INTRODUCTION:

Not a great deal has been written about closing adjustments in text books. However, Alan Crowe has lectured at many bar admission courses and his notes have been most helpful in the preparation of this paper.

When considering closing adjustments, one must refer to the Agreement of Purchase and Sale or the governing contract between the parties. The standard form Nova Scotia Real Estate Association Agreement of Purchase and Sale, clause 6, provides the position of the parties with respect to adjustments. As not all real estate companies are using the new form of Agreement of Purchase and Sale, I propose to set out both the old and new clause.

Old Clause 6:

> Interest, rentals, insurance premiums, taxes, rates and assessments are to be adjusted to the date of closing. The cost of municipal improvements, (including, but without limiting the generality of the phrase "municipal improvements", betterment charges and capital charges for utility or municipal services) completed as of the date of this agreement, whether billed or not, are to be paid by the Vendor on or before the closing date.

New Clause 6:

> Interest, rentals, taxes, rates, fuel on the premises and assessments are to be adjusted to the date of closing. The cost of municipal improvements (including, without limiting the generality of the phrase "municipal improvements", betterment charges and capital charges for utility or municipal services) completed as of the date of this agreement are to be paid by the Vendor on or before the closing date unless otherwise stated.

If the Agreement of Purchase and Sale does not contain a clause providing for adjustments, the Vendors and Purchasers Act, R.S.N.S. 1967, c.324, s.5(d) provides as follows:

> Every contract for the sale and purchase of land shall, unless otherwise stipulated, be deemed to provide that, ...(d) taxes, insurance premiums, rents and interest, and other charges, shall be adjusted as at the date of closing.

These, then, are the relevant provisions that govern all adjustments unless provided otherwise in the specific Agreement of Purchase and Sale.

One cannot consider the problems associated with adjustments without first considering the standard adjustments which apply in almost every transaction. I propose to consider these adjustments in the order that they usually occur on the "Memo re Transfer" or "Statement of Adjustments". When preparing adjustments, it is useful to consider this as a checklist for the transaction, so all items should be noted, even if there is no particular adjustment in the instant case. Adjustments should be prepared by the Vendor's Solicitor as soon as possible in the transaction so that the Purchaser's Solicitor can be notified of any unusual charges which might require more money to be paid by the Purchaser on the closing. As well as being a courtesy to the Purchaser's Solicitor, you may find that the transaction is not delayed because of the Purchaser's inability to arrange the necessary additional financing.

CREDITS TO VENDOR:

1. Purchase Price:

Before attempting to prepare the adjustments for the transaction, read carefully the Agreement of Purchase and Sale to ensure that the proper purchase price has been ascertained. The counter offer should be consulted, as quite often the vendor will only counter the purchase price. Also check with your client to determine whether there are any ancilliary or collateral agreements governing the transaction which might require additional monies to be paid. I am thinking here of the recent program of the Federal Government giving a $3,000.00 grant for new home construction under $100,000.00 in the Maritime area. A lot of agreements were drafted around this

time that provided for the purchase price to be just under $100,000.00. Ancillary agreements, to do additional work on the property, were also executed to cover the extra cost.

2. Fuel

Under the old Agreement, unless the parties specifically provided for it, there was no mention of an adjustment for fuel. Therefore, it was up to the parties to agree as to whether or not there would be any adjustment for fuel on the premises. In my opinion, fuel is the personal property of the Vendor and the Vendor may take it with him on the closing of the transaction. Unless there is a provision in the agreement, the Purchaser is not required to make an adjustment for the fuel and can clearly ask the Vendor to take it with him if he wishes.

However, the reasonable way to deal with fuel and perhaps the most common and certainly the accepted custom in this area is to have the Vendor top up the tank on or about the date of closing and provide a fuel oil delivery slip and then have the Purchaser give a credit to the Vendor for the full tank of oil. The reason this custom developed was because it was very difficult to estimate the amount of fuel in the tank as gauges were always inaccurate.

The new agreements now provide for an adjustment of fuel on the premises. However, I would suggest that the custom as noted above should still be followed.

As a courtesy to the Purchaser's Solicitor, the Vendor's Solicitor should note in his opening letter whether or not a fuel oil adjustment will be requested and how much the appropriate adjustment will be. On closing of the transaction, the Vendor's Solicitor would normally provide a fuel delivery slip or an undertaking to hold the amount of the fuel oil adjustment until the Purchaser can confirm that the tank has been topped up.

Often the parties will request, or the agreement will require, that the lease of a propane tank be assumed by the Purchaser. The question then arises as to whether there should be an adjustment for the propane in the tank. It has been my experience that there should be no adjustment between the parties and that this adjustment will be made by the company holding the lease on the tank. The reason for this is that the propane suppliers can quite accurately measure the amount of

fuel in the tank and when the Purchaser signs the contract for the lease of the tank, they can measure the amount of fuel in the tank and make the appropriate charge to the Purchaser and credit the Vendor's account.

You may also be required from time to time to make adjustments for stove oil and wood. It is my opinion once again that this is personal property and should not be required to be adjusted unless specifically stated in the agreement. The parties should attempt to specify the amount of the adjustments in the agreement where possible.

3. Extras

In the case of new construction agreements, there may have been additional work done to the property which is not in the agreement and which may or may not have been agreed to in writing by the parties. Both Solicitors should attempt to determine from their respective clients the cost of these extras and include them as an addition to the purchase price in the adjustments. Also, in the case of new construction, where allowances are given to the Purchaser for the provision of cabinets, flooring, lighting, etc., the Purchaser, in choosing these items, may have exceeded the allowance. The amount of the excess over the allowance should be included as an extra on the adjustments as a credit to the Vendor.

In many cases, appliances are included with the house that is being transferred. The agreement may provide that an additional consideration should be paid for these items. Even though there is nothing in the agreement, the parties may have made an ancillary agreement verbally to pay for the cost of these items on the transfer. It is my suggestion that these should be included as extras on the statement of adjustments so that a financial record can be kept of the transaction. The Vendor's solicitor can also ensure that the Vendor is getting money that has passed through his trust account and not a purchaser's uncertified cheque.

4. Insurance Premium

This is not commonly adjusted in residential transactions. It involves situations where premiums have been prepaid on the insurance policy and the policy is being assigned to a new Purchaser. If this occurs, there is simply an adjustment of the balance of the prepaid portion of the premium on a per diem basis, as a credit to the Vendor in addition to the purchase price. This may occur in the case of mobile homes which are sometimes difficult to insure.

5. Condominium Reserve and Contingency Fund

It has been established in the case of Re: MacCulloch (1981),48 N.S.R. (2d) 402 (N.S.S.C.,T.D.) that, as Reserve and Contingency Funds are part of the common elements, they are part of the realty and covered by the purchase price of the unit. If the Vendor wishes to receive credits for these funds as an adjustment on the sale price, he must include this in the Agreement of Purchase and Sale or increase the price to cover the amount of the funds when negotiating the agreement. On the other hand, as these funds are part of the realty, the Vendor is also obligated to ensure his assessments to the fund are paid in full before any transfer. Thus if either of these funds are in a deficit position, a credit should be given to the Purchaser on the adjustments, if the Vendor does not pay this amount before closing.

With respect to common expenses, these are normally paid in advance, and on the closing a credit should be given to the Vendor for the prepaid portion which accrues to the benefit of the Purchaser.

One should always have reference to the estoppel certificate governing the unit before agreeing to make any adjustments. Although the condominium corporation is bound by the contents of the estoppel certificate, there may be cases where items noted on the estoppel certificate are not legitimately due and owing by the Vendor. Reference should be made to the case of C.M.H.C. v. Halifax County Condominium Corporation and Crowe (1982), 52 N.S.R. (2d) 579 (N.S.S.C.,T.D.). Here there were unpaid common expenses which had accrued on the unit prior to the acquisition by C.M.H.C. through a foreclosure sale. These unpaid amounts had not been perfected to a lien and when C.M.H.C. purchased the property at foreclosure sale, they did not agree to pay these amounts or to assume this charge. As this was still a personal debt against the original owner of the unit, the only recourse of the condominium corporation was against the original owner. Even if a lien had been perfected, it would have been wiped out by the foreclosure of the first mortgage.

If, after you have closed a transaction for a condominium unit, the Purchaser comes in to your office indicating that he has received a bill for a special assessment for work having just been completed and for which nothing was indicated on the estoppel certificate at the time of sale and for which no adjustment was made on closing, reference should

be made to the case of Halifax Condominium Corporation No. 5, Cowie Hill v. McDermaid (1982), 24 R.P.R. 248 (N.S.S.C.,T.D.). In that case, a motion had been passed approving borrowing by the corporation for the repair of windows and shingles. An estoppel certificate was issued stating the contingency fund and the monthly condominium fee but not mentioning anything about the resolution for borrowing for special maintenance. After the purchaser bought the property, a first draw was made on the loan and work was done on the property. The purchaser then received a letter indicating the amount required for a monthly payment on the special assessment. Chief Justice Glube found that as the estoppel certificate contained no reference to the special assessment for windows and shingles, even though only a borrowing resolution had been approved prior to the date of purchase, the condominium corporation was estopped from claiming any amount not referred to in the certificate. Of course, had the parties known about this special assessment before the closing of the transaction, there might have been a special adjustment on account of the purchase price to account for the special assessment, or the purchasers could have chosen to pull out of the deal.

As there can be some unforseen items disclosed in the estoppel certificate which were not apparent to the parties at the time the agreement was signed, it might be useful to consider inserting the following clause in the Agreement of Purchase and Sale, if one is consulted before the agreement is finalized:

> This Agreement of Purchase and Sale is subject to a condition precedent for the sole benefit of the Purchaser, which may be waived at any time by the Purchaser, that (1) the Purchaser receive a proper estoppel certificate prior to the closing, and (2) if the estoppel certificate contains any information materially different from that contained in the Agreement of Purchase and Sale or discloses an obligation or liability that the Purchaser will be required to assume after closing but which was not disclosed in the Agreement of Purchase and Sale, then the Purchaser shall have the right to terminate this Agreement.

If acting for the Vendor and you have knowledge of a possible special assessment even though no work has been done and no money expended, include a provision in the agreement requiring the Purchaser to assume this ultimate obligation. It may save expensive litigation or it may save the deal if the estoppel certificate discloses this special borrowing resolution.

6. Interest Adjustment

This adjustment is not too common today; however, in the case of new construction agreements, it was quite common a few years ago where purchasers were assuming construction mortgages. If you come across this sort of situation, the problem will usually arise because at the time of closing the builder's mortgage will not have been fully advanced and the final draw on this mortgage will not be made until after the date of closing.

A common practice of mortgage companies was to deduct the accrued interest up to the interest adjustment date from the final draw directed to the builder. Of course, from the date of closing, interest on the mortgage is the responsibility of the Purchaser. Therefore, it is important, if acting for the Vendor, to ensure that this interest adjustment is credited to the Vendor in addition to the purchase price. One controversy that always crops up is that this interest is calculated for purposes of adjustment on the basis of a fully advanced mortgage but the builder is not paying interest on the basis of a fully advanced mortgage but only on the amount advanced from time to time, until the final draw. On the other side of the argument is the fact that the Purchaser on the closing adjustments is getting credit for a fully advanced mortgage and provided the builder is not unduly delayed in collecting his final draw, this difference will be only nominal.

The current practice of mortgage companies seems to be that builders' mortgages are paid out and conventional mortgages placed by new purchasers, or mortgage companies are collecting the interest adjustment from the purchaser when the mortgage is assumed. I expect the reason for the decline in the former type was that the A.H.O.P. program was terminated and there was not a great need for high ratio assumable mortgages.

If you are acting for a Vendor and the mortgage is being assumed by the Purchaser and the final draw is to be made

to the Vendor, be sure and obtain a direction from the Purchaser that such an advance is to be made direct to the Vendor and that any interest from the date of closing is to be charged to the Purchaser if it is not adjusted on the closing.

7. Mortgage Insurance Fee

Also associated with the assumption of high ratio new construction mortgages is the mortgage insurance fee which will be deducted from the builder's advance. Unless a credit is given to the Vendor for the amount of this premium, the Purchaser will be given the benefit of a high ratio mortgage, but the Vendor will be paying the fee. The builder can deal with this by either including the value of the mortgage insurance premium in the total purchase price, or including a clause in the Agreement allowing for a credit to the Vendor in addition to the purchase price on the closing adjustments.

8. Taxes

(a) Credit for Taxes in mortgage account - If the mortgage is being assumed and the Vendor has been paying a monthly instalment on taxes to the mortgage company, then there may have accumulated in this account a sizeable sum which will be transferred to the Purchaser on assumption of the mortgage. Therefore, there should be a credit given to the Vendor in addition to the purchase price for any amount remaining to the credit of the Vendor in this account. Around the time that taxes are paid by mortgage companies, there is always a considerable amount of confusion as to whether these taxes have been paid and whether the figure on the statement for assumption purposes properly reflects the true standing of the account. Once you receive an assumption statement, you should always follow it up by a telephone call to the mortgage company on the date of closing to determine exactly the amount that is remaining to the credit of the Vendor.

If, on the other hand, the account is in a deficit position, then you will want to collect these funds as an adjustment to the Purchaser and remit these funds to the mortgage company.

Also associated with assumption statements is another credit sometimes referred to as an "interest savings credit". This may be accumulated interest on the tax account and if it is in a credit position, this figure should be credited to the Vendor as an adjustment in addition to the purchase price.

(b) Prepaid Taxes - Taxes that have been paid by the Vendor or his mortgage company to the municipality should be shown as a credit to the Vendor in addition to the purchase price. Under credits to the Purchaser, an amount will be shown for taxes, which are the responsibility of the Vendor, so that only a net credit goes to one party or the other, depending on the time of year.

9. Mortgage back to Vendor

In the case of Agreements that provide for the Vendor holding a first, second or third mortgage, the Solicitor for the Vendor usually prepares the mortgage and sends a bill to the Purchaser's Solicitor for the preparation fee. Although this has developed to be a custom in Nova Scotia, it is advisable to include in the agreement, a clause to the effect that the Purchaser agrees to pay for all costs involved in the Vendor holding such a mortgage. My preference is to include this fee for preparation of the mortgage as a credit to the Vendor in addition to the purchase price. This fee then can be dealt with between the Vendor and his Solicitor. Once again, it is my view that the statement of adjustments should reflect all financial matters relating to the transaction.

10. Prepaid Services

Where the agreement provides that certain contracts are to be assumed by the Purchaser and amounts have been prepaid by the Vendor, then a credit should be given to the Vendor, in addition to the purchase price, for the portion remaining in the term, which is the Purchaser's responsibility. This might involve such things as maintenance contracts, cable T.V., etc. In the case of such agreements, arrangements should be made for their assignment to the Purchaser.

CREDITS TO THE PURCHASER

1. Deposit

The deposit in most cases will be noted on the agreement, however there may have been a subsequent addition to the deposit which is not noted on the agreement. You should always check with the real estate company or the person holding the deposit to determine whether a deposit was made. Reference to the Real Estate Commission statement if acting for the Vendor will note the deposit which has been credited against the commission.

Believe it or not, some companies are still in the habit of accepting promissory notes as a deposit. In my view, this is clearly a bad habit and should be discouraged. In any case, if a promissory note has been accepted and no follow-up deposit has been made, then of course there should not be any adjustment and the promissory note should be retrieved.

In the case of large deposits, agreements often provide that these deposits be held in interest bearing accounts. Hopefully, the agreement will also indicate who is to receive the benefit of the interest on the deposit. Whomever is the beneficiary, this should also be given as a credit to the appropriate party.

2. Taxes

There are three common entries as credits to the Purchaser under taxes. These include:

(a) the portion of taxes for the current year which are the Vendor's responsibility, i.e. from January 1 up to and including the day before the day of closing. This of course is calculated on a per diem basis;

(b) any arrears of taxes;

(c) any interest on arrears to the date of closing.

When obtaining a tax certificate, you should always verify the current balance by telephone shortly before the closing.

In some cases, the tax certificate will refer to clearance from the Public Service Commission and one should also verify any amounts outstanding to the Public Service Commission and make the appropriate adjustment as a credit to the Purchaser when necessary.

In the case where there has been no bill issued for the current year's taxes, the custom varies, but my practice, is to estimate on the basis of a 10 per cent increase over the previous year's taxes. However, if you later find that you have made an error in calculation, recourse against the other party may be difficult. This is what occurred in the case of Wu v. Campbell, [1977] 4 Alta. L.R. 392 (District Court).

Because an agreement has been made, this will bring in the doctrine of merger and prevent readjustment at a later time. This is often a desirable result because the parties are moving away and they want to finalize the matter at the closing and are prepared to deal with the matter on the basis of estimates.

Beware, however, if you are dealing with a new construction agreement as the previous year's taxes might very well have been based on the lot assessment and not having a completed house. In this case, you may wish to estimate the new taxes or obtain an undertaking from the respective clients to adjust the taxes at a later date when they are known. An alternative to obtaining an undertaking might be to type right on the statement of adjustments that the Vendor agrees to readjust the taxes when the tax bill is issued. This of course, will bring it home to your client when he reviews it later on, not having remembered that he made such an agreement.

Another problem arises, in the case of block assessments, where there is no separate assessment for the individual lot at the time of closing. In some cases where there is a very large block which is not fully developed, often the only practical solution is to make no adjustment but to ensure that the Vendor pays the entire block assessment. If the entire block has been developed and subdivided, then you may wish to determine the percentage that your lot represents to the block and adjust taxes on that basis.

3. Betterment charges

The standard agreement provides that the Vendor should pay for all betterment charges resulting from improvements completed as of the date of the agreement unless it is otherwise provided in the agreement. This will include principal and outstanding interest. One should also review the agreement to determine whether there have been any amendments or additions which might conflict with this standard provision. Very often there is a clause requiring the Purchaser to assume such amounts and unless the appropriate part of clause 6 of the standard agreement is deleted, this will create an ambiguity in the agreement which can only be resolved by agreement of the parties, or recourse to the courts.

If the tax certificate indicates that work has been completed but not yet billed, then you should consult the engineering department of the municipality to determine roughly the amount of the charge for the subject property and obtain an

agreement from the Solicitor for the Vendor that such an amount will be held back pending issuance of the bill. These amounts are normally held in interest bearing accounts and an agreement should be made at that time as to whom the interest is to accrue.

Where the agreement provides for the Purchaser to assume a particular betterment charge, you are always concerned with whether or not the Purchaser is assuming a fully paid up capital charge or whether the amount is to include any outstanding instalments and accumulated interest. There are many arguments on this matter and the easiest way to resolve it is to include a clause in the agreement before it is completed as follows:

> The Vendor agrees that any past due instalments or interest are the Vendor's responsibility and must be adjusted at the time of closing. Both parties agree to adjust the present year's annual instalment.

Some Solicitors might feel that this clause is superfluous in light of the decision of Mr. Justice Hallett in Petrofina Canada Limited v. Markland Developments Limited (1977), 3 R.P.R. 33 (N.S.S.C.,T.D.), where he found that the phrase "property taxes" included taxes of all sorts and was not limited only to annual taxes. In that case, they included betterment charges as were listed on the tax certificate. Thus, if the normal agreement calls for adjustment of taxes to the date of closing, then the current year's instalment as well as arrears and interest on arrears, should be adjusted the same as normal annual taxes even though there is no provision in the agreement requiring such.

However, this is not totally accepted by solicitors, especially when an agreement provides that the Purchaser should assume betterment charges in a specific amount. As we all know, realtors put a figure in the agreement but don't bother to check whether or not there are any outstanding instalments or interest accrued. Usually when the Purchaser is confronted with the Vendor's interpretation, his response is that he only agreed to assume a fully paid up capital charge and not one with outstanding instalments which he will have to pay on the closing, especially if he is arranging a new mortgage.

The case of Markland (Supra.) also indicates that if title is transferred by way of a Quit Claim Deed and the

solicitor for the Purchaser does not object to betterment charges as an encumbrance within the time allotted for title objections, and there is no clause in the agreement requiring betterment charges to be paid by the Vendor, then the Purchaser may be out of luck with regard to payment by the Vendor of these capital charges, at least for the capital portion. In that case, the Purchaser had to accept the encumbrance as a charge on the title because of the poor wording of the agreement and the failure of the Solicitor for the Purchaser to make a timely objection as to the betterment charge.

If the Purchaser is arranging a new mortgage, most companies require that current instalments be paid and in some cases, companies will require that betterment charges be paid out, especially if a high ratio mortgage is being obtained. If acting for the Purchaser, be sure to check your instructions in this regard, and advise the Purchaser of any additional monies that may be required to satisfy the mortgage company.

If an assumption of the betterment charge by the Purchaser is to take place, then the only deduction from the purchase price as a credit to the Purchaser should be the interest and outstanding instalments or arrears. Any principal amount which is to be assumed is in addition to the purchase price and not adjusted as a credit to the Purchaser.

If the Purchaser is assuming a betterment charge which has not been billed, then you may wish to place a limit on that amount in the agreement, and to hold a security holdback or accept an undertaking to readjust this figure at a later date when the amount is known.

There are many cases where the closing takes place with no adjustment for betterment charges and the Purchaser receives a bill down the road for unpaid betterment charges. These may have been unknown to the parties at the time of closing or they may have been overlooked by the solicitors for the parties.

In the case of the normal standard agreement which calls for the Vendor to pay for work completed as of the date of the Agreement, the case of Stevens v. Grant (1976), 22 N.S.R. (2d) 505 (N.S.S.C.,T.D.) provides some solace to the Purchaser. Here a betterment charge was unbilled and unknown to either party at the time of closing. This case held

that, whether or not a lien was perfected against the property by the municipality, the Vendor is considered to have breached the Agreement of Purchase and Sale which required the Vendor to pay the cost of local improvements, whether they were billed or not, provided they were completed as of the date of the agreement. Thus the Vendor was still responsible after the closing for unpaid betterment charges which under the agreement were his responsibility.

4. Mortgage payout

Order a statement no matter who you are acting for. Remember most companies will not give you any information over the telephone unless it is to update a statement already received. This is for fear of providing incorrect information on which the Purchaser may rely to his detriment after which the mortgage company may be estopped from setting up the true facts and going after the Purchaser for the balance of the unpaid mortgage.

When ordering mortgage statements, reference should be made to the recommended procedures set out by the Law Society of Upper Canada's Practice Advisory Service on Real Estate Transactions, Undertakings, Closings and Mortgage Discharges, which report is found in Appendix "A".

When the payout statement is received, check to see whether there is any prepayment penalty. If there is, refer to the agreement to check whether the Purchaser was to assume the mortgage or obtain financing through the same company. If this is the case, then there may be grounds for not including the amount of the penalty in the adjustment of the credit to the Purchaser for the mortgage payout or, if the Vendor is paying out the mortgage, then obtaining a credit from the Purchaser in addition to the price, for the amount of the payout penalty.

One should also determine whether the statement is conditional upon monthly payments clearing the bank. I have had closings occur one month after the payment presumably had cleared the bank and yet the payment was still returned N.S.F. Of course this never comes to your attention until after the mortgage has been paid out and you then begin scrambling around to find the Vendor to collect this payment. Since it is the Vendor's responsibility to pay out the mortgage and all amounts owing under it, it is my opinion that it is only proper that the Vendor's solicitor should hold the amount of payments which haven't cleared, until he can be satisfied that they have

cleared. I'm sure we've all had cases where we've had to pay, out of our own pockets, the amount of a payment which didn't clear the bank.

If funds on the payout will not reach the mortgage company the same day as the closing, then be sure to collect sufficient interest from the party responsible (normally the Vendor), until the payment can reasonably reach the mortgage company. A specific example here is the payout of Fidelity Trust mortgages to First City Trust, which is located in Toronto. If the Purchaser's Solicitor pays out the mortgage then consideration should be given to getting a credit for the delivery charge.

There have been many cases where the Vendor's Solicitor has failed to pay out the mortgage, having received the total funds from the Purchaser. The question is always raised as to who should be paying out the mortgage. I believe the custom in Nova Scotia has been, in the case of conventional lending institutions, for the Purchaser to pay out the mortgage and receive a credit from the Vendor for the amount required to pay it out. In the case of private mortgages, the accepted practice has been for the Vendor to give an undertaking to the Purchaser's Solicitor to pay out the private mortgage and provide a Release for recording, to the Purchaser's Solicitor. Although this practice has worked fairly well in Nova Scotia, it has not been without its problems.

The Law Society of Upper Canada as part of the Practice Advisory Service, has reviewed its procedures dealing with the discharge of existing mortgages and has made a number of recommendations regarding accepted procedures. This is a very important area, and rather than review the recommendations here, I have chosen to include them in Appendix "A". I encourage you to review them carefully as there is no doubt that some of these practices should be adopted in Nova Scotia.

What happens if, after paying out the mortgage, the mortgage company refuses to give a Release because of errors in the statement? Unless you have followed the procedure set out by the Law Society of Upper Canada in requisitioning the mortgage statement, thereby creating an estoppel, you may have little ground for refusing to pay additional amounts. As a practical matter, most mortgage companies will continue to refuse to give the Release until they receive this final payment. If you cannot obtain the funds from the Vendor, the

mortgage will remain a charge on the property and the balance will have to be paid by the Purchaser unless you are prepared to take the mortgage company to Court.

5. Mortgage Assumption

Once again, both parties should order the assumption statement. On receipt of the assumption statement, review it to ensure that the particulars are the same as the client agreed to assume in the Agreement of Purchase and Sale.

If the statement provides that an assumption fee be paid to the mortgage company, then this is the Purchaser's responsibility and not the subject of an adjustment. The mortgage should be adjusted as a credit to the Purchaser for the principal and interest accruing up to and including the day immediately preceding the closing day. The Purchaser is then responsible for the interest on the mortgage from the closing date. You should collect payments that are in arrears and take a holdback credit or request the Vendor's solicitor to holdback for payments that haven't cleared the Bank.

As referred to earlier, adjustments should be made in favour of the Vendor for credits in the tax and savings account and where there is a deficit in the tax account, this should be taken as a credit to the Purchaser on account of the purchase price and these funds remitted to the mortgage company.

If you're dealing with the assumption of a builders' mortgage, you may have to adjust as a credit to the Vendor for the interest adjustment and mortgage insurance fee as noted earlier.

If the Purchaser is assuming less than the full amount on a builders' mortgage, then you may have to take a credit on account of the purchase price, for the amount of the pay-down, where the mortgage has been advanced to the builder over and above the assumption figure. These funds would then be forwarded to the mortgage company.

6. R.R.A.P. Mortgage

As you may know, this is a loan administered by C.M.H.C. which is forgiveable under certain circumstances and is normally secured by a mortgage on the property. If the Agreement of Purchase and Sale requires that the Purchaser assume this obligation, then the Agreement of Purchase and Sale should provide that this is in addition to the purchase price

because it should not be taken as a credit to the Purchaser to be deducted from the purchase price. If this were so, the Purchaser would get a reduction in the price but might never have to pay the forgiveable loan.

7. Vendor Take Back Mortgage

This involves a credit to the Purchaser as a deduction to the purchase price of the principal amount of the mortgage. Normally payments begin 30 days following the closing, but if they are to begin on the first of the following month, then you may want to give a credit to the Vendor, in addition to the purchase price, for the amount of the interest adjustment. Also, as noted earlier, there should be a credit to the Vendor depending on your practice, for the amount of your legal fee for preparation of the mortgage.

8. Preparation Release

This credit is not commonly taken nowadays since most mortgage companies prepare their own releases and add the fee to the mortgage statement. However, if you are required to prepare this Release and the Purchaser is paying out the mortgage, you may wish to take a credit for the preparation fee. There are only a few mortgage companies who collect this on their statement and pay the solicitor for preparation.

9. Recording

For any items that are the Vendor's responsibility to provide on closing and which require recording, there should be a credit to the Purchaser as a deduction to the purchase price. These include such things as releases, powers of attorney, statutory declarations, additional deeds, and anything requiring further clarification of title. An exception to this might be a statutory declaration provided on a judgment which is given for courtesy reasons.

10. Tax Certificates

The Halifax and Dartmouth City charters have a similar provision. The Halifax City Charter reads as follows:

> "Section 288 (6) - The vendor or mortgagor of any real property in the City shall, at the request of the purchaser or Mortgagee, and prior to the delivery of a deed or conveyance of, or execution of the mortgage upon such real property, obtain from the Tax Collector a tax certificate

respecting such real property and shall deliver it to the purchaser or mortgagee."

The practice varies throughout the Province, but in the metro area it is the custom for the Purchaser to obtain the tax certificate and receive a credit on account of the purchase price for the cost of the tax certificate. In other areas of the Province this custom may be different.

11. Rental Adjustments

If rent is prepaid, then there should be a credit to the Purchaser for the balance of the prepaid period including the day of closing (see City of Toronto v. Toronto Railway Company (1926), 59 O.L.R. 73).

If the rent has not been paid in advance, then you should place the onus on the Vendor to collect the outstanding rent if he wants any adjustment; otherwise no adjustment should be made.

12. Security Deposits

The Residential Tenancies Act S.N.S. 1970, c.13, s.9(5) requires that the security deposit together with interest, shall be returned to the tenant within ten days of the day of termination of the lease. The Act provides, in Section 9(4) that the rate of interest shall be 6% per annum until the 1st day of July, 1982 and 12% per annum compounded annually after the 1st day of July, 1982. As a result of recent amendments(S.N.S. 1984, c. 44, s.5(1)), section 9(3) requires that security deposits shall be held in trust by the landlord and deposited in a trust account with a chartered bank or trust company or credit union or invested in such securities as are authorized by regulation. Therefore, a credit must be taken by the Purchaser on account of the purchase price to enable the security deposit plus interest to be transferred to the new landlord.

13. Holdbacks

Holdbacks may be required for various reasons and they can be held in either lawyer's trust account. The holdback may be interest bearing or non-interest bearing. If it is interest bearing, be sure it is agreed to whom the interest will accrue. If you are holding the funds in an interest bearing account you may wish to obtain a fee for preparation and filing of a Trust Information Return to Revenue Canada.

Without discussing the merits of the holdback, examples of holdbacks include:

(a) dispute resolution and reference under the Vendors and Purchasers Act;
(b) deficiency holdback for work to be done as a result of new construction;
(c) mechanics' lien holdback (you should ensure that the mechanics' lien holdback does not double as a deficiency holdback unless you're prepared to lose the deficiency holdback if the mechanics' lien fund is required);
(d) holdback until correct figure is known, e.g., sewer lien or mortgage payout.

In any case, the reason for the holdback and when it is to be released, should be clearly defined and set out in writing.

14. Allowances

In the case of new construction, there are quite frequently allowances for cabinets, floor coverings and lighting. The Purchaser only gets a credit for the allowance on the statement if the Purchaser is going to be paying for the full amount of the account. If the Purchaser exceeds the allowance and the Vendor is paying the account, then there is a credit to the Vendor in addition to the purchase price for the excess amount. Therefore, it is important to tell the Purchaser, that if they're not going to spend the full amount of the allowance, they should pay the account in order to get the benefit of the allowance.

15. Fixtures

Review the agreement as it may provide that if the Vendor takes a certain fixture, then the Purchaser is to be given a credit. Many purchasers think that they will be getting a cheque on the closing for the amount of this adjustment, however, obviously the best way to deal with this is to give a credit to the Purchaser to reduce the purchase price.

16. Buy Down of Interest Rate

In times of high interest rates, it was quite common to see a Vendor agreeing in new construction deals and resales, to buy down the interest rate to the Purchaser. If your agreement provides for this, make sure this can be done with

the mortgage company and get them to determine the cost in advance and have the amount agreed to by both parties well in advance of the closing. This, of course, is taken as a credit to the Purchaser on account of the purchase price, and the funds paid either directly to the mortgage company or credited to the Purchaser if the mortgage company has deducted this amount from the advance.

17. Non-Resident

If the Vendor is a non-resident, the Purchaser may be liable to pay 15% of the purchase price to Revenue Canada unless a Clearance Certificate is received. The onus is on the Purchaser to inquire as to the Vendor's status. In many cases the only way to deal with this problem is to hold back the 15% until a clearance is received or, if no clearance is received within a specified time, then to remit the money to Revenue Canada.

18. Leased Hot Water Heaters

Always check with your client to determine whether the hot water heater on the property is leased. If it is a leased hot water heater and there is not a provision in the agreement for the Purchaser to assume this lease, then get an agreement early in the transaction from the Purchaser to assume it to prevent the problem arising on the closing. If the Purchaser refuses to assume this hot water heater lease, the Vendor may have to give a credit to the Purchaser for a new one or buy out the existing lease.

19. Miscellaneous Credits

The cost of obtaining documents which are the Vendor's responsibility to provide should be taken as a credit to the Purchaser on account of the purchase price. Examples of these include the cost of estoppel certificates, condominium declaration and by-laws.

20. Extended Closings

If the closing is extended because of delays on the part of the Purchaser, then the Vendor may want to:

(a) Receive interest on the balance to complete as of the original closing date and to stop his expenses with respect to taxes and mortgage; or,

(b) make adjustments as of the extended date if the property is revenue producing.

If the extension is as a result of the Vendor's delay, the Purchaser may wish to:

(a) adjust on the extended date to obtain the benefit of smaller tax adjustment; and,
(b) obtain a credit from the Vendor for the extra costs incurred because of the delay, such as hotel and moving expenses.

WHAT IF AFTER CLOSING, ADDITIONAL ADJUSTMENTS ARISE OR ERRORS ARE DISCOVERED IN THE ORIGINAL ADJUSTMENTS?

Whether one can reopen adjustments depends on whether the doctrine of merger applies. This doctrine operated to restrict the rights of the parties after conveyance had been delivered. The reasons for this have been long established and have been set down in such cases as Allen v. Richardson (1879), 13 Ch. D.524; 49 L.J. Ch. 137, by Malins, V.C. at page 537:

> "Now I say that there is a rule between vendor and purchaser which cannot, in my opinion, be too rigidly adhered to. I have said so in other cases, and I adhere to it strictly now: and that is, that in all the transactions of life, whether it be a sale or a purchase, you must, if you are wise, be wise in time. Therefore, in the case of a vendor and purchaser, which necessarily involves the investigation of a title - an investigation whether the vendor can give the purchaser all that he has contracted to give, and upon which alone, being satisfied, the purchaser pays his purchase-money, if he is to be wise he must be wise in time, and he cannot be wise in time unless he objects before he completes the contract...
>
> I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance, pays his purchase-money and is put into possession, there is an end to all as between him and the vendor on that purchase. If it were otherwise, what would be the consequences? A man sells an estate generally because he wants the money; if

> this were not the rule, he must keep the money at his banker's, and there never would be an end to the question; whereas by adhering to the rule, the purchaser is put into possession at once of his land, and the vendor has the purchase-money to dispose of as he thinks fit the moment after receiving it."

The rule was succinctly stated by the Privy Council in the case of Knight Sugar Co. v. Alberta Railway & Irrigation Co., [1938] 1 W.W.R. 234; [1938] 1 All E.R. 266, at page 269:

> "It is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed: Leggott v. Barrett. The most common instance, perhaps, of this merger is a contract for sale of land followed by a conveyance on completion. All the provisions of the contract which the parties' intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied."

However the Courts recognized the harshness of this rule on an honest purchaser who might reasonably have expected that the terms of the original contract would survive the closing. Early cases, such as Freeman v. Calverley (1916), 10 W.W.R. 567 (Man. C.A.), established that there may be independent collateral obligations in the agreement that are not discharged by the transfer of title and payment of monies and that these should best be determined by the intention of the parties.

The Supreme Court of Canada confirmed this in Hashman v. Anjulin Farms Ltd., [1973] S.C.R. 268, at page 277:

> "...it is not every case were an agreement for the sale of land is followed by the execution of a conveyance of the land, that the provisions of the agreement must of necessity, be merged in the conveyance.

> What the court must do, ... is to 'endeavor to see what was the contract according to the true intention of the parties'."

Later Mr. Justice Dickson, in the case of Fraser-Reid et al. v. Droumtsekas et al. (1979), 103 D.L.R. (3d) 385 (S.C.C.) suggested a possible presumption against merger rather than in favour of merger. He reasoned as follows, on page 394:

> "Although it is the general rule that the acceptance of a deed is prima facie full execution of the agreement to convey, and preliminary agreements and understandings relating to the sale of land became merged in the conveyance, such rule is not applicable to independent covenants or collateral stipulations in an agreement of sale not intended by the parties to be incorporated in the conveyance. Delivery and acceptance of the conveyance in such circumstances, is merely part performance of the obligations of the Vendor under the contract.
>
> Essentially, a deed of conveyance is a mere transfer of title, and it is not to be supposed that the whole contract between the parties is incorporated in the deed.
>
> . . . . .
>
> There is no presumption of merger. The proper inquiry should be to determine whether the facts disclose a common intention to merge the warranty in the deed; absent proof of such intention there is no merger."

The question of determining the intention of the parties is still a difficult one, and where there is no written evidence of this intention and an individual judge is not prepared to look for it, the doctrine of merger will still apply. An example is the case of Moretta et al. v. Western Computer Investment Corporation Ltd. (1982), 27 R.P.R. 11 (Alta. Q.B.) affirmed (1983), 3 D.L.R. (4th) 738 (Alta. C.A.). Here, the agreement provided for a mortgage to be assumed with a maturity date of 1985. The deal closed in 1976 and the mortgage expired in 1980. The court held, that in the absence of fraud, this was an innocent misrepresentation and not a

warranty which should survive the closing and thus the doctrine of merger applied. The court may have been less lenient because a careful search by the purchasers' solicitor would have uncovered the difficulty and permitted the purchaser to deal with the problem before closing.

In other cases, such as Handsaeme v. Dyck et al. (1982), 26 R.P.R. 9 (Alta. Q.B.), judges have found ways to get around the doctrine of merger. In this case, a calculation error resulted in an incorrect tax adjustment, leaving a balance owing to the Vendor. McFayden, J. could find no authority to suggest that "the purchaser's obligation to pay the full amount of the purchase price in the absence of evidence of a compromise or settlement, is necessarily merged in the transfer". He concluded at p.13:

> " ...that a transfer merges or extinguishes the obligations of the purchaser under an agreement for sale with respect to purchase price only where the evidence discloses that this was intended by the parties.
>
> Where it is established that as a result of mutual mistake, the full amount of the purchase price was not paid to the Vendor, the Vendor is entitled to maintain an action for the recovery of the balance of the purchase price."

In the case of North American Life Assurance Co. v. Johnson, [1940] 4 D.L.R. 496 (Ont. C.A.), the Court went behind the deed of conveyance using the phrase in the deed "and other valuable consideration" to permit evidence of the terms of the agreement.

DiCastri in The Law of Vendor and Purchaser, (1976, Carswell: Toronto), at section 667, suggests the following categories which prevent the operation of the doctrine of merger:

(1) fraud;
(2) mutual mistake founded upon misapprehension as to the continued existence of the subject matter or as to its ownership and resulting in a complete failure of consideration;

(3) a warranty collateral to the contract of sale;
(4) a condition to which effect is not given by the conveyance;
(5) some express provision for compensation in the contract which has not become merged in the conveyance;
(6) some express condition;
(7) an express covenant for title contained in the conveyance itself;
(8) estoppel.

And further where there is a covenant for title in the deed supported by an express covenant in an agreement of sale to give a conveyance free from encumbrances, the Vendor is obligated to discharge such encumbrances after the conveyance even though its existence may have been unknown to either party until after the closing.

In the case of Stevens v. Grant (Supra.), no consideration was given to the doctrine of merger, but, Morrison, J. relied on the express covenant in the agreement that betterment charges for work completed as of the date of the agreement, whether billed or not, were to be paid by the Vendor. Here no adjustment was made at the time of closing as the charge was unknown to either party. He found that there was a breach of the covenant in the agreement and allowed the subsequent adjustment.

To avoid problems associated with the doctrine of merger, you may wish to consider the following:

(1) include a provision in the agreement of sale indicating that certain clauses are warranties which are collateral to the conveyance and shall survive the closing;

(2) place a warranty clause in the deed of conveyance;

(3) execute a separate express warranty outside the deed of conveyance;

(4) enter into undertakings or arrangements at the time of closing covering problem areas incapable of being resolved before closing.

Reference should be made to an example of an undertaking in Appendix "B", which is common in other jurisdictions.

CONCLUSION

I have attempted in the foregoing to outline as many of the problems regarding adjustments as have come to my attention over my short term of practice and you may have encountered many more. In short, if there is any advice that I could give to practitioners as a result of this research, it would be as follows:

1. Draft the Agreement of Purchase and Sale as carefully as possible and where adjustments are known in advance, include these in the agreement;

2. Prepare adjustments carefully and review all material relating to the transaction; check mortgage payouts, tax information and double check them to reduce the possibility of missing information and errors in the adjustments;

3. If areas cannot be dealt with on the closing or there is some degree of uncertainty or covenants should survive the closing, obtain undertakings on the closing or ensure that the agreement provides that such items will survive the closing and will not be merged in the conveyance.

APPENDIX "A"

PRACTICE ADVISORY SERVICE
DIRECTOR
ALAN T. MARSHALL, Q.C.

OSGOODE HALL
TORONTO, ONTARIO
M5H 2N6

THE LAW SOCIETY OF UPPER CANADA

REAL ESTATE TRANSACTIONS -
UNDERTAKINGS ON CLOSING -
MORTGAGE DISCHARGES

The Practice Advisory Service has reviewed current procedures for dealing with the discharge of existing mortgages at the time of closing a real estate transaction. Contributions have been made by a number of individual lawyers who are regarded as highly qualified in real estate practice, the Real Property Section of the Canadian Bar Association-Ontario and by Joan Morham of Maltman & Company (the Law Society's Insurance Adjusters). Following the background information and outline of risks are recommendations which are submitted to the Profession as guide-lines to be followed in the circumstances outlined. The recommendations are an attempt to set a general standard, but individual situations may indicate the need for variation or an entirely different approach. It remains the responsibility of the individual lawyer to choose and recommend to his client the procedure best suited to the individual transaction. Reference should always be made to the extensive published material now available concerning the avoidance of risks in real estate transactions, particularly as this material refers to Undertakings on closing (e.g. the Law Society Risk Management Handbook, pages 135 to 138).

BACKGROUND

In the past the general practice has been that the Vendor's Solicitor would deliver to the Purchaser's Solicitor on closing a written undertaking to withhold from the balance due on closing sufficient moneys to pay off and discharge any existing mortgage, remit the same to the mortgagee and attempt to obtain and register a proper form of discharge of mortgage as soon as possible after completion of the transaction. These undertakings were normally essential, and accepted by Purchaser's Solicitor, when the mortgagee was one of the regular recognized mortgage lending institutions (i.e. Banks, Trust Companies, Insurance Companies etc.).

If the mortgagee is what is referred to as a "private lender", being a person or corporation not regarded as one of the regular institutional mortgage lenders, the general practice is to require that the discharge be available for delivery and registration at the time of closing of the real estate transaction. This procedure should be continued when a discharge is required from a "private lender".

The problem is that it is difficult and practically impossible to have institutional lenders make their mortgage discharges available for closing of a real estate transaction. They will co-operate in this regard if the transaction is likely to be in jeopardy for want of the discharge being available on closing. However, as a general rule, a lending institution will not prepare its mortgage discharge until after the funds have been received and credited to the mortgage account. This situation gives rise to a practice whereby either -

(a) The Vendor's Solicitor gives an undertaking to withhold and remit moneys to discharge the institutional mortgage and attempt to register a proper form of discharge as soon as possible after closing, or

(b) The Purchaser's Solicitor requires that the Statement of Adjustments divide the balance due on closing to show the amount payable to the mortgagee to discharge its mortgage in accordance with a written mortgage discharge statement delivered to the Purchaser's Solicitor and the balance to be paid to the Vendor or his Solicitor, all of which should be according to a written direction from the Vendor. The Purchaser's Solicitor issues cheques accordingly and delivers them to the Vendor's Solicitor in return for his undertaking to deliver the cheque forthwith to the mortgagee.

RISKS

Some of the risks involved in these mortgage discharge situations are as follows:-

1. If the Purchaser's Solicitor accepts the undertaking of the Vendor's Solicitor to withhold funds and discharge:-

   (a) The Vendor's Solicitor may find that he does not have sufficient funds to discharge all encumbrances.

   (b) The Vendor's Solicitor may fail to remit the required funds to the mortgagee, either through oversight or by misappropriation.

   (c) The mortgage statement might be in error and the mortgage company might demand additional funds which are not available.

2. If adjustments are drawn, and direction received with accompanying mortgage discharge statement, so that the Purchaser's Solicitor issues a separate cheque to the mortgagee to discharge its mortgage:-

(a) If the Purchaser's Solicitor delivers the mortgage discharge cheque to the Vendor's Solicitor in return for his undertaking to deliver the cheque to the mortgagee then:-

(i) if the Vendor's Solicitor delays delivery of the cheque to the mortgagee, substantial added interest charges may have accrued by the time the situation could be corrected, at which time it might be difficult or virtually impossible to recover the added charges from the Vendor. (Also consider the possibility that the mortgage discharge statement has made some special considerations as to waiver or reduction of prepayment bonus on the understanding that the mortgage would be repaid in full on the sale closing date), or

(ii) between time of delivery of the discharge statement to the Vendor's Solicitor and receipt of payment the mortgagee finds an error and demands additional funds before preparing and delivering the discharge.

(b) If the Purchaser's Solicitor undertakes to deliver the discharge cheque to the mortgagee (rather than have the Vendor's Solicitor do so), then:-

(i) the mortgagee may find an error in its discharge statement and refuse to prepare and deliver a discharge until it receives additional funds.

(ii) for the Vendor's Solicitor there is the risk that the Purchaser's Solicitor fails to deliver the cheque to the mortgagee promptly, or fails to do so altogether, with the possibility that the Vendor would have continuing liability to the mortgagee under the mortgage covenant for payment.

RECOMMENDED PROCEDURES

A. INSTITUTIONAL MORTGAGES - FULL DISCHARGES

The following assumes a willing Purchaser and a willing Vendor. The Solicitor should attempt to acknowledge these arrangements in writing as early as possible in the transaction but keep in mind requirements for proper tender (for example, see Fong v. Wienper /1973/ 2 O.R. 760) and the need for client approval for any arrangement that is not strictly within the terms of the Agreement of Purchase and Sale.

1. Mortgage Discharge Statements - the Purchaser's Solicitor should write directly to the mortgagee and require that the discharge statement be addressed to him. He should make it clear that he will be relying on the accuracy of the statement and will be issuing a cheque payable to the mortgagee, to be deducted from the closing funds at the time of completion of the purchase and, consequently, will not be bound by any qualification of the statement by "E. & O. E." or other similar qualifications. In other words, the Purchaser's Solicitor should do everything possible to establish an estoppel against the mortgagee claiming additional funds on the basis of some error in the mortgage statement.

2. Closing Funds - On the statement of adjustments the balance due on closing should be divided to show the amount payable to the mortgagee in accordance with its statement and the remainder payable to the Vendor or his Solicitor in trust. A written direction of the Vendor is required for payment of funds to anyone other than the Vendor.

3. Closing Procedure - On closing the Purchaser's Solicitor produces for the examination of the Vendor's Solicitor a certified cheque to the mortgagee and the covering letter to the mortgagee advising that the cheque is in full payment and discharge of its mortgage, in accordance with its mortgage statement, referring to the statement by date and mortgage particulars.

The Purchaser's Solicitor will give an undertaking including the following:-

(a) To deliver the cheque and covering letter to the mortgagee forthwith after closing.

(b) To pay any interest or other charges payable to the mortgagee by reason of any delay in delivery of the discharge funds, and

(c) To make every reasonable effort to obtain and register a proper form of discharge of the mortgage as soon as possible after closing.

The Vendor's Solicitor will deliver to the Solicitor for the Purchaser:-

(a) The fees necessary to register the discharge, and

(b) The undertaking of the Vendor to provide any additional funds required to obtain the mortgage discharge by reason of any error, omission or other change in the mortgage statement, apart from those attributable to delay by the Purchaser's Solicitor.

The foregoing is the preferred procedure. However, as an alternative, on closing the Purchaser's Solicitor might deliver to the Vendor's Solicitor the certified cheque payable to the mortgagee with the covering letter addressed to the mortgagee. The Purchaser's Solicitor will require the undertaking of the Vendor's Solicitor:-

(a) To deliver the cheque and letter to the mortgagee forthwith.

(b) To be responsible for any additional moneys payable for the discharge of the mortgage as a result of any delay in delivery of the discharge funds.

(c) To make every reasonable effort to obtain and register a proper form of discharge of the mortgage as soon as possible after closing.

The Purchaser's Solicitor will also require an undertaking from the Vendor that he will be responsible for any additional amounts payable to the mortgagee by reason of any error, omission or other change in the mortgage statement.

B. BLANKET MORTGAGES - DEVELOPMENT LANDS AND CONDOMINIUMS - PARTIAL DISCHARGES

In recent years it has become the practice of some land developers and condominium developers that they include in their standard printed form of Agreement of Purchase and Sale a provision requiring the Purchaser of a Lot or Unit to accept the Vendor's undertaking to register a Partial Discharge of "Blanket" mortgage after closing of the transaction. See E. & O. Bulletin No. 3 dated November 29th 1979. Such provision should be deleted from the Purchase Agreement if the Purchaser's Solicitor has an opportunity of examining the Agreement before it is executed. If the Purchaser does not wish to delete this provision (e.g. - for fear of losing the transaction), such instructions should be reduced to writing immediately, and acknowledged by the client's signature. Consideration might be given to the right of rescission given to a Purchaser under Section 52 of The Condominium Act.

When acting in a transaction pursuant to an Agreement that contains such a provision, the five alternatives outlined in E. & O. Bulletin No. 3, dated November 29th 1979, should be carefully considered. They are as follows:-

1. Insist on a partial discharge before closing.

2. Pay the funds to the Vendor's Solicitor in return for a personal undertaking to obtain and register a partial discharge.

3. Make the cheque payable to the developer and mortgagee jointly or to the mortgagee and obtain a partial discharge.

4. At the very least, find out the amount required to obtain a partial discharge and try to obtain one directly from the mortgagee.

5. Refuse to close and tender though this might be unrealistic for practical reasons.

It is recommended that a combination of items 1 and 4 might be the best course. In the letter of requisitions the Vendor's Solicitor should be advised that, notwithstanding the provision in the Agreement, a part discharge will be required to be available for registration at the time of completion of the transaction. The Purchaser's Solicitor might advise that, as an alternative, he will accept a statement addressed to him from the mortgagee to confirm the amount required for the part discharge and that a part discharge in registrable form will be delivered immediately upon receipt of the funds. The Purchaser's Solicitor should then follow the procedures outlined above in relation to full mortgage discharges on closing.

Reference should also be made to Subsections (9) and (10) of Section 7 of The Condominium Act which gives a right to discharge any Unit from an encumbrance by payment to the claimant of a portion of the sum claimed, determined by the proportion specified in the Declaration for sharing the common interests.

APPENDIX "B"

U N D E R T A K I N G

TO: THE PURCHASER

AND TO: THE PURCHASERS' SOLICITOR

RE: TRANSACTION (names and property address)

In consideration of, and notwithstanding the closing of the above transaction, I hereby undertake as follows:

1. To deliver up vacant possession of the premises on closing.

2. To pay all hydro-electric, water and gas charges, if any, to the date of closing.

3. To pay all arrears of taxes, and to re-adjust taxes if necessary forthwith upon demand.

4. To leave on the premises the chattels and fixtures specified in the agreement of purchase and sale herein, free of encumbrances, liens, charges or claims of any kind whatsoever.

5. To pay all mortgage interest to date of closing and to pay any mortgage arrears if necessary and to re-adjust mortgage interest should same be necessary.

6. The warranties in the Agreement of Purchase and Sale and in this undertaking survive the continue in force after the closing of this transaction and the registration of the documents on closing, and shall not merge upon closing of such registration.

7. I hereby warrant that no damage has occurred and there has been no substantial physical change in the property since it was inspected by the purchasers.

DATED at , this day of , 198 .

_____ _____

Witness

LIST OF CASES

Allen v. Richardson (1879), 13 Ch. D.524; 49 L.J. Ch. 137

C.M.H.C. v. Halifax County Condominium Corporation and Crowe (1982), 52 N.S.R. (2d) 579 (N.S.S.C.,T.D.).

City of Toronto v. Toronto Railway Company (1926), 59 O.L.R. 73

Fraser-Reid et al. v. Droumtsekas et al. (1979), 103 D.L.R. (3d) 385 (S.C.C.)

Freeman v. Calverley (1916), 10 W.W.R. 567 (Man. C.A.)

Halifax Condominium Corporation No. 5, Cowie Hill v. McDermaid (1982), 24 R.P.R. 248 (N.S.S.C.,T.D.).

Handsaeme v. Dyck et al. (1982), 26 R.P.R. 9 (Alta. Q.B.)

Hashman v. Anjulin Farms Ltd., [1973] S.C.R. 268

Knight Sugar Co. v. Alberta Railway & Irrigation Co., [1938] 1 W.W.R. 234; [1938] 1 All E.R. 266

Moretta et al. v. Western Computer Investment Corporation Ltd. (1982), 27 R.P.R. 11 (Alta. Q.B.) affirmed (1983), 3 D.L.R. (4th) 738 (Alta. C.A.)

North American Life Assurance Co. v. Johnson, [1940] 4 D.L.R. 496 (Ont. C.A.)

Petrofina Canada Limited v. Markland Developments Limited (1977), 3 R.P.R. 33 (N.S.S.C.,T.D.)

Re: MacCulloch (1981),48 N.S.R. (2d) 402 (N.S.S.C.,T.D.)

Stevens v. Grant (1976), 22 N.S.R. (2d) 505 (N.S.S.C.,T.D.)

Wu v. Campbell, [1977] 4 Alta. L.R. 392 (District Court).

REFERENCES

Residential Tenancies Act S.N.S. 1970, c.13, s.9(5) recent amendments(S.N.S. 1984, c. 44, s.5(1)), section 9(3)

Vendors and Purchasers Act, R.S.N.S. 1967, c.324, s.5(d)

DiCastri, Victor, The Law of Vendor and Purchaser, (1976, Carswell: Toronto)