HOW SHOULD THE VENDOR'S SOLICITOR DEAL WITH NON-VALID OBJECTIONS TO TITLE- -SOME NOTES

The comments below presuppose a valid Agreement of Purchase and Sale with timely delivery of the property description to the Purchaser.

The rights of the parties are, in part, set out in their Agreement of Purchase and Sale (assuming they have one) which may be in the Nova Scotia Real Estate Association "Approved Form" a copy of which is attached as Schedule "A". The "annulment clause" set out in paragraph 3 states:

"The Vendor is to furnish the Purchaser with a metes and bounds description of the property which is the subject of this Agreement, after receipt whereof the Purchaser is allowed days to investigate the title to the property, which he shall do at his own expense. If within that time any valid objection to title is made in writing, to the Vendor, which the Vendor shall be unable or unwilling to remove, and which the Purchaser will not waive, this Agreement shall be null and void and the deposit herein shall be returned to the Purchaser, without interest, and without liability by the Vendor for any expenses incurred or damages sustained by the Purchaser."

Apart from whatever contractual term there may be concerning valid objections to title the Vendors and Purchasers Act, R.S.N.S. 1967, c.324, s.5 states, in part, that:

"Every contract for the sale and purchase of land shall, unless otherwise stipulated, be deemed to provide that,

(a) the vendor shall deliver to the purchaser a copy of the metes and bounds description of the land contracted to be sold or contained on the last deed by which it was conveyed but otherwise shall not be bound to produce any abstract of title, deed, copies of deeds or other evidence of title except such as are in possession or control;

(b) the purchaser may search the title at his own expense and shall make his objections thereto in writing within thirty days from the date that the vendor delivered to him a copy of the metes and bounds description as provided for in clause (a) hereof;

(c) the vendor shall have thirty days in which to remove any objection made to the title, but if he is unable or unwilling to remove any objection which the purchaser is not willing to waive, he may cancel the contract and return any,deposit made but shall not be. otherwise liable to the purchaser;"

A copy of the Act is attached as Schedule "B".

Assuming the Vendor's solicitor has received requisitions she/he must determine if the requisition is an objection to title coming within the ambit of the above provisions or whether the requisitions are matters of conveyancing or contract. This vexing issue was so well dealt with by Donald Lamont, Q.C., at the Practical Property Conference in 1982 I have attached a copy of his paper as Schedule "C". Reference may also be had to Schedule "D" which cites some Nova Scotia cases and other references on this topic. The above annulment provisions apply only to objections to title. Matters of conveyancing, matters of contract and objections to title going to the root of title may be made at any time. **For matters** going to the root of title see Schedule "C", pages I-18-20.

i The "approved form" of Agreement of Purchase and Sale refers to "valid objections to title" while the Vendors and Purchasers Act refers only to "objections to title". The word "valid" in the Agreement appears significant. Presumably any objection to title raised by the purchaser would be taken to be considered valid by the purchaser by estoppel. The inclusion of this word would appear to prevent the purchaser from making "non- valid" objections to title as a means of escaping the contract should the vendor be unwilling or unable to remove them - it leaves the vendor the opportunity to make an application for determination of validity of the objection.

The vendor is entitled to receive the purchaser's objections to title in writing within the time prescribed by the contract or the statute whichever applys in the circumstances. Failing this the purchaser is stuck with such clouds or defects on title as do not go to

the root of title. In Real Estate Conveyancing, Lamont states, at pp. 159-160:

"The need for delivering requisitions in the time provided for by the contract of sale cannot be emphasized too strongly. In Stykolt v. Maynard, [1942] O.R. 250, it is stated in the headnote:

A contract for the sale of land provided, inter alia, that the title was to be examined by the purchaser at his own expense, that he was to have ten days in which to search and make objection to title, and that if no objection was made within that time he should be deemed to have accepted the title: Before searching, the purchaser's solicitors wrote a letter containing a number of requisitions, including a general one as to building restrictions. The-trial judge was of opinion that this letter indicatd clearly that it had been written without any reference to the particular title or contract, and that it was not so worded as to contain any valid objection to title. [There was no reference to the document imposing the restrictions or in what manner it was alleged the buildings did not comply.] The time for objecting was twice extended at the request of the purchaser's solicitors, the second extension expiring on 18th August. On that day the solicitors wrote a letter, which was not received by the vendor's solicitors until 19th August, making a specific requisition as to building restrictions, which had been found registered against the property. No reply was made to this letter, and, since the building then on the land did not conform to these regulations [restrictions;, the purchaser declined to complete the sale, and demanded the return of his deposit.

The purchaser plaintiff did not succeed. The plaintiff stood on what he claimed as his strict legal rights. His claim failed on the ground that there had been no valid objection to title within the time prescribed, and under the contract he was deemed to have accepted the title.

There are.several lessons to be learned from this case:

(a) The requisitions must be received on or before the date stipulated, not merely mailed on that date.

(b) The requisitions must be relevant to the **instant** title.

(c) Requisitions should refer to the instrument in question, giving details thereof, and specify the defect or non-compliance, and what is required to clear up the problem, that is, the production and registration of a document, or putting it on deposit, as the case may be.

(d) Requisitions that do not go to the "root of title" are ineffectual if not made within the time specified in the offer to purchase. That means that by delay a solicitor for a purchaser may put himself in a position where his client can be forced to take a title which, though valid, may be defective. The agreement for purchase and sale means what it says: if you do no object in time, you are deemed to have accepted the vendor's title. However, a requisition that goes to the root of title does not have to be made in the time limited in the contract and the words "deemed to have accepted the title" do not apply to such a requisition."

To know when the time by which the right to object expires one must know when the purchaser or his/her solicitor received the metes and bounds description. How would you prove the date of receipt? Do you send the description by receipted registered or certified mail in order to have a receipt for delivery? This does not appear to have been a problem in the cases **we have reviewed** but you may wish to review this aspect of your

practise.

Once the vendor's solicitor has received objection to title she/he must take care before attempting to remove them or enter negotiations about them. Di Castri, The Law of Vendor and Purchaser, Second Edition, (Carswell, 1976] page 287 states.
" . . . unless the vendor expressly reserved to himself all rights ancillary to his right to rescind in pursuance of his contractual provision, he may lose the right if he answers and attempts to remove the objections raised by the purchaser; the right to rescind should be exercised reasonably and promptly, and not capriciously or arbitrarily . . .

and at page 257:

"The benefit of the clause may be lost to the vendor if he attempts to comply, either wholly or in part, with a requisition unless: (1) he does so without prejudice; or (2) the clause reserves to the vendor the benefit of the right to rescind notwithstanding negotiations consequent upon the purchaser's requisitions; and (3) he exercises his right in a reasonable time, and at any rate, prior to a judgement determining that he has.no title."

Lamont also comments on attempts to deal with requisitions in light of the annulment clause. In Real Estate Conveyancing at pp. 168-169 he states:

"It should be noted that the vendor may lose his right to rescind if he attempts to answer requisitions on title unless the annulment clause reserves the right to rescind notwithstanding negotiations consequent upon the purchaser's requisitions. Even with those terms he should when replying to requisitions state that his answers are without prejudice to his rights under the agreement. This point was clearly stated in the headnote in Crabbe v. Little; Moses v. Little at(1907), 14 O.L.R. 631. The benefit of a provision in a contract for the sale of land that if any objection or requisition be made by the purchaser which the vendor shall be unable or unwilling to comply with, the vendor shall be at liberty, by notice in writing, to rescind the agreement if **the vendor's solici**tor attempts to answer the requisitions and **enters** into negotiations with the purchaser's solicitor in regard to them. A vendor should either cancel the contract when he first reads the requisitions or when embarking on the attempt to comply with them, or to remove the objections, should reserve to himself the benefit of the right to rescind further on during the negotiations."

With the above warning in mind the vendor's solicitor mus determine whether the vendor is able and willing to remove the requisitioned objections to title. If not the vendor's right of rescision arising from the annulment provisions must be exercised reasonably and in good faith and not in a capricious or arbitrary manner. Mason v. Freedman, [1958] S.C.R. 483. See also Schlumberger and Devereaux both cited in Schedule "D".

Di Castri, supra, page 257, states:

"The clause does not assist the vendor who enters into his contract recklessly and with full knowledge of his inability to carry it out.

Such a clause cannot be used to enable a person to escape his obligation by taking advantage of his own default nor to justify a capricious or arbitrary repudiation of the contract negativing any suggestion of a genuine effort to meet the purchaser's requisition. The minimum essential to qualify the clause as an escape hatch from specific performance with compensation is the bona fides of the vendor."

The vendor does not have to "go to the ends of the earth" to **answer** requisitions. Di Castri states, at page 257:

"But a vendor does not have to be completely beyond criticism before he can exercise his right to rescind. His position has to be ascertained as of the date he entered into the contract. So, a mere failure to disclose a defect of title, much less a defect in the evidence of title, will not deprive him of his right."

A vendor does not have to engage in an extensive and expensive lawsuit to remove an objection. Mitz v. Wiseman [19721 1 O.R. 189.

If a vendor would be unable to remedy the defect in title by the date of closing the vendor may rescind. J. C. Bakker Sons Ltd. v. House (1979), 8 R. P. R. 24.

If the vendor can, bona fide, bring himself within the annulment clause - and the purchaser will not waive the objection to title - the agreement is null and void and the deposit will be returned to the purchaser. See Devereaux cited in Schedule "D".

The purchaser can waive his objections to title expressly or, in certain circumstances, by taking possession. Howland, Objections to Title, Law Society of Upper Canada Lectures, 1960, p. 221 at pp. 231-232 says in part about waiver by possession:

"Then the basic question would seem to be one of fact, namely, has a purchaser waived his right to object to the title. Waiver is a question of intention to be determined from the acts of the parties. One has to consider carefully whether the purchaser knew of the defects when he took possession and what has been his attitude toward them since taking possession. In some instances the Agreement of Purchaser and Sale stipulates that **the purchaser may** go into possession almost **immediately after the Agreement** is executed and some time before the date for submitting requisitions on title. In such circumstances taking possession will not amount to waiver as the purchaser would not know of any defects since he has not made his investigation of the title. Nor will it amount to waiver if he states his objections on taking possession and continues to insist upon them. It has also been suggested that in the case of a removable objection taking possession will not generally amount to waiver as it will be in the case of an objection that is not removable."

Later, at p. 233 he summarizes:

"Whilst the matter is not free from **doubt there would seem** to be a good deal of substance in the criticism of Ilsley, C. J., in Hull et al. v. Hennigan et al. ((1959), 16 D. L.R.(2dT7-8T--that the taking of possession and exercising acts of ownership by making repairs and improvements does not automatically amount to waiver."

Waiver then will be a question of fact in each case but, from the vendor's point of view, it may a useful argument.

If the vendor disagrees that the objection to title is "valid" the vendor may wish to have the matter heard under Section 3 of the Vendors and Purchasers Act. If an application is made remember that neither of the contractual dates for making objections nor closing are affected by the application. The application must be heard promptly or the dates must be properly extended.

The Nova Scotia Court of Appeal has stated that the Vendors and Purchasers Act was intended for cases where there is no dispute as to the validity of the contract, but the parties are seeking the court's opinion on a matter affecting title. The court will not hear a question of interpretation of the agreement based largely on the conduct of parties. Sackett v. Ritchie (1980), 36 N.S.R.(2d) 597 (C.A.) at page 602. copy attached
See also Atlantic Wholesalers cited in Schedule "D" for restrictions on applications when rights of third parties will be affected. Further reference as to what matters lie within or outside the scope of the Vendors and Purchasers Act generally may be found in Di Castri, supra, at pp. 469-476.

If, all else fails, and the purchaser fails to close because of a non-valid objection to title the vendor may elect to pursue his remedies of forfeiture of deposit, damages or specific performance. If the validity of the objection has ,r not already been judicially determined by an action under the Vendors and Purchasers Act it will certainly be put to rest, one way or the other, by this action.

SUMMARY

Following are some of the points to remember when representing the vendor:

1. Review your practise to be sure that you will be able to prove when the purchaser received the metes and bounds description from you.

2. Determine whether the requisition you have received is an objection to title (as opposed to a matter of conveyancing or contract) and that it does not go to the root of title. Only if it falls in this category does it come within the Annulment Clause.

3. Did you receive the Objection to Title in writing, in proper form and within the required time? If not it is not a valid Objection to Title. Remember an Objection to Title going to the root of title may be given at any time up to closing.

4. If you receive an Objection to Title you feel is not valid ask the vendor if he wishes to rescind immediately. If he wishes to proceed be sure you reserve his right to rescind the contract under the annulment provision before you attempt to remove the objection or negotiate with the purchaser's solicitor, otherwise the vendor may lose his right to rescind. Has the purchaser waived his objection to title expressly or by taking possession?

5. If the vendor decides to rescind be sure he is doing so reasonably and in good faith. If the vendor decides to rescind then the clause must be expressly invoked.

6. If you bring a Vendors and Purchasers Act application to determine the validity of the objection be sure it is done promptly and, if necessary, any contractual dates are properly extended.

GARTH C. GORDON