Requisitions - Objections to Title

1. Requisitions generally

There is a distinction with some difference.

The former - Requisitions - applies to many matters which the solicitor for the purchaser will wish to raise with the solicitor for the vendor by way of reminders, requests or inquiries, including objections to title.

The object of making the requisition in writing and early on may be simply to remind the other party of an obligation under the contract to produce or do some specific thing or it may be with respect to alleged title defects and must be made promptly to preserve the purchaser's rights under the contract.

The latter - Objections to Title - refer to problems concerning the title, minor, major or even that the vendor has no title.

Requisitions other than objections as to title can be as to conveyance and separately as to the contract, the offer to purchase terms.

We will deal with them in that order from the point of view of the solicitor for the purchaser.

But before doing so, two initial comments to make are that the different categories should be dealt with separately in your mind and in your correspondence, and secondly in almost every offer to purchase there is a date by which requisitions or objections to title must be made, or otherwise the purchaser has to accept the title as is.

The Nova Scotia Real Estate Association form of agreement of purchase and sale covers this point in the following paragraph:

3. 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 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.

That clause does not include the words found in many forms of offers to purchase - "except for requisitions made within the stipulated time the purchaser shall be deem to have accepted the vendor's title".

Even though those words are not in para. 3 of the Nova Scotia offer to purchase, that must be the effect, imp if you will, that when a purchaser does not requisition as any title defects within the stipulated time the purchaser has to accept the title as is.

But it should be noted that the clause only refer; to matters of title, about which there will be comments late on.

If perchance there is no reference to this in the offer to purchase, the Vendors and Purchasers Act, R.S.N.S. 1967, c. 324, S. 5 applies:

(b) the purchaser may search the title at his own expense and shall make his objection thereto in writing within 30 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 30 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.

There will be. reference later about objections to title, but we should not leave the quoting of the above section without some comment. The section states that the vendor shall have 30 days to respond to purchaser's objection to title. No time limit is specified for the vendor in paragraph 3 of the Nova Scotia offer to purchase. Di Castri in Canadian Law of Vendor and Purchaser, at p. 262 states that "where no time is stipulated, the relevant statute is applicable". Presumably for the same *reasoning but* said with less assurance a vendor may also resort to the words of S. 5(b) of the statute of being "unwilling" as well as unable to remove an objection; provided of course the vendor acts bona fide and not capriciously. With those preliminary remarks we will proceed to deal with the different categories of requisitions.

2. Matters of ConveYancing

(a) Preliminary

You will wish a draft deed soon. This request should include your advising the vendor's solicitor how your client wishes to take title.

You should also include a request for the survey, hoping that the vendor has one.

These requests should be stated in writing and separately from any requisitions as to conveyancing or titl In fact if the letter is written promptly as it should you will not have yet searched the title and will not at this stage have any requisitions on title.

If it is a rental property you would like copies of all leases and for a condominium purchase you will reque early production of the mass of condominium documents.

As applicable there may be other requests at this early stage.

(b)Later

After your search of title, you may have some specific additional requirements for the conveyance.

Any error in the legal description would be a mat of conveyancing, or it could be of contract.

In Ontario the Planning Act controls severances of land into smaller parcels. If a consent to severance ha been granted then the production of the consent would be a matter of conveyancing, or if you will of contract as the d, would be invalid without the consent. If a consent has not been obtained, the offer to purchase must state that it is subject to compliance with the Planning Act, because without that term in the contract the contract will be null and void

If a corporation is conveying, you will wish production of evidence that the requisite corporate action beef taken, where necessary a special resolution of directors, approval of shareholders and authorization of signing office and affixing of corporate seal, and supporting documentary evidence.

If the sale is by a trustee in bankruptcy, has the trustee been properly appointed and inspectors approved of the sale and the other requirements properly documented.
If it is an estate sale, has the executor **power to sell**, **what are** the terms of the will and so forth to support a valid conveyance.
Some of the above requests or requisitions about the conveyance may be considered in law as matters of title. Just in case of that interpretation the time limit for requisitions on title must be observed. When what is required is the concurrence of some person whom the vendor does not control or whom the vendor cannot compel to execute the required documentation, a requisition requiring the concurrence would be a requisition on title.
Halsbury, Vol. 34, 3rd., p. 286 states:
The purchaser may also make requisitions as to the conveyance. These assume that the

vendor has shown that he can either alone, or jointly with other persons whose concurrence he can require, make a title to the property, and the only question is as to the persons to make the conveyance and the form which it is to take.
A discharge of mortgage to give clear title is a matter of conveyancing - Majak Properties Ltd. v Bloomburg, (1976) 13 O.R. (2d) 447 - as "a discharge could have been demanded by the vendor on payment of the amount owing".

The requisition in this regard was made after the date for submitting requisitions on title, but that made no difference.

It was referred to as a requisition as to conveyance, but it might also have been treated as a requisition on the contract, note not on title.

In O'Neil v Arnew we, (1976) 16 O.R. (2d) 549, the was an outstanding mortg a which was past due and was not to be assumed by the purchaser. The requisition for a discharge was sent after the time limit for requisition. The court held that the discharge of mortgage was a matte: of conveyancing and the requisition could be made at any time. The judgment stated - "A matter of conveyance as opposed to one of title is an encumbrance which the vendor is able to pay off and discharge *by* virtue of his own interest in, or his own power over the property, or *by* the concurrence of a party which the vendor can compel". Further the court said that as it was a matter of Con the vendor could not rely on the lateness of the requisition to avoid his obligation to obtain the discharge, and also that the annulment clause did not apply.

However a word of caution - if the mortgage is not open, or is not overdue, which it was in the above case, then it becomes a matter of title and must be requisitioned within the time period provided in the contract.

The distinction between matters of conveyancing and of title was put succinctly by W.G.C. Howland, Q.C. (now Chief Justice of Ontario) in the Law Society of Upper Canada Lectures, 1960 at p.221, and since referred to in a number of judgments
In the first place a distinction must be drawn between matters of conveyance and matters of title. If the objection is one of conveyance rather than of title the purchaser does not have to submit it within the time for submitting requisitions on title (Re Scott and Eave's Contract (1902), 86 L.T. 617). Matters of conveyance may be said to be those by which the vendor alone or with other persons whose concurrence he can require is in a position to convey the title to the property. They assume that the vendor has a right to make title or to cause it to be made and are concerned with the satisfaction of that right. As Lord Langdale said in Sidebotham v. Barrington (1841), 3 Beav. 524 at p. 528 - "Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the Court considers it a question of conveyance only."

If the vendor is not entitled as of right to obtain a discharge of an encumbrance then it is an objection to title.

In jurisdictions where a wife has a right to dower she should join in the conveyance to release her dower. A Nova Scotia case, MacPherson v Vandenburg, (1977) 20 N.S.R. (2d) 1 supports that statement that a vendor must deliver a properly executed conveyance which includes a release of dower. The Supreme Court of Canada in Mason v Freedman 1958' S.C.R. 483 seemed to say that a bar of dower was both a matter of title and of conveyancing, but at least stated at p. 489 that because the lack of a bar of dower by the wife of the vendor might not be discovered by the search of title it could be requisitioned at any time and right up to closingIn Ontario the Family Law Reform Act, R.S.O. 198 c. 152 s. 40-(1) gives a spouse a right to possession of t matrimonial home. Accordingly a purchaser is entitled to demand that the grantor's spouse must join in the conveyance. to consent to the conveyance.

The production of a mortgage statement signed by the mortgagee for a mortgage being assumed is a matter of conveyancing - Heck v Matthiss, C1971] 1 O.R. 105, although in that case the court held that a statutory declaration b5 one of the vendors was sufficient evidence of the state of the mortgage account.

Some other examples of matters of conveyancing a: discussed in Farantos Developments Ltd., v Canada Permanent Trust (1975) 7 O.R. (2d) 721. It was held that requisitior as to outstanding writs of execution and for releases for succession duty and estate tax were matters of conveyancing The vendor was not able to avoid the contract on the basis was unable to raise the money, and also as they were matter of conveyancing the annulment clause did not apply.

The latter case also decided that a release of do is a matter of title, which is consistent with the above definition of a matter of conveyancing, but as stated in Ma v. Freedman the requisition can be made right up to closing
After all, a purchaser may not know until the closing date that the vendor's wife has refused to release her dove: or in the case of the Ontario Family Law Reform Act the refusal of a spouse to consent to the transfer of the matrimonial home.

If either and there are other examples, such as i concurrence of beneficiaries in some estate sales, then regardless of the definition of matters of conveyancing, it could be treated in practice if not in law as a matter of conveyancing, and failing that as non-fulfillment of the contract.

Non-compliance with a zoning by-law was held to be not a matter of conveyancing - Jackson v Nicholson, (1979) 25 O.R. (2d) 513.

That case makes it necessary to digress for a moment. The offer to purchase included the usual clause for submitting requisitions or objections to title within a time limit, and also as is now usual in Ontario forms of offer to purchase the paragraph is expanded and includes objections as to non-compliance with zoning by-laws, which likewise must be made by a definite date. The purchaser's solicitor unfortunately did not submit requisitions as to i zoning in time. Then ascertained that there was non-compliance. In the action it was argued for the purchaser that this was a matter of conveyancing and that the objection could be made at any time.

However the court held that as zoning compliance was included in the usual clause referring to title, a requisition as to non-compliance had to be made by the stipulated date otherwise it was out of time and the purchaser had to accept the property notwithstanding the noncompliance. The court also noted that the non-compliance with a zoning by-law was not a matter of title.

It had been held earlier in Re Mullin and Knowles, 1966] 1 O.R. 324 that a zoning by-law is not a matter of title, it applies to the use of land, and in that case was "a question affecting the validity of the contract".

That statement might indicate that we should consider another or fourth category of requisitions, i.e., requisitions as to zoning.

Be that as it may they will be treated in this paper as matters of contract, particularly if a purchaser would only wish the property provided certain zoning is in effect. If so there should be a special reference or condition expressed in the contract. Matters of contract will be dealt with later.

The above are just some examples which you will requisition as to the conveyance.

For the moment we can treat these as matters of conveyance although the law becomes less clear when we try to define the difference between matters of conveyancing and matters of title.

An important point is that there is no time limit for making requisitions as to a proper conveyance and so requisitions can be made right up to the time for closing.

It is of course hardly courteous to leave making such requisitions until the last minute. Presumably you wish to close the purchase and the vendor has to be given time to rectify whatever the problem is concerning the conveyance.

The annulment clause or right of the purchaser to rescind clause - paragraph 3

of the Nova Scotia formof offer to purchase - because a valid objection to titlehas not been satisfactorily answered by the vendor does not apply to matters of conveyancing.

If the vendor does not produce a valid conveyance the purchaser can refuse to close and have the deposit refunded.

To reiterate requisitions as to matters of conveyancing should be made early on. But can be made at any time providing you are certain that the problem is a matter of conveyancing. No particular words are necessary. The requests should be separately stated in the correspondence and not lumped in with any objections to title. 3. Matters of Contract

These requisitions will also be separately stated from requisitions on matters of conveyancing and requisitions as to objections to title.

These relate to provisions in the offer to purchase, for example, to completion of a building, fulfilment of conditions precedent, mortgages being assumed, area of property being conveyed if not in conformity with what purchaser bought according to offer to purchase, and compliance with zoning by-laws if that is a contractual term of the offer to purchase.

As for conditions precedent the leading case is Zhilka v Turney, 11959, S.C.R. 578 and put simply a condition precedent is one that must be performed or happen before a duty of performance by the other party arises. The offer to purchase usually stipulates a date well before closing by which the condition must be fulfilled or the contract is at an end.

The terms and conditions precedent should be spelled out clearly. This has not always been so as witness the many cases litigated on the effect of such clauses.

If for example there is a clause in the offer to purchase that there will be no by-law or restriction in effect prohibiting the use of the property for any commercial purposes, and in fact the property can only be used for residential purposes, then there is no right i to insist upon performance of the contract.

Unless the offer to purchase provides that a term of the contract or a condition is to be fulfilled by a specific date, fulfilment or compliance can be effected up to the date of closing - Smith v Butler, 1900] 1 Q.B. 694. And a requisition for compliance can be made right up to the date of closing.

Here again the time for submitting requisitions on title does not apply, nor does the annulment clause, providing of course the annulment or rescission clause doe not also include specifically that objections re noncompliance must be submitted within a time limit.

Strictly speaking it is not necessary to requisition for what the purchaser is entitled to under the contract. It is however good practice to make such a requisition, simply to remind the vendor's solicitor as well as yourself: for your client the purchaser of certain specific things to be expected in fulfilment of the contract.

For example when the contract provides for the assumption of a mortgage and the registered mortgage does not appear to comply it would be prudent to requisition the production of an amending agreement, or if applicable renewal agreement, or mortgage statement from the mortgagee confirming that the mortgage does in fact comply. i

In paragraph 4 of the Nova Scotia form of agreement of purchase and sale the property "is to be conveyed free from ... encumbrances" other than as may have been specifically referred to. And in some offers to purchase it is provided that the vendor shall register discharges of any existing encumbrances. In either case there should be a requisition for a discharge of whatever appears from your search of title to be outstanding. While the requisition would relate to a matter of title, it is submitted that it could quite properly be classified as a requisition on a matter of conveyance or a matter of contract.

Schlumberger v Burke, (1978) 21 N.S.R. (2d) 190 is an example. There was an outstanding mortgage and the vendor sought to annul the contract because of the cost of paying off the mortgage. The court referred to the words of the offer to purchase that the vendor contracted to remove all encumbrances, saying - "part of the bargain was to remove all encumbrances". The other ground for the decision was that the vendor should not be allowed

to rely on the rescission provision in S. 5 (c) of the vendors and Purchasers Act just because the mortgagee required a payment of bonus interest before it would give a discharge.

Our concern that what would appear to be a matter of contract is held by the courts to be a matter of title is best illustrated by the case of Petrofina Canada Ltd. v Markland Developments Ltd. (1979) N.S.R. (2d) 158, 3 R.P.R. 33. There were arrears of charges owing to the City of Halifax and therefore liens for sewers and sidewalks. The purchaser's solicitors received a tax certificate showing the liens only 3 days before closing and long after the time for submitting requisitions on title. The court stated:

There is no question that the charges as shown on the certificate are encumbrances ... and one would normally expect that a vendor would remove such encumbrances .... The agreement provided a mechanism to object to title, and failing the same, title was deemed to be accepted There was no objection to title made by the purchaser. If the purchaser had so objected and the vendor had refused to clear the encumbrance in favour of the City of Halifax, the vendor could have terminated the agreement and the deposit would be returned to the purchaser. As Markland did not object then in accordance with the clause for objecting to title it must take title to the property subject to the encumbrance as inequitable as this may be. It would seem that the clause that the purchaser who fails to requisition in time must accept the vendor's title overrides the clause that the title will be free of encumbrances. When the offer to purchase refers to the terms of a mortgage to be assumed, the purchaser is entitled to objec if the mortgage terms are different. "The parties should be held strictly to the thing agreed upon and the Court should I not enter into any discussion of the question how nearly the thing tendered as compliance with the contract corresponds with the thing stipulated for" -Garfreed Construction Co. Ltd. v Blue Orchard Holdings, (1977) 15 O.R. (2d) 22.

Also that case held that the purchaser did not have to accept a tenancy with a right of renewal when the contract referred to the expiry date of the lease and did not mention the tenant's right to renew.
The judgment refers to both these matters as terms of the contract, but also said they were matters of title.
If it is a matter of contract the purchaser may refuse to close if the vendor is unable to sell what was contracted for.
A rather obvious case is Maglario v. Simon, (1979) 27 N.S.R. (2d) 674 *when the* purchaser refused to close because the vendor had not completed the building of the house which had been contracted for by the closing date.
In Ritchie & Hayward Realtors v. Sackett, (1976) 36 N.S.R. (2d) 598, 11 R.P.R. 308 (ICS. App. Div.) the question was whether s. 3 of the Vendors and Purchasers Act, R.S.N.S. 1967, c. 324 could be resorted to to determine whether the description in the contract covered the land being purchased. The court stated that "the question here is not merely a question of a title defect. It is a question of interpretation of the agreement", and only matters of title can be decided under the section quoted. It is also useful to repeat what your Court of Appeal thought of a solicitor acting on both sides of a real estate transaction - "that does not give proper protection to either party".
Another case of contract is Joydan Developments Ltd. v. Hilite Holdings Ltd., [1973, 1 O.R. 482.

There was a Hydro right of way across the property being purchased. The judge stated - "it is my view that the purchaser could not have that which he contracted for". It was also held that there was a valid objection to title which was not properly answered and the requisition was not waived by the purchaser.

Whether it is conveyancing or title does not make much difference if you are in time with your requisit.but if you are late then you hope your requisition will be accepted by a court as a matter of conveyancing or of contract, and not one of title as in the Petrofina case, supra.

An interesting and confusing case in Ontario is Re Dai and Kaness Investments Ltd., (1979) 24 O.R. (2d) 51. It concerned the assumption of a mortgage "in terms differ(from the one which the purchaser by contract had agreed to assume". The judge said the annulment clause had no applic tion to requisitions on conveyance or matters of contract. Then referred to

the above definition for matters of conveyancing, and as the vendor could not compel the mortgage* to amend the mortgage the registered mortgage constituted e defect in title. Having decided that it was a matter of title the judge further confused the matter by saying that "the purchaser may insist to the date of closing on compliance with the agreement".

So to conclude this point there can be requisitic as to the contract, they can be made at any time right up to closing, and the annulment clause does not apply. But if in doubt that a court may interpret the requisition as one of title, then be sure to submit it in time.

Obiections to Title

To revert to the outset of this paper the differentiation between objections to title and requisitions was to point up the different categories of requisitions. Objections to title of course lead to requisitions.

You may have requisitions on title after search of title, searches for taxes, various statutory liens, and also after examination of a survey.

The offer to purchase usually provides a time limit to file with the vendor written objections to title, and a right of rescission for the vendor if unable or unwilling to clear up the defect.

As has been stated S. 5 of the Nova Scotia Vendors and Purchasers Act provides for this if the contract is silent.

A purchaser's solicitor should be sure that the rescission or annulment clause contains a right of waiver by the purchaser if the vendor is likely to resort to rescission. If the latter happens the purchaser's solicitor should immediately confer with the client and if the requisition is not too serious then in accordance with the client's instructions waive the requisition.

Also both vendor and purchaser should note whether the clause refers to intermediate negotiations which shall not prejudice the rights of either in the making, answering or refusing to answer requisitions; or otherwise and perhaps as a matter of course when making or answering requisitions one should specifically reserve the client's rights notwithstanding attempts or discussion about remedying any deficiencies.

Going to the root of title

This may be easier to discuss first.

Requisitions going to the root of title may be made at any time even right up to closing.

Courtesy dictates that they be made promptly.

When made late, carelessness on the part of the purchaser's solicitor is indicated which may show up in some other ways and affect the position which the purchaser wishes to take.

What does it mean - going to the root of title it means simply a total failure of consideration and the purchaser would receive nothing at all - Howland, Law Society Lectures, supra, p. 229.

As was stated in Jakmar Developments Ltd. v smith E1973] 1 O.R. (2d) 87 in which a requisition about an eases was submitted late - "In all the cases ... where an objection to title is 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".

Some examples of defects in title which have bees held as going to the root of title are:

- if the vendors were executors and had no power to sell - Re Tanqueray-Williamson a Landau, (1882), 20 Ch. D. 465

-encroachment of a house on a street Martin v. Kellogg 1932] O.R. 274

- subdivision control by-law - Innes v Van de Weerdhof, [1970] 2 O.R. 334 (although in same case breach of zoning by-law held not a matter of title)

The principle of total failure of consideration to constitute a defect in title going to the root of title apparently does not have to relate to the whole of the property contracted to be purchased.
In Zender v Ball, (1975) 5 O.R. (2d) 747 there were three pieces of property sold under the one offer to purchase, 104.723 acres, .961 acres and .955 acres. The vendor did not have paper title nor adequate evidence of possessory title for the second piece. The judge held that the vendor could not force upon the purchaser anything less than a marketable title, that is "one which can at all times and under all circumstances be forced upon an unwilling purchaser who is not compelled to take a title which would expose him to litigation and hazard", and of more importance for the subject at hand the judge held that the lack of title of part of the property being purchased went to the root of title "and was thus not affected by the delay of the purchaser in requisitioning this deficiency within the stipulated period".

The judge also noted although not too clearly that the principle of de minimus did not apply in the circumstances, perhaps because of the less than perfect tender by the vendor.

Further but not on the point with which we are dealing the tender by the vendor was defective in that a discharge of mortgage could not be registered as it lacked an affidavit of execution and particulars of the mortgage being discharged were not correctly recited in the discharge. This was a matter of conveyancing.

Another case of a requisition going to the root of title, although the defect affected only part of the property was Heifetz v Gural, 1950] O.W.N. 854, where two entrance steps to a house encroached two feet on the stree The judge thought that some alterations to the house would be necessary and that the purchaser should not be compelled to take a house which would be materially different from the house purchased.

Also in Re Mountroy Limited and Christiansen,

1955] O.R. 352 an encroachment was held to go to the root of title. Here it was found by the survey that a loading platform on one side of the building which was the subject matter of the transaction encroached from 6 to 12 feet oven property of a railway. The purchaser requisitioned the consent of the railway company or clear title to the lands covered by the platform. The vendor's reply was that there was a lease of the property from the railway company. The court held that the platform was an integral part of the building and that a fee simple title could not be given for that part of the property.

An encroachment of 4 inches over a right of way, although trivial was held to go to the root of title: Brow: v Laffradi, C1961] O.W.N. 263, the judgment stated that the purchasers should not be compelled to purchase a property which might involve them in legal proceedings.

Although in these last few cases only parts of the properties were concerned the fact is that for a requisition to go to the root of title it means that the vendor has no title, and to repeat there would be a total failure of consideration.

(b)<u>Defects or Clouds on title</u>

Under this heading are all matters of title which do not go to the root of title.

Restrictive covenants running with the land but not referred to in the offer to purchase would be defects of title: Re Rowan and Eaton, (1926) 50 O.L.R. 245.

A lease with a later expiry date than as stated in the contract is a matter of title: Garfreed Construction Co. Ltd. v Blue Orchard Holdings, supra.

Some other examples of defects of title are: improper execution of documents, failure of necessary parties to join, defective discharges of mortgages, outstanding lis pendens, easements and encroachments.

A number of apparent defects of title might well be cleared up by more careful searches or inquiry of solicitors who had been on the particular title earlier.

The *annulment or* rescission clause applies, either as expressed in the agreement of purchase and sale or in S. 5 of the Nova Scotia Vendors and Purchasers Act.

Therefore requisitions must be submitted in writing and received by a stipulated date. Then you do not **have to worry when you have** delayed about relying on the requisition going to the root of title or that it is a matter of conveyancing or contract.

The requisition and the desired answer should be drafted clearly and early on. You may wish to apply to the court under S. 3 of the Vendors and Purchasers Act for an order that the requisition is valid and whether or not the answer is adequate.

The closing date for the transaction does not get extended by reason of the application to court, unless both sides agree.

The practicality of the application has some drawbacks. Your client the purchaser is for a time in a state of uncertainty as to whether to be ready for the closing date and the plans for moving.

The annulment clause and the right of the vendor to rescind being unwilling or unable to remedy the defect is not deferred by the application to court.

The purchaser's solicitor has to be on the alert with his client well informed to decide whether to waive the requisition, rather than be involved in a Vendors and Purchasers application or to have the vendor rescind.

It was said above that the requisition should k clearly stated. A number of solicitors send off a form letter of requisitions. while that may come through the word-processing equipment quickly, it is almost a useless exercise, annoying to the receiver and so is usually ignc

It has been stated a few times in this paper the importance of requisitions being made before, preferably well before, the stipulated date. If for some reason the time is not sufficient then ask by telephone and in writing for an extension. From the point of view of the vendor y may decide to grant the extension, but only after you have the approval of the vendor to do so.

As requisitions may result from an examination a survey, it is important to obtain a survey as soon as possible. The vendor may have one or a mortgagee, or faith that you will have to discuss with the purchaser the need i for ordering a survey. And again you must bear in mind the time factor for' submitting requisitions. If the client decides to go ahead without a survey after discussion with you make an entry of the client's instructions and refer to this in your reporting letter.

To be valid a requisition must state a specific objection to the particular title and require a specific solution. In Stykolt v Maynard, [1942] *O.R.* 250 the judge said,the form letter of requisitions was written without reference to the particular title and did not express a valid requisition. A proper requisition was then submitted late. As there was no valid requisition within the time prescribed the purchaser was deemed by the wording of the clause about requisitions to have accepted the vendor's title.

The vendor's right of rescission arising from a a requisition which he is unwilling or unable to remedy must be exercised reasonably and in good faith and not in a capricious or arbitrary manner - Mason v Freedman, [1958] S.C.R. 483.

There is a limit to what a vendor must do in answering requisitions. In Mitz v Wiseman,

[1972] 1 *O.R.* 189 the headnote states that a vendor need not engage in extensive and expensive litigation in order to remove an objection to title.

If the vendor would be unable to remedy the defect in title by the date of closing the vendor may rescind. In J. C. Bakker & Sons Ltd. v House, (1979) 8 *R.P.R* 24 the vendor would have had to apply to a municipal council to pass a by-law closing a road allowance.

The court said it would have been a long process to obtain title, and that therefore the vendor acted reasonably in repudiating the contract.
In Ungerman v Maroni, 11956] O.W.N. 650 the purchaser requisitioned a discharge of a mortgage which had apparently been paid off. The vendor replied that he tried but could not locate the mortgagee. It was held that the vendor acted in good faith and did not have to apply under the Mortgages Act for an order which proceedings would have involved no inconsequential expense.
In Devereaux and Robinson v Saunders, (1979) 26 N.S.R. (2d) the vendor was unwilling to send a statutory declaration to someone in Florida for completion and this unwillingness was not accepted as a justifiable reason for the vendor to rescind.
To sum up many times defects in title can be cleared up by the efforts of the purchaser's solicitor and should be. But if you are looking to the vendor's solicitor to do so, give that solicitor plenty of time to remedy the problem.

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If the objection to title is serious discuss it with your client early on, and make an entry of the discussion and instruction.
Well-handled real estate conveyancing is our objective.

Can a Vendor force a purchaser to receive property with a defect in title or which is not in strict conformity with the terms of the offer to purchase.

If it is a defect in title properly requisitioned in time the annulment clause applies and the purchaser can rescind if the requisition is valid and is not properly answered. Likewise the vendor can rescind if the purchaser will not waive the requisition.

If there is a defect in title and it is trivial even though it goes to the root of title the vendor may be successful in an action for specific performance with or without an abatement. In Martin v Kellogg [1932] O.R. 274 there was an encroachment of the eaves over the street line.
It was held that so far as that part of the building was concerned the encroachment went to the root of title, but was so trivial that specific performance with a modest abatement was granted.

However there is the underlying principle expressed in Re Dai and Kansas Investment Ltd., supra, that "performance of the contract of purchase and sale must be precise and exact and that the vendor (purchaser) is entitled to insist strictly upon the transaction described in the agreement".

The courts have lessened the rigour of that statement a bit. A full discussion of the application of the equitable principles is found in Bowes v Vaux, (1918) 43 O.L.R. 521 quoting from Rutherford v Acton-Adams, [19151 A.C. 866 - "If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get the Court will decree specific performance with compensation for any small and immaterial deficiency".

A sensible relaxation of the principle that performance of a contract must be precise and exact was in Rexhill Holdings Ltd. v Maybird Investments Ltd, [1973] 1 O.R. 285. One of the grounds which the purchaser sought to rely on to avoid the purchase was that the two mortgages to be assumed were each for more than stipulated for in the offer to purchase - but they were both open mortgages. The judge reviewed a number of texts and cases stating the principle in various ways, such as "the parties should be held strictly to the thing agreed upon". However the judge held that as the mortgages were fully open "the fact that they had not been reduced to the sums stipulated by the agreement does not present any great problem" and in the headnote "the purchaser could have reduced the amounts owing thereunder to the amounts contemplated by the agreement by deducting the difference from

the balance due on closing andpaying the same to the mortgagees".

Another case concerning the terms of a mortgage, Stubbs v Downey, [195 O.W.N. 330 held that the difference between $57.11 monthly including interest at 6% as stated in the offer to purchase and the mortgage in fact providing for payments of $75.00 quarterly plus interest at 6% was, although negligible, not the same as specified and the purchaser did not have to complete the purchase.

In a more recent Ontario case, Re Stieglitz and Prestolite Battery Division, (1981) 31 O.R. (2d) 655 the court held that an undisclosed easement materially affected the land, and that the requisition was valid and i I not remedied. Part of the headnote in the latter case stated:

In determining whether a purchaser should take subject to a defect, it is not helpful to classify the defect as latent or patent. The correct test to apply is whether the purchaser, if required to accept the title, would be purchasing property which is materially different froze that which he bargained for . .. the defects were not trivial so as to entitle the vendor to specific performance with an abatement".

In conclusion then there are or can be requisitions as to conveyance, contract and title - to be dealt with separately in correspondence. The date for submitting requisitions on title should be the date by which all requisitions are in the hands of the vendor's solicitor. That's the best way to keep you, your client and your insurer happy.

Thank you.

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