Hazards of Objecting To Title

Occasionally, lawyers acting for a purchaser object to some problems in an inappropriate manner and end up causing substantial loss to their client and sometimes to themselves.

The law relating to this whole area is more complex than it appears at first glance, and it might be helpful to review some of the pertinent considerations.

Objections may be raised with respect to title to property, municipal by-laws and zoning, restrictive covenants, building restrictions, errors in description and lack of planning approval, as well as taxes, encumbrances and a multitude of other problems.

Before objecting, it is a good practice to make a reasonable effort to try to resolve the objection through your own research.

There are three general categories of objection to title and the distinction is important with respect to the timing of the objection.

1. Objections which go to the root of the transaction.

These may be made at any time before closing, although decency and professional courtesy would dictate that a purchaser's solicitor would advise the solicitor for the vendor as soon as such a problem is uncovered. Within this category would be included matters such as an outstanding undivided interest in the property, an illegal deed in the chain of title or total lack of title in the vendor.

As to what is an objection which goes to the root of title, Cromarty, J. stated in the case of *Jakmar Developments Ltd.* v. *Smith* (1974), 39 D.L.R. (3rd) 379:

> In all the cases to which I was referred and which I have been able to find where an objection to title was made after the date for requisitions was permitted it was a case where the vendor could give no title at all and the defect could not be discovered as a result of the usual search of title.

The following have been held to be objections going to the root of title:

a. An undisclosed public road or easement running through the land. *Board* v. *Bauer* 60 D.L.R. 208.
b. The existence of zoning when the agreement states there is none. *Re Pentecost and Congregation Anshei Libavich* (1927), 33 O.W.N. 232.
c. Vendor unable to deliver up possession. *Haste* v. *Goodman*, 66 D.L.R. 360.
d. Outstanding lease. *Larson* v. *Rasmussen* (1913), 10 D.L.R. 650.
e. Breach of statute, including planning. *Halifax Relief Commission* v. *Halifax* 51 M.P.R. 9.
f. Vendor's title arising from a breach of trust. *Millard* v. *Gregoire* (1913), 47 N.S.R. 78.

2. Objections which do not go to the root of title.

Such objections, to be effective, must be made within the time specified in the agreement of purchase and sale.

Some examples where courts have strictly applied the cut off date for objections contained in an agreement of sale are:

a. Vendor's title subject to agreement requiring consent of third party to the conveyance. *Mosiman* v. *Carveth*, [1923] 2 D.L.R. 725.
b. The land is subject to expropriation. *Mauvais* v. *Tervo* (1915), 25 D.L.R. 192.
c. Absence of affidavit of status in prior deed. *Lett* v. *Gettins* (1918), 43 D.L.R. 247. (But see *Mills* v. *Andrewes* (1982), 54 N.S.R. (2d) 394.)
d. Will not registered.
e. Misdescription in chain of title. *Lance* v. *Jones* (1980), 115 D.L.R. (3d) 254.

3. Objections which raise questions on matters of conveyancing.

A distinction is made between matters of title and matters of conveyancing. Objections to the latter category can be made at any time. Such objections would relate to the question of who should join in the deed and what form the deed might take. They generally arise where the vendor is found not to be able to convey the property without the concurrence of another. A frequent instance of this arises under the *Matrimonial Property Act* where a spouse of the vendor is a necessary party to the transaction.

Zoning and building by-laws have been held to be matters of land use, not title. Accordingly the time limit for objections to title does not apply to these, nor does the annulment clause giving the right to the vendor to rescind rather than remedy the defect. *Re Pongratz and Zubyk* (1954), O.W.N. 597, *Re Mullin and Knowles*, [1969] 1 O.R. 324.

The Escape Clause

Most agreements of sale contain a provision allowing the vendor to annul the contract if an objection is raised which he is unwilling or unable to remove. This right must be exercised in a *bona fide* manner and a genuine effort should be made to meet the purchaser's requisition. *Mason* v. *Freedman* [1958] S.C.R. 483.

Several Disastrous Objections

In *Bowes & Cocks Ltd.* v. *Aspirant Invts. Ltd.* (1984), 31

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R.P.R. 63, a solicitor acting for the purchaser fired off an objection to the vendor based upon several encroachments arising from the survey amounting to .4 foot shortage on the front and .13 foot encroachment on the side. The parties could not resolve their differences and the matter arrived in court after tender by each. Finding the discrepancies to be "trivial" the court granted specific performance and special damages in the amount of $105,570.42 to the vendor.

In *Berger* v. *Westren* (unreported, Judicial District of York, 172659/82), the objection related to urea formaldehyde foam. The purchaser had no reason to suspect the presence of foam in the building but wished an assurance that it was not present. The court found that this was not a valid cause to object and that the purchaser was therefore liable to the vendor. The property was sold at a loss after collapse of the first agreement and the court ordered payment to the vendor of damages for that loss of $21,420 together with additional expenses relating to special damages.

In *Batson* v. *An-Rob Investments Inc.* (1982), 31 R.P.R. 311, the vendors were required to discharge all encumbrances on or before closing. At the closing, the vendor's solicitor produced an executed but unregistered discharge of mortgage. The purchaser's solicitor refused to close, insisting upon a registered discharge and would not accept the undertaking of the vendor's solicitor in respect to this.

Hollinger, J., found this course of conduct unreasonable and awarded damages of $3,582.57 plus costs. This matter went on appeal to the Ontario Court of Appeal which agreed with the lower court and awarded further costs against the defendant.

In the Ontario case of *Koffman* v. *Fischtein*, (unreported, November 19, 1984), the vendors sued the purchaser for failure to close. The problem arose out of a last minute objection by the solicitors for the purchaser respecting an execution judgment filed against a person that had a name similar to one of the vendors. In fact the vendor was not the same person as the judgment debtor. Due to the lateness of the day, it was impossible to get an affidavit from the vendor with respect to his identity. The court awarded damages against the purchasers, finding that this question should have been raised within the time limited in the agreement of sale for raising of objections, and that the purchasers were therefore in default.

In all the foregoing cases, the objections were of a legal nature and probably arose through a misunderstanding of the mechanisms involved. It is likely that disappointed purchasers looked to the lawyers involved, or their insurers, for compensation.

— *C.W. MacIntosh, Q.C.*

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