (Complaint No CA4032678 & CA4065006).
5. Be mindful that lawyers will need time to take instructions from their client before the authority can be granted.

### C. When there is dispute in relation to the release of the deposit, lawyers should bear in mind:

1. That a licensee, under s122 of the Real Estate Agents Act 2008, may not release the money if in doubt, on reasonable grounds, as to the person who is lawfully entitled to the money. In such cases, lawyers should try and assist the agency to ascertain, as soon as practicable, the person who is lawfully entitled to receive the money.
2. That if the licensee receives written notice of any requisitions or objections in respect of the title to any land related to the transaction, monies cannot be released until both parties consent in writing or a court orders the release.
3. That the agency's claim for its commission is unaffected by any dispute between the parties regarding the deposit (s122(5)). Therefore, lawyers should take the commission amount into account before concluding any negotiations to resolve a dispute between the parties.

### D. Releasing deposit close to settlement

1. For whatever reason, if the deposit is being released into a lawyer's trust account on or near the settlement day, licensees should be mindful that lawyers need these monies in cleared funds. The best practice in these circumstances is for there to be an early discussion between the lawyer and the licensee to agree on how these monies will be deposited and in what way the lawyer can be assured that the monies will arrive in cleared funds and not be reversed. It is recommended that such discussion takes place at least 3 working days prior to settlement.
2. In the event that the settlement date predates the expiry of the 10 working days (s123), then the licensees should:
  - (a) insert an appropriate condition in the agreement to permit an early release prior to signing (see, for example, clause B17 in the NZLS/REINZ Useful Clauses 2013); or
  - (b) the licensee should obtain an authority from both parties (s123).

**Note:** This information has been prepared jointly by the Property Law Section of the New Zealand Law Society and the Real Estate Institute of New Zealand. This information is a guide only and is not intended to form professional legal advice or legal opinion on any particular matter.

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