The Requisitions Clause

BY PETER BLANCHARD LL.M.

It is the duty of a Vendor of land or an interest in land to make out a good title to the property which he is selling unless his contract with the Purchaser specifically or impliedly limits his obligation in this regard. The burden on the Vendor is clearly stated by Hosking J. in *Hayes* v. *Ross* (No. 2):[1]

> Now, upon the sale of real estate there is an implied undertaking on the part of the Vendor, except to the extent that the agreement for sale may modify the same, that he has a good title to the land proposed to be sold and if he fails to show a good title he cannot entitle himself to payment of the purchase money.

The Purchaser thus has the right to object to any defect in the title of his Vendor of which he was either not aware at the time of the contracting or (if aware) which he believed that the Vendor was in a position to remove and would remove before settlement. A Purchaser is not precluded from raising objection to a defect in title merely because he knew of the defect at the time when he signed the agreement for sale and purchase. To be so barred he must have known at that time not only of the existence of the defect but also of the Vendor's inability to remove it.[2]

1 [1919] N.Z.L.R. 777, 780.
2 *Ellis* v. *Rogers* (1884) 29 Ch. D. 661; *Wisely* v. *McGruer and Kerr* (1909) 28 N.Z.L.R. 481.

Where a Purchaser puts in a valid requisition and the Vendor does not give an answer or indicates that he is not prepared to give an answer and/or to comply the Purchaser may rescind the contract and is entitled to receive back his deposit provided that:

1. The Vendor has been given a reasonable time within which to answer[3] and
2. The requisition was one going to the root of the Vendor's title and was not simply a matter entitling the Purchaser to compensation under the compensation clause in the agreement[4] and
3. The Purchaser has given notice making time of the essence before attempting rescission.[5]

Where these conditions have been met the Purchaser may proceed to rescind even where the Vendor was in fact in a position to give a satisfactory answer to the requisition but did not trouble to do so

In the absence of a requisitions clause a Vendor who is faced by a valid requisition which he is unable to satisfy is in breach of his contract to deliver a good title. The Purchaser may, depending on the nature of the defect, pursue the usual contractual remedies. The Vendor has no means of escape from the consequences and may be obliged to complete settlement whilst at the same time paying substantial damages to the Purchaser.

He has in these circumstances no right to rescind simply because he is unable to comply with the Purchaser's requisition.

Usually, however, the agreement for sale and purchase will contain a requisitions clause which constitutes a binding arrangement by the parties that the common law position of the parties shall be varied. It is the purpose of this paper to examine the extent of that variation.

The Real Estate Institute's approved form of agreement contains the following clause which may be taken as being typical of the form of requisition clause in use in New Zealand:

> Any objections or requisitions on the title which the Purchaser shall be entitled to make must be stated in writing to the Vendors Solicitors within (number) days hereof (time in this respect being of the essence of the contract) and in default thereof the same shall be held to be waived and the title to have been absolutely accepted by the Purchaser. In the event of the Vendor being unable or unwilling to remove or comply with any such objections or requisitions the Vendor shall be at liberty notwithstanding any intermediate negotiations by notice in writing to the Purchaser to rescind this contract in which case the Purchaser shall receive back the deposit without interest but shall have no

[3] *Smith* v. *Wallace* [1895] 1 Ch. 385.
[4] *Ibid.* See also *Price* v. *Macaulay* (1852) 2 De G.M. & G. 339; 42 E.R. 903.
[5] *Re Stone and Saville's Contract* [1963] 1 All E.R. 353.

claim whatsoever on the Vendor for the expense of investigating the title or for compensation or otherwise howsoever.[6]

EFFECTS OF REQUISITIONS CLAUSE

It is immediately apparent that the requisitions clause is inserted in the contract for the benefit of the Vendor and will therefore be construed against him. It provides a means whereby, in proper circumstances, he may confess to his Purchaser that he is unable or unwilling to rectify the matter of which the Purchaser is complaining and may terminate the contract and refund the deposit. The Purchaser is precluded from obtaining damages from the Vendor for any loss which the Purchaser may have suffered as a result of the Vendor's failure to keep his bargain.

The operation of a requisitions clause is well illustrated by the case of *Procter* v. *Pugh*[7] where the Purchaser requisitioned for the removal of certain restrictive covenants. The Vendor did not comply. The Purchaser then issued a summons for the return of his deposit and advised the Vendor that he repudiated the contract. At this point in time, since the Vendor had not invoked the requisitions clause the Purchaser clearly had an action in damages against the Vendor for the costs incurred in the investigation of the title.[8] The Vendor later gave notice under the requisitions clause rescinding the contract. It was held that a claim brought by the Purchaser for his costs failed because it was contrary to the requisitions clause. The decision has been criticized on the ground that the contract (and with it the requisitions clause) ceased to exist once the Purchaser had exercised his right of repudiation.[9] However it is submitted that the decision is correct in principle because the protection of the requisitions clause would otherwise become illusory. The clause constitutes an agreement by the Purchaser that the Vendor shall not be liable in damages in exactly this situation. In the face of such an arrangement the Purchaser's right to repudiate should not be allowed to affect the Vendor's right which does not conflict with it.[10] The first effect of the requisitions clause is therefore that it provides an escape route for the Vendor in proper circumstances.

Sometimes a requisitions clause states that the Vendor may rescind only if the Purchaser "insists" on his requisition.[11] Where this is so

[6] The Auckland Law Society form is to similar effect but provides also that where a plan is to be lodged or has been lodged the period for requisitions arising out of the deposit of the plan is to run from the date on which the Purchaser is notified of deposit.

[7] [1921] 2 Ch. 256.

[8] But not general damages *Flureau* v. *Thornhill* (1776) 2 Wm. B 1078; 96 E.R 635; *Bain* v. *Fothergill* (1874) 7 H.L. 158.

[9] *Williams on Vendor and Purchaser* 3rd Ed. pp. 156 and 174.

[10] *Procter* v. *Pugh* was approved in *Elliott* v. *Pierson* [1948] Ch. 452.

[11] This is uncommon in New Zealand but usual in England.

there are four steps which must have been taken before the Vendor can terminate the contract:[12]

1. An objection to title by the Purchaser;
2. An inability or unwillingness on the part of the Vendor to remove the objection;
3. Communication to the Purchaser by the Vendor of the existence of the Vendor's inability or unwillingness;
4. An insistence by the Purchaser on his objection.

It is submitted that under the Real Estate Institute clause quoted above,[13] which does not require insistence, the Vendor may rescind after the second of these steps.

The other important effect of the requisitions clause is to limit the time within which the Purchaser may put in a requisition as to title. In practice most agreements for sale and purchase allow between seven and fourteen days for the making of requisitions. If a requisition is not stated in writing to the solicitor acting for the Vendor within that time period the clause provides that "the objection or requisition to the title of the Vendor shall be held to be waived and the Purchaser shall be deemed to have accepted the Vendor's title absolutely." Thus the Purchaser who fails to put in a requisition will have to take a transfer of a defective title and cannot raise the matter with the Vendor.

Time is of the essence in the usual requisitions clause without express stipulation that this shall be so.[14] Where title is based on a Deeds system time is generally computed from the date of delivery to the Purchaser of a perfect abstract. In the absence of a time limit in the contract a requisition as to title must be made within a reasonable time after the delivery of the abstract.[15] It has been held that under the Torrens System there is no need for delivery of a formal abstract of title and the Purchaser cannot insist upon it.[16] It is necessary only for such information to be given as will enable the Purchaser to ascertain whether the Vendor has title or not.[17] One would have expected that under these conditions time would run from date of delivery of the information but agreements usually specify otherwise and the Courts have not ruled against a strict interpretation of the words.

The usual New Zealand requisitions clause requires time to be computed from the date of the contract with time being of the essence. In the recent decision of *Murphy et. ux.* v. *Rae*[18] Moller J. stated that

12 *Duddell* v. *Simpson* (1866) L.R. 2 Ch. 102, 109.
13 P. 2.
14 *Oakden* v. *Pike* (1865) 34 L.J. Ch. 620.
15 *Spurrier* v. *Hancock* (1799) 4 Ves 667; 31 E.R. 344.
16 *Davidson* v. *Brown* (1879) 5 V.L.R. 288.
17 *Bodley* v. *McDonald* (1901) 20 N.Z.L.R. 371, 372.
18 [1967] N.Z.L.R. 103, 113.

where there was a strict time limit to be computed from the date of the contract the Purchaser was unable to put in a requisition as to title out of time upon the plea that his solicitors had not received a copy of the agreement until after the time period had elapsed. The Purchaser was presumed to have known the provisions of the clause and, in the words of the learned judge, he "lost his right to repudiate the contract on any grounds involving a question of title (*Williams on Title* 3rd Ed. p. 527)".[19] This may work hardship on the Purchaser and it is submitted that it would be fairer if the rule were modified so that time ran from the date on which the Purchaser received, either from the description in the agreement or elsewhere, sufficient information to enable him to search the title. The rule might well be that a sufficient "legal description" (title reference and lot and deposited plan numbers) be supplied by the Vendor. In the agreement in *Murphy* v. *Rae* the property was described by its residential address which would not have enabled a search to be made if the records of the local body were inaccurate.

The strict time limit does not apply at Common Law to things not mentioned in the abstract of title which may be the subject of requisitions after the stipulated time has elapsed.[20] In New Zealand, by analogy, late requisitions are permitted in respect of matters discovered subsequently to acceptance of the title i.e. which are not shown on the certificate of title.[21] An example is the situation which arises where a Purchaser is holding a section in a subdivision under an agreement for sale and purchase which provides for restrictive covenants in the form of a building scheme—e.g. to use the property for residential purposes only, not to build flats, not to build a dwellinghouse worth less than X. Because this is merely an agreement there will be no record of the covenants on the title which can be discovered by a searcher. If the Purchaser resells his interest and provides the new buyer with a legal description that buyer may remain in ignorance of the agreement for the covenants. It is submitted that if he were later to learn of it—say, on being handed the prior transfer on the day of settlement—he would be able to put in requisitions and would not be bound by the time limitation in the requisitions clause.

Where the Requisitions Clause is Inapplicable

A requisitions clause does not cover every dispute arising in respect of the title. Its scope is limited. Firstly, and most obviously, there may be certain requirements or claims made by a Purchaser which do not

[19] *Ibid.* 113. The reference to *Williams on Title* does not directly support the contention, for the learned author is discussing only the possibility of a Vendor's inserting into an agreement a clause restricting the obligation to present a good title.

[20] *Warde* v. *Dixon* (1858) 28 L.J. Ch. 315.

[21] *Hayes* v. *Ross* (No. 2) [1919] N.Z.L.R. 777, 785.

constitute objections or requisitions but are merely claims for compensation under the compensation clause in the agreement.[22] The requisitions clause does not come into play and the Vendor has no right of rescission. This was so in *Gardiner* v. *Orchard*[23] where the Purchaser applied for compensation in respect of a very small discrepancy in the measurement of the frontage of the property. The Vendor attempted to use his application as a ground for rescission. It was held that the Purchaser was not making a requisition as to title and the Vendor could not rescind.

Halsbury[24] does not refer to *Gardiner* v. *Orchard* and suggests that every complaint which brings into operation the compensation clause must necessarily involve a requisition allowing the Vendor to rescind. However, the authorities cited by the learned editor[25] do not support this contention. Quite the reverse, for an argument along these lines was rejected in *Ashburner* v. *Sewell.*[26]

The rule in *Gardiner* v. *Orchard*[27] applies only where the complaint is a matter of compensation only—a comparatively trivial affair. Some questions, being of greater importance, are, however fit to be the subject of compensation while at the same time giving to the Vendor a right to put an end to the contract if he does not wish to meet the compensation claim. Here he can elect whether to rescind or to compensate. This is because compensation claims of this magnitude are not mere questions of misdescriptions but also constitute objections or requisitions on the title of the Vendor. The amount of compensation which would result is sufficiently large to justify giving the Vendor the right to withdraw. The operation of the two clauses is quite separate but will often overlap in this way.[28] It is submitted that matters of compensation

22 The clause which is in the Real Estate Institute form reads: "If any misdescription errors or omissions shall be discovered in this Agreement it shall not annul the sale but shall be the subject of compensation to be ascertained if the parties cannot agree by arbitration under the law relating to arbitration in New Zealand." The Law Society form is similar in effect.

23 (1910) 10 C.L.R. 722.

24 *Laws of England* 3rd Ed. Vol. 34 p. 250 para. 415.

25 *Mawson* v. *Fletcher* (1870) 6 Ch. App. 91; *Ashburner* v. *Sewell* [1891] 3 Ch. 405; *Vowles* v. *Bristol etc. Building Society* (1900) 44 Sol. J. 592.

26 At p. 409 Chitty J. gave it as his opinion that "there may be errors within (the compensation clause) which are also objections to title within (the requisitions clause) and errors within (the compensation clause) which are not within (the requisitions clause)." In *Mawson* v. *Fletcher* (1870) 6 Ch. App. 91, 95 Sir George Mellish L.J. held that the right of the Vendor to rescind depended upon the question being more than one of mere misdescription or compensation. In similar circumstances a Purchaser cannot rescind but must complete and accept compensation (*Price* v. *Macaulay* (1852) 2 De G.M. & G. 339; 42 E.R. 903).

27 (1910) 10 C.L.R. 722.

28 *Grace* v. *Mitchell* (1926) 26 S.R. (N.S.W.) 330. See also the cases cited in footnote 26.

only need not be raised within the time limit because they are not requisitions or objections on the title.

Secondly, the Vendor's protection under the requisitions clause is usually limited to a defence against a defect of *title*. He receives no protection from a defect of *conveyancing*. In *Williams on Vendor and Purchaser* 3rd Ed. p. 175 it is said:

> If the stipulation gives the right to rescind in case of insistence on a requisition or objection as to title only the Vendor will not be enabled to rescind if the Purchaser insists on some requirement which is a matter of conveyance, as the discharge of a mortgage.

The wording of the Real Estate Institute requisitions clause is not wide enough to cover requisitions as to conveyance.[29] If it read "any objections or requisition as to the title, particulars, conditions or any other matter or thing relating or incidental to the sale" the clause would cover defects of conveyancing and would bring into operation in respect of these things the Vendor's right to rescind and the time limit.[30]

A requisition is of conveyancing and not title where the Vendor on doing certain acts, which he can perform immediately and independently of the consent of others,will have the right to direct the conveyancing of the whole estate contracted for.[31] At this point the Vendor has made out his title; no-one can prevent him from transferring free of encumbrances and other defects but there are certain further matters to be attended to, such as the removal of a mortgage, which it is in the power of the Vendor acting alone to remove or to compel the removal of. In *Kitchen* v. *Palmer*[32] the Vendor had contracted to sell the legal estate but was found to have an equitable interest only. Because he could unilaterally have rectified the situation—albeit at great inconvenience—it was held that the defect was one of conveyancing and he could not set aside the contract. A similar result occurred where it was discovered that a Vendor's sub-lease had been mortgaged.[33] On the other hand the existence unbeknown to the Vendor of a right of way was a defect of title and rescission by the Vendor was allowed.[34] Unless the owner of the dominant tenement agreed to surrender the easement the Vendor was powerless.

A third situation in which the requisitions clause is totally inapplicable is where there is not just a technical objection or defect in the title of the Vendor but rather the Vendor has no title at all to the property or a title which is wholly bad (which is another way of describing lack

[29] *In Re Jackson and Oakshott* (1880) 14 Ch.D. 85.
[30] *In Re Deighton and Harris's Contract* [1898] 1 Ch. 458. It would also entitle a Vendor to rescind if a Purchaser raised a matter of mere misdescription.
[31] *Williams on Vendor and Purchaser* 3rd Ed. p. 170.
[32] (1877) 46 L.J. Ch. 611.
[33] *In Re Jackson and Oakshott* (1880) 14 Ch.D. 85.
[34] *Ashburner* v. *Sewell* [1891] 3 Ch. 405.

of title). This is not an objection to the title but to the absence of it. So where a Vendor held property upon trust during the life of X to pay the income therefrom to X and after the death of X to sell the property and, notwithstanding the trust, the Vendor purported to sell the property during the lifetime of X, he was not permitted later to rescind the contract when he discovered his mistake. The Court examined the situation which would have arisen had the Vendor been trying to enforce the time limit. He had no title to the property which he could have compelled the Purchaser to accept yet, if the clause applied, the time limit would have worked against the Purchaser. Pollock B. said:

> It would be putting a most unreasonable construction upon the conditions of sale to hold that the Vendee by failing to object to the abstract of title not merely waived any requirement as to further information or further security which he might properly have enforced against a Vendor who had a valid title or one capable of being made valid but that he became liable to accept a title wholly bad when the very basis of the contract apart from the conditions of sale was that the Vendor was bound to give a good title.[35]

Therefore the Vendor was not allowed to rely on the requisitions clause. The Vendors in *Cook* v. *Hill*,[36] whose title had a fatal flaw because of an unrevoked trust, were treated in the same way.[37]

The decision of Moller J. in *Murphy et ux.* v. *Rae*[38] which has been discussed above[39] is open to criticism, it is respectfully submitted, on the grounds that if one adopts the assumption made by the learned judge the Vendor could be said to have no title to the property so as to exclude the operation of the requisitions clause and the time limit contained in it. In *Murphy et ux.* v. *Rae* the Vendor and his wife were joint owners of a house property. The Vendor contracted to sell the house and the Purchaser later attempted to repudiate the contract because (*inter alia*) Mrs. Murphy was not a party to the contract. Moller J. first held that on the evidence it was likely that the Vendor was acting as the agent of his wife and with her consent. Having reached this conclusion he put it aside and dealt with the argument relating to the strict time limit in the requisitions clause upon the assumption that no such consent on the part of Mrs. Murphy had been forthcoming. As has been seen above,[40] the learned judge held that the time limit should be strictly applied. However, it is respectfully submitted that the learned judge overlooked the fact that the property was registered as a joint family home under the Joint Family Homes Act, 1964,

35 *Want* v. *Stallibrass* (1873) L.R. 8 Exch. 175, 185.
36 (1890) 8 N.Z.L.R. 570.
37 See also *Bowman* v. *Hyland* (1878) 8 Ch.D. 588.
38 [1967] N.Z.L.R. 103, 113.
39 P. 4.
40 P. 4.

Section 9 (2) (c) of which provides that during the lifetime of both the husband and the wife neither of them "may sell . . . his or her undivided estate or interest in the settled property or any part thereof." The effect of this section would seem to be that acting alone neither party to a joint family home settlement can be said to have a title to the property which he can pass to a purchaser. The situation is the same as that which exists where a trust forbids a sale except after a certain time or on certain conditions. Therefore there was a complete lack of title for the purposes of sale in Mr. Murphy and it is submitted that the requisitions clause had no application.[41]

RESTRICTIONS ON VENDOR'S USE OF REQUISITIONS CLAUSE

Even where the requisitions clause has application the Vendor may still be restricted in his right to rescind. *Prima facie* his right appears to be absolute where the clause applies but the Courts of Equity have not been prepared to allow him complete freedom of action.

The Vendor does, however, start with one great advantage. Though, as we shall see, he must have good reason for his use of the clause, he need not reveal that reason to the purchaser.[42] This puts a Purchaser who wishes to impeach the Vendor's use of his power at a great disadvantage.

Suggestion has been made from time to time[43] that this proposition is incorrect and that Chitty J. in *Re Starr-Bowkett Building Society and Sibun*[44] was in error in his interpretation of *Re Glenton* upon which he based his proposition. Chitty J. said:

> . . . the Court of Appeal[45] have determined that the Vendor is not bound to submit his reasons to the Purchaser and they decide that if he has a reason, although he does not state it, that is sufficient.[46]

This statement is an *obiter dictum* because the Vendors did give reasons in the *Starr-Bowkett Case*. Farwell J. in *Quinion* v. *Horne*[47] is of the opinion that Chitty J. was wrong and that the Court of Appeal in the *Starr-Bowkett Case* did not agree with his interpretation of *Re Glenton*. It is apparent, however, from a reading of the Court of Appeal judgments in *Starr-Bowkett* that all the judges specifically stated that it has been held that the Vendor does not have to give reasons and they certainly seem to agree with that statement.[48]

[41] *Harris* v. *Hurst* (1927) 27 S.R. (N.S.W.) 480.
[42] *Re Glenton and Saunders to Haden* (1885) 53 L.T. 434; *Re Starr-Bowkett Building Society and Sibunn* (1889) 42 Ch.D. 375.
[43] Notably in *Quinion* v. *Horne* [1906] 1 Ch. 596.
[44] (1889) 42 Ch. 375.
[45] *In Re Glenton and Saunders to Haden* (1885) 53 L.T. 434.
[46] (1889) 42 Ch. D. 375, 384.
[47] [1906] 1 Ch. 596.
[48] It is interesting to note that Cotton L.J. was a member of the Court of Appeal in both *Glenton* and *Starr Bowkett*.

It seems therefore that it is not necessary for the Vendor to give reasons and this throws an added burden on a Purchaser who is attempting to show that the Vendor's reasons are not adequate. It should be noted that where the requisitions clause provides for the Purchaser to "insist" upon his requisition before the right to rescind arises in the Vendor (but not otherwise) the Vendor must give a reply (but not necessarily an answer) to the requisition i.e. he must inform the Purchaser that he is unable or unwilling to comply so as to give the Purchaser the choice of insisting on or retracting the requisition.[49] At no stage—whether or not insistence is an element—need he warn the Purchaser that he is thinking of exercising his right under the requisions clause.[50] In all cases, where reasons are in fact given by a Vendor they may be used against him.[51]

The general equitable principles governing the right of a Vendor to rescind are stated by Viscount Radcliffe in *Selkirk* v. *Romar Investments Limited*:[52]

> . . . a Vendor . . . must not act arbitrarily or capriciously or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale *brevi manu* since by so doing he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of recklessness in entering into his contract, a term frequently resorted to in discussion of the legal principle and which their Lordships understand to connote an unacceptable indifference to the situation of a Purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the Vendor has no reasonable anticipation of being able to deliver. A Vendor who has so acted is not allowed to call off the whole transaction by resorting to a contractual right of rescission.

On the other hand the Vendor's actions need not be "beyond criticism".[53] Let us then examine the standard more closely. Firstly, a Vendor must not act capriciously. If he wishes to rely on the clause he "must show that if he proceeds to comply with a requisition he will be involved in expenses far beyond what he ever contemplated or be involved in litigation and expenses which he never contemplated and for avoiding which he reserved to himself the power of annulling the contract".[54] Hence if the Purchaser can show that compliance with the requisition will not put the Vendor to any substantial labour or expense which the Vendor has not anticipated then the Vendor will be unable to rescind by use of the clause. What constitutes a substantial labour or

[49] *Turpin* v. *Chambers* (1861) 29 Beav. 104; 54 E.R. 566.
[50] *Duddell* v. *Simpson* (1866) L.R. 2 Ch. 102 cf. *Gee* v. *Tahos* [1963] S.R. (N.S.W.) 935 where there was a special clause under which an indication of intention had to be given.
[51] *Quinion* v. *Horne* [1906] 1 Ch. 596.
[52] [1963] 3 All E.R. 994, 999–1000 (P.C.).
[53] *Grace* v. *Mitchell* (1926) 26 S.R. (N.S.W.) 330.
[54] Per Turner J. in *Duddell* v. *Simpson* (1866) 1 L.R. 2 Ch. 102, 107.

expenses will vary with the value of the property. The need to spend $500 may allow the Vendor of a $2,000 section to terminate the contract but similar expenditure would probably have to be undertaken if the property were worth $200,000.

In *In Re Weston and Thomas's Contract*[55] the Purchaser requisitioned for the removal of a contingent encumbrance relating to some estate duty. Under the Estate Duties Act an application could have been made by the Vendor for the commutation of the duty which would have been payable only if one or more of the Vendors survived to a certain date on which they would all have been over 90 years of age. The amount of duty involved was very small. The Vendor's answer was that he was not prepared to seek commutation but would execute an indemnity for the Purchaser. This the Purchaser would not accept whereupon the Vendor invoked the requisitions clause. The Court held that the Vendor was bound to discharge the encumbrance for there was no inherent difficulty delay or expense in so doing. He could not use the clause in these circumstances.

Secondly, the Vendor will not be allowed to rescind under the requisitions clause where he knowingly misrepresented a defect in title to the Purchaser. He cannot use the clause in bad faith.[56] He must satisfy the Court that he has been genuinely in ignorance of some material fact or document or under some mistaken notion that there was no defect. More than this, he must not have acted recklessly and thereby have encouraged the Purchaser to enter into the contract. There must be no failure of duty on his part and he must have omitted nothing which an ordinarily prudent man having regard to his contractual relations with other persons would have done. This rule was laid down in *Re Jackson and Haden's Contract*[57] in which the Vendor had contracted to sell land under a description so wide that it covered the minerals contained in the land. He should have been aware that he had no right to the minerals. It was held that he could not rescind and that the Purchaser could insist on completion with compensation for the defect in title. Similarly, where a Vendor agreed to sell a house but did not actually have the legal estate the Court held that he had been imprudent to the point of recklessness in proceeding in the hope of obtaining it with the help of the executor of his wife's estate.[58] If, however, he has acted on the faith of a promise or representation by the proprietor of the legal estate that he will concur in the sale then the Vendor's action is not necessarily reckless even where he has failed to extract a binding

[55] [1907] 1 Ch. 244.

[56] *Nelthorpe* v. *Holgate* (1844) 1 Coll. 203; 63 E.R. 384. *Sivewright* v. *Casey* (1949) 49 S.R. (N.S.W.) 294. *Orchard* v. *Taylor* (1909) 10 S.R. (N.S.W.) 93.

[57] [1906] 1 Ch. 412.

[58] *In Re Des Reaux and Setchfield's Contract* [1926] 1 Ch. 178. See also *Baines* v. *Tweddle* [1959] 1 Ch. 679.

agreement from the legal owner. Again, if the Vendor has made an untrue statement under a *bona fide* belief as to its truth and with some reasonable ground for that belief he is not debarred from rescinding under the requisitions clause.[59] As one would expect, if the Vendor has taken proper legal advice before entering into the contract he will not be refused the right to rescind if a requisition is upheld.[60]

Lastly, the Vendor must exercise his right of rescission within a reasonable time after receiving the Purchaser's requisition. It was said in *The Vestry of St. Leonard's, Shoreditch* v. *Hughes*[61] that he need not make his election *instanter* but must not delay for an unreasonable period. What is reasonable is to be implied from the nature of the agreement and the degree of difficulty caused by the requisition. In *Hughes'* case a rescission some time after the date fixed for settlement by the agreement was acceptable because of the complicated nature of the requisitions. It is probable that had the requisitions been simple matters rescission at such a late date would not have been permitted.[62] If the Vendor is guilty of delaying his decision for an improper purpose —e.g. to enable him to carry on negotiations with another potential buyer—he may be held to have lost his right to rescind. In such circumstances it is submitted that the Court will be very ready to hold that his delay is unnecessarily long.[63]

Alternatively where the Court regards the delay as not sufficiently unreasonable to justify denying the right to rescind but still of sufficient duration to put the Purchaser to unfair expense and trouble it will occasionally disregard the stipulation in the usual form of clause that the Purchaser "shall have no claim on the Vendor for . . . compensation or otherwise howsoever" and will order the Vendor to pay the Purchaser's costs.[64] This power is sparingly used as it is in direct conflict with the agreement.

The Right to Negotiate

The usual New Zealand form of requisitions clause allows the Vendor to rescind "notwithstanding any intermediate negotiations." Without these words any attempt by the Vendor to comply with the requisitions loses him the right to rescind because he is deemed to have

[59] *Merrett* v. *Schuster* [1920] 20 Ch. 240.
[60] *In Re Milner and Organ's Contract* (1920) 123 L.T. 168.
[61] (1864) 17 C.B. (N.S.) 135; 144 E.R. 55.
[62] *Bowman* v. *Hyland* (1878) 8 Ch.D. 588.
[63] *Smith* v. *Wallace* [1895] 1 Ch. 385 is an example of the converse situation where the Vendor's delaying for an improper reason lost him his Purchaser.
[64] *In Re Spindler and Mear's Contract* [1901] 1 Ch. 908; *Re Higgins and Hitchman's Contract* (1882) 21 Ch. D. 95, 99.

waived it.[65] The Vendor has to elect forthwith whether to abandon the ship. If he makes an effort to save it and fails he must go down with it.

Where the right to negotiate is reserved the Vendor's right of rescission will not be lost even where he indulges in litigation with the Purchaser.[66] If he sees that the case is going badly he can still back out by means of the clause, though once a final judgment is given against him his right vanishes for intermediate negotiations are no longer being carried on. There can be no question of further negotiation once the Court has pronounced. If rescission was permitted at this juncture the Vendor could go happily into Court safe in the knowledge that he could nullify any decision against his interests.[67] Before judgment, however, the right to negotiate allows the Vendor to try all manoeuvres to satisfy the Purchaser without risking the loss of his right to terminate the contract.

Conclusion

The requisitions clause is an established part of conveyancing life. Rarely does an agreement for the sale and purchase of land not contain one. It serves a valuable purpose by preventing a Vendor from becoming inextricably enmeshed in a contract which he cannot fulfill without considerable and unexpected difficulty. If his actions have been prudent the clause will relieve him of his obligations unless they are not onerous, but if he has behaved improperly it will not operate.

From the Purchaser's point of view the workings of the clause may often be annoying but although the restoration of the pre-contractual position may involve for him the loss of his bargain it must be remembered that at Common Law he can not recover damages for this anyway where the Vendor can not complete[68] and it is unlikely to result in great hardship for him such as may happen if a Vendor is forced to proceed. The widespread use of the clause is based on the feeling that the Purchaser should not be allowed to take advantage of an innocent Vendor's misfortune by rigourously following his remedies.

But whilst the principle of the clause may thus be approved the following changes in its usual form are suggested to alleviate unfairness in its operation:

1. The Purchaser should in all circumstances be permitted to claim from the Vendor the expenses of investigating title. The mistake is not his. He has probably been put to much time and effort in

[65] *Tanner* v. *Smith* (1840) 10 Sim. 410; 59 E.R. 673; *Morley* v. *Cook* (1842) 2 Hare 106; 67 E.R. 44.
[66] *Isaacs* v. *Towell* [1898] 2 Ch. 285.
[67] *Re Arbib and Class's Contract* [1891] 1 Ch. 601.
[68] *Flureau* v. *Thornhill* (1776) 2 Wm. B. 1078; 96 E.R. 635; *Bain* v. *Fothergill* (1874) 7 H.L. 158.

his negotiations with the Vendor. He has incurred legal fees. Yet he gets back only his deposit and must be out of pocket. In the United Kingdom where the investigation of a title can be a protracted and expensive business such a practice may be justifiable. It may be based on the theory that where the land title system is relatively uncertain the risks must be shared or that where expense must be heavy it must not all be borne by an innocent Vendor. It is submitted that there is no merit in the rule in New Zealand where with rare exceptions the Vendor's title can be easily traced and established. The number of requisitions should be fewer; the legal fees involved should not be great. Hence the Vendor should bear the costs for it is difficult to see that much hardship will be worked.

2. There should be a requirement that the Vendor must give the Purchaser an opportunity of withdrawing his requisition and must warn him that if he insists on it rescission will follow. The Vendor must give notice of intention to rescind. The Purchaser's present position is unenviable. He may be very eager to obtain a piece of land, but on searching the title he may find a defect in it—let us say, a limitation as to title recorded on the register. What is he to do? If he puts in a requisition in the belief that the Vendor will not have too much trouble in complying he may find that he has underestimated the expense involved for the Vendor. If the Vendor then elects to rescind, the Purchaser, who may have been willing to withdraw his objection and to have run the risk of taking a defective title in order to preserve his bargain, is not given the opportunity. What prejudice is there to the Vendor if he must give notice? It is worth noting that in New South Wales by virtue of S. 56 of the Conveyancing Act 1919–54 there is a statutory requirement which prevents rescission before the Purchaser has insisted on his requisition.
3. The time within which requisitions have to be put in should run from the date on which the Vendor supplies the Purchaser with a legal description comprised of lot and deposited plan numbers and certificate of title reference. If this information were in the agreement the requirement would be satisfied automatically on signature by the Purchaser. Where a plan has yet to be deposited time should run from the date on which the Vendor advises the Purchaser of the deposit. The Auckland Law Society's new form of agreement contains this modification and it is to be hoped that the practice will spread. It may be regarded as an extension of the principle that matters not mentioned on the abstract or occurring subsequently may be the subject of requisitions out of time, but a specific statement in the agreement will clarify the point.