**UNABLE OR UNWILLING**

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Much has been written about valid requisitions, and what constitutes a valid requisition, and much has been written about a vendor's right to deny requisitions made, where those requisitions are invalid.

What is not often written about, is the vendor's right to ***not*** remedy a valid requisition that has been made by a buyer.

**Advantage, Buyer**

When one steps back from a real estate purchase contact for a moment, and considers the notion of requisitions in the first place, one might question why a vendor should have any right to refuse to remedy a requisition validly made. Isn't it the point of the contract, in the first instance, to ensure that the buyer gets good title? And on a balance, does it not make sense that a vendor who bargains to deliver good title, should not thereafter have the right to refuse to make that title good, should a defect be discovered, or at the very least, an obligation to convey what that vendor does own (subject to that defect) with an abatement?

If you answer is yes, then you are entirely correct at law, assuming of course that you are practicing law before the 1800s. It was about that time that agreements of purchase and sale and offers to buy land were changing to specifically address the problem that vendors could be compelled to complete the sale of real estate with a valid title deficiency (that the vendor could not or did not want to remedy) through the remedy of specific performance, with an abatement.

**The Contractual Right of Rescission**

The change that was being made to agreements of purchase and sale is what we now commonly refer to as the rescission or annulment clause. Over the last two hundred years, it has been variously worded and modified, but has always amounted to something like the following: if a valid requisition is made by the buyer within a certain period, and the seller is unable or unwilling to remedy or remove the subject matter of that valid requisition, then the seller may terminate the agreement and shall return the deposit.

And so by contract, the balance of power (in respect of handling valid requisitions) appeared to shift in favour of sellers. On the plain reading of the rescission clause, the seller could exercise its discretion so as to determine that it was unwilling or unable to address the requisition and to unilaterally get out of its bargain. Even the plain wording of the modern OREA form appears to give a vendor a plain, unfettered and unilateral right to terminate the contract:

"If within the specified times referred to ***any valid objection to title*** or to any outstanding work order or deficiency notice, or to the fact that the said present use may not lawfully be continued, or that the principal building may not be insured against risk of fire ***is made in writing to the Seller and which the Seller is unable or unwilling to remove remedy or satisfy***, or to obtain insurance save and except against risk of fire (title insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller***), and which the Buyer will not waive, this Agreement***, notwithstanding any intermediate acts or negotiations in respect of such objections, ***shall be at an end*** and all monies paid shall be returned without interest or deduction…" (*emphasis added*)

**Advantage, Vendor**

And for some time, courts were prepared to accept that the parties had contractually shifted the balance of power in the context of valid requisitions, from buyer to seller.

In 1884, the High Court of Justice in *Dames v. Wood, In re*[[1]](#footnote-1) considered the following similar language in the contract:

"If the purchaser shall take any objection, or make any requisition as to the title, evidence or commencement of title, conveyance or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may, by notice in writing delivered to the purchaser or his solicitor, and notwithstanding any intermediate negotiation, rescind the contract for sale, and the vendor is, within one week after such notice, to repay the purchaser his deposit money…".

On the facts, the purchaser made its requisitions in a timely manner, and the vendor had answered the requisitions. The decision does not set out the specific nature of the requisitions or the answers made. However, what is clear is that the purchaser did not accept the vendor’s answers. The vendor then sent notice stating that it was unable or unwilling to comply with the purchaser's objections and requisitions, and was exercising its contractual power to rescind the contract. In the face of this rescission, the purchaser withdrew its objections and requisitions and stated that it was willing to complete the purchase.

The purchaser's counsel argued that ""inability" or "unwillingness" on the part of the vendor must be reasonable and the vendor ought to give notice to the purchasers as to which of the requisitions he was unable or unwilling to comply with".

The court did not quite agree. In fact, the court weighed in heavily in favour of the plain meaning of the contract and the right of the seller to make a unilateral and unfettered decision to terminate the contract:

"The question turns upon the meaning of the words "unable or unwilling." What do these words mean? The vendor knew that unreasonable and improper requisitions might be tendered to him, and accordingly he sought to protect himself on two grounds, unwillingness and inability to comply with them. He says in the first place, "I may be unable to answer these requisitions except at great trouble and expense, and I wish to protect myself accordingly." Or he may say, "The requisitions may not be of such a nature that I cannot comply with them, yet may they be so unreasonable and unjust that I may be unwilling to comply with them, by reason of the expense or otherwise, and in this case, also, I wish to protect myself" The conditions appear to me to contain a clear stipulation, namely, that the vendor may at any time say, in answer to requisitions, "I am unwilling to go on; I decline to answer them." No one has a right to inquire why he is unwilling; at any rate he is not bound to give his reasons".

The court enforced the plain meaning of the contract - that seller may terminate the contract if it is unwilling or unable to answer or address requisitions, and need not give reasons why. Full stop. Thanks for coming out.

And so begins the reason for this paper. To consider how, in the face of what was once treated as an absolute seller right of rescission, the courts have since brought equitable principles to bear so as to rebalance the rights between sellers and buyers dealing with valid requisitions.

**Good Faith – Equity Intervenes**

In 1907 an Ontario court in *Crabbe v. Little*[[2]](#footnote-2) considered the purchase and sale of two properties on Spadina. The agreement provided that "if any objection or requisition is made by me which you are unable or unwilling to comply with, you shall be at liberty by notice in writing to rescind this agreement without interest". The purchaser presented "very lengthy requisitions" and the seller responded that he was "unwilling to go to the expense of complying with the requisitions", and he rescinded the contract.

The court (unlike the court in *Dames v. Wood*) took a different view in considering whether the rescission was validly exercised. The court stated:

"The vendor, I find, acted in good faith; he had no improper motive in attempting to rescind the contract; he was advised by his solicitor that the expense of complying with the requisitions would amount to many hundreds of dollars, and that, even then, there were matters he could not obtain evidence upon, and so he was both unable and unwilling to comply with the requisitions".

And so what was recognized in this decision is that there were criteria for when the right of recession could be relied upon by a vendor; or perhaps more correctly, it was recognized that there may be certain equitable reasons why a seller would not be permitted to avail itself of this contractual right of rescission.

The case did not turn on the point at the time, but the court referred to two indicia that might have disqualified the seller from such reliance:

(a) had he not acted in good faith; and

(b) had he had an improper motive in attempting to rescind the contract.

While these were imperfect tests, they constituted judicial recognition that equity played an important role in understanding the rescission rights of the seller.

**Sweet Will**

Some fourteen years after *Crabbe v. Little*, the Ontario Court of Appeal wrote (what is now) one of the more quoted decisions on the subject, in *Hurley v. Roy*[[3]](#footnote-3).

In this case, the seller contracted to sell a property but he and his wife each owned half the property. His wife took the position that she would join in the required conveyances but only if she received half the money. When the buyer requisitioned that it receive a conveyance from both spouses, the seller refused (on the grounds that he would have to relinquish half the purchase price to his wife to do so), and purported to rescind the contract.

The court considered his claim that he was unable or unwilling and stated:

"The provision enabling the vendor to rescind has no application to the facts. The vendor can convey if he allows his wife to have her share of the price. This provision was not intended to make the contact one which the vendor can repudiate at his sweet will. The policy of the Court ought to be in favour of the enforcement of honest bargains, and it should be remembered that, when a contract deliberately made is not enforced because of some hardship the agreement may impose on one contracting party, the effect is to transfer the misfortune to the shoulders of the other party, though he is admittedly entirely innocent".

So without stating it expressly, the Court in *Hurley v. Roy* was further limiting the availability of the rescission right, by in effect reversing the onus – stating that the exercise of the rescission right, where such exercise would amount to terminating an honest bargain because of undue hardship on the seller, was invalid.

For a time, there In *Louch v. Pape Avenue Land Co*[[4]](#footnote-4) the court accepted the trial court's finding that the objections made had been valid, and that "there is no suggestion of bad faith". The court then found that, in the absence of bad faith, the Vendor could avail itself of the rescission clause even it if had bargained to sell something that it can't prove ownership:

"Take, for instance, the case where a piece of land is included in the description to which a title cannot be made out: regard must be had to the importance of that particular piece, and the amount of compensation which would have to be paid. I think it quite reasonable for the vendor to say "I will reserve to myself a mode of escape from all the trouble of these enquiries and investigations and expenses of arbitration. I desire to settle the price myself; and if the purchaser insists on his objections to my title, I will retain in my own hands the power to rescind".

*Louch v. Pape* moved the needle back in favour of the vendor, and focused on the rescission clause as a defence to the exercise by the purchaser of a right of specific performance with an abatement. In doing so, *Louch* tacitly took the position that the only way to be disqualified from exercising the rescission right, was to have acted in bad faith (even if it had agreed to sell something it could not prove good title to).

**The Reckless Cases**

All along, however, running along a parallel track to the good faith cases, were a collective of cases I affectionately call the "Reckless Cases". *In Re Jackson and Haden's Contract*[[5]](#footnote-5), Master of Rolls Collins stated:

"It is to be noted that, in dealing with this right to rescind, the learned judges have always criticized most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is, in the circumstances of the particular case, a condition that ought to be applied for the benefit of the person who had introduced it. In this particular case, there is no doubt that this clause was introduced for the benefit of the vendors. The Court considers whether or not the vendor has so acted in the matter as to avail himself of that condition: or it may be put in other words. Can we construe this condition [sic], in the circumstances, as applying to the particular state of facts which has caused the difficulty."

Then the court addressed the standard – the elements of behaviour that might prevent a Vendor from relying on the rescission clause:

"It may stop short of fraud, it may be consistent with honesty; but at the same time, there must be a falling short on his part – he must have done less than an ordinary prudent man, having regard with his relations to another person, when dealing with him, is bound to do; and therefore where, knowing the exact facts, he has recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that person might know as much as himself), there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced into the contact for his benefit is introduced to meet such a case as that which has arisen here, namely a reckless disregard by the vendor as to accuracy of statement when he is making a statement which a view to the other people acting on it as correct. On that ground it is enough to say that this particular condition must be read (as against the persons who are taken to have introduced it for their own benefit) as not applying to the particular case to which they seek to apply it, namely, something arising wholly and solely out their own recklessness in the manner in which they have formulated the contract."

In *Merrett v. Schuster*[[6]](#footnote-6), the court distinguished In *Re Jackson and Haden's Contract* as standing for the principle that "recklessness" only applied to situations where the vendor had made an untrue statement without having substantial grounds for belief in its truth. Instead the court stated that the right of rescission should be allowed, even in the face of untrue statements having been made by the vendor, so long as the vendor acted in good faith and reasonable belief in those facts.

In *Lavine v. Independent Builders Ltd.*[[7]](#footnote-7), the Court confirmed and applied the recklessness test from *In Re Jackson and Haden's Contract* in a situation where "on the evidence this was plainly not a mere oversight or mistake upon the part of the vendor" and that the vendor "stated that the vendor owned the lands to the read and could give the lane desired". As it turned out, he couldn't, and was found to have been reckless.

**Recklessness and Bad Faith**

And then it happened. In a 1958 decision, the Supreme Court of Canada acknowledged that both recklessness and bad faith had roles in limiting the vendor’s right of rescission.

In *Freedman v. Mason*[[8]](#footnote-8), the vendor agreed to deliver a deed containing a bar of dower and later attempted to terminate the contract on grounds that he was unable to obtain one. The court found that "his duty was, at the very least, to make a genuine effort to obtain what was necessary to carry out his contract and that there can be no doubt in this case that he made no such effort". The court found that both husband and wife wanted out of the transaction and that the inability to obtain the bar of dower was perhaps not genuine.

Then the court gave us a first taste of how the concepts of recklessness and bad faith can co-exist in the analysis:

"A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contact to convey more than he is able."

And there we have it. The recklessness test applies to the point in time when the contract is entered into. A vendor cannot avail himself of the right of rescission if it acted recklessly in bargaining for something it could not convey.

The bad faith test is one that is applied at the time the vendor is otherwise allowed to respond to the valid requisition and exercise the right of rescission in the contract. It can only do so if it is acting in good faith and not in a capricious or arbitrary manner.

Which then raises the question, how does one act capriciously or in bad faith? The court went on: "his attempted rescission was arbitrary and there was a complete and deliberate failure on his part to do what an ordinarily prudent man having regard to his contractual obligations would have done".

Is this the entire test? Not quite. It is only an example. The court went on to state: "I doubt that it is possible to formulate in the abstract and apart from the actual conditions of a case the precise limits within which the clause may enable a vendor to rescind."

In *Paulter Holdings Ltd. v. Karrys Investment Ltd.*[[9]](#footnote-9), the court determined that, in getting a court order to determine that an instrument on title did not constitute a registerable encumbrance on title, a vendor had satisfied its duty to evidence to the purchaser that its title was not affected thereby. An effort had been made.

Just two years later, in 1963, the Privy Council in *Selkirk v. Romar Investments Limited*[[10]](#footnote-10) illustrated how the British courts were on a parallel track. In a manner not unlike *Freedman v. Mason*, the court noted that there are two distinctly recognized ways in which a vendor can disqualify itself from being able to exercise its right of rescission, both of which are rooted in principles of equity. By way of preamble, the court recognized the longstanding notion that, but for such principles, the contractual right in favour of the vendor would stand on its terms:

"If a vendor, having stipulated for or been conceded such a right, is to be precluded from asserting it in any particular context, it must be by virtue of some equitable principle which enures for the protection of the purchaser; and it is not in dispute that Courts of Equity have on numerous occasions intervened to restrain or control the exercise of such a right of rescission in contracts for the sale of land, despite what, on the face of the contract, its terms seem to secure for the vendor."

That said, the court then recognized the longstanding cases that established the principle of good faith:

"Thus it has been said that a vendor, in seeking to rescind, 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 doing so he makes a nullity of the whole elaborate and protracted transaction."

and as to the standard of behaviour, the court remarked:

"…a vendor has to be reasonable: he does not have to be beyond criticism before he can exercise his right of rescission".

The court also turned its mind to the separate notion of recklessness:

"Above all, perhaps, he must not be guilty of "recklessness" in entering into his contract, a term frequently resorted to in discussions 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 not reasonable anticipation of being able to deliver".

It is on the point of "recklessness" that the court then focused, and despite that it is a decision of the Privy Council, the colour provided by the court is helpful in our understanding of the principle as it has been and will, I expect, be applied by Canadian courts. On the issue of recklessness, the court stated (and for convenience, I provide three excerpts that collectively illustrate the concept):

"what is now at issue, which is simply the question whether the respondent is to be held guilty of "recklessness", in the legal sense, in not warning the appellant before the contract was signed that there were certain evidential gaps in the proof of its title that it was unlikely to be able to fill up"

…

"While there have indeed been some instances in which a vendor has been deprived of the right of rescission for entering into his contract in circumstances in which he had no reasonable assurance that he could convey the whole title for which he was contracting, his disqualification arises out of his carelessness or lack of prudence in the particular circumstances and not out of a mere failure to disclose a defect of title, much less a defect in the evidence of title, which rendered the title he had to offer less than complete"

…

“A Vendor's position for this purpose has to be ascertained as at the date when he enters into his contract.”

And so in many respects the concept of recklessness amounts to a failure of a duty to warn the purchaser in advance of entering into the agreement of purchase and sale that the vendor cannot (or may not) be able to evidence and deliver good title to the property, and such failure has to be because the vendor exercised carelessness or a lack of prudence in the particular circumstances (an "unacceptable indifference to the situation of a purchaser"). To put it another way, it is not that the vendor doesn't have good title, or has an evidentiary issue in proving good title, it is that it acted recklessly in inducing the purchaser to enter into the contract for good title, in the face of that known deficiency.

**The Modern Canadian Position on Good Faith is Established**

So far we have considered some of the pivotal developments in the case law, both British and Canadian, up to the 1960s. In this part of the discussion we will track what has happened in the Canadian courts in the last 40 years.

The discussion begins with *Mitz v. Wiseman*[[11]](#footnote-11). The Ontario High Court of Justice addressed arguments related to the degree of effort that a vendor put into answering valid requisitions, and whether having regard to that effort, its subsequent rescission of the contract amounted to bad faith. While the case does not add to the test in any way (it being acknowledged that the facts of each case determine its application), the decision is interesting because it points to certain things that a vendor need not resort to in evidencing its good faith exercise of its rescission right. Speaking of the vendor, the court stated:

"I do not believe that it is necessary for him to engage on an extensive and expansive law suit, or to commence mandamus proceedings….this would place the vendor in an intolerable position for at any moment, after a reasonable time, the purchaser could withdraw from his obligations on the ground that the sale was not being completed within a reasonable time".

It is also a helpful decision because the court expressly rejected that vendor has to evidence "best efforts" in resolving a valid requisition before exercising its right of rescission.

The good faith concept was developed a little further in 1982 in *Koccoris v. Cordery*[[12]](#footnote-12). Like some of the earlier cases, this was one in which the vendor had contracted to sell real estate, but had to compel his wife to bar dower in order to satisfy the purchaser's valid requisition. In assessing whether the "good faith" test in *Mason v. Freedman* was met, the court remarked that the vendor had "made real, honest, genuine, bona fide and reasonable attempts to get his wife to bar her dower", and that therefore he was “unable” to satisfy the requisition.

However, for further colour, the court also reaffirmed that the vendor has the right to be unwilling to satisfy the requisition, albeit a restricted right. Reaffirming *Mason v. Freedman*, the court stated:

"While the right to be unwilling is a restricted one in the sense pointed out by *Mason v. Freedman* there remains the right on the part of the vendor to decline the exercise of his will in favour of removing the objection. The clause cannot be used to make a valid agreement terminable at the defender's will, but it does leave him with a choice. In my opinion if he acts reasonably in making that choice then the clause is operative to render the transaction null and void."

And then in a manner curiously similar to *Mitz v. Wiseman*, the court confirmed that "a Court must be very careful before it says that a person is not genuinely attempting to fulfill his contractual obligations when he declines to make an application to a Court which could lead directly or indirectly to protracted litigation or an abatement of the purchase price".

In 1988, two decisions advanced our understanding of what the standard of performance is in order to assert that one is unable to satisfy a valid requisition:

1. In *Mink Printing Inc. v. K.J. Choi Ltd.*[[13]](#footnote-13), the court suggested what a minimum standard might be in evidencing that one acted in good faith when asserting that it was unable to satisfy a requisition. The court stated that a vendor must "at the very least, make a genuine effort to obtain what was necessary to carry out his contract". This is the first time that the notion of a "genuine effort" was suggested to be the minimum standard in this regard.

2. The discussion was advanced by a Master's decision in *777829 Ontario Ltd. v.616070 Ontario Inc*[[14]](#footnote-14)*,* (appeal refused by Ontario High Court of Justice), which considered a situation in which the purchaser requisitioned the removal from title of a certificate of pending litigation. The vendor brought an application for its removal that same day, and extended the closing date, but when the certificate was still not vacated by that extended closing date, refused to extend the closing date further, stating that it had used its best efforts to vacate the certificate by the closing date and was terminating the contract. The order to vacate the certificate was made by a court four days later. Although the vendor had stated that it had been unable to obtain the order by the closing date, the court found that, on the facts (and presumably the fact that the order happened on the heels of the termination), the vendor had been unwilling (and not unable). The purchaser argued that the vendor had sought an order that was returnable after the date that the vendor extended the closing date to, which indicated a lack of good faith. The trial judge considered *Freedman v. Mason*, and came to the conclusion that "in the absence of some binding authority as to how the "annulment clause" is to be applied in the circumstances of the within case, I am obliged to accept the plain meaning of the words of clause 12 of the agreement of purchase and sale"…and that those words "clearly allow an unwilling vendor, without qualification, to withdraw from the agreement in the circumstances of the within case”. Going further, the court went on to state that it was prepared to rely on the ruling in *McNiven v. Pigott* for the proposition that a vendor need not litigate to make good title where there was no collusion or deliberate failure by the vendor to cloud title.

What is interesting about this judgement is that, when one steps back from the facts, it appears that the vendor could have completed the transaction had it simply agreed to extend the closing date by a short time, in order for the process to run its natural course, but that it had deliberately extended the closing date to an earlier date just shy of when it would have been able to complete the process. What the court was apparently unwilling to do, was to find that the vendor had an obligation to act reasonably or in good faith when it came to granting extensions of closing in order to satisfy a valid requisition. As for the standard of behavior to evidence "good faith", the court stated: "No authority has been cited to me in support of the proposition that the defendant in the within action is obliged to do whatever is necessary (even "reasonably" necessary) to remove the cause of a requisition on title, when that cause (in this case a certificate of pending litigation) was unknown to him at the time of entering into the contract".

The fact that the court in 1988 at affirmed that a vendor does not have to do what is “reasonably necessary” to satisfy requisitions in order rely on the annulment clause, resonated five years later when, in *Grant v. Tiercel Digital Ltd.*[[15]](#footnote-15) the Ontario Court of Justice (General Division) considered a situation where the vacation of various construction liens from title was requisitioned. On the facts, the court found that the vendor had made "significant efforts" to settle the lien litigation and "at the very least were not standing idly by". And on the applicable standard of performance, the court stated that "it is apparent from the cases that it is the reasonableness of the vendor's efforts to satisfy the requisition that are important." The Ontario Court of Appeal[[16]](#footnote-16), dismissed the appeal but relied more broadly on the principle that the trial judge had concluded that the vendor had not acted in bad faith.

A light shone through the judicial fumbling as it relates to the recklessness test, when the Ontario Court of Justice, General Division, released its decision in *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd*[[17]](#footnote-17).

The court considered the judicial canon, both British and Canadian, on the rescission of real estate contracts, and provided us with the following pithy points, which can be considered to be “good law” in Canada today:

1. “the limitations on a vendor’s conduct are twofold, are independent of one another, and impose on a vendor separate and distinct duties which arise at different times in the transaction; the first being at the time that the Agreement of Purchase and Sale is entered into and the second being after an objection is made to the vendor’s title;”
2. “If the vendor has no knowledge of the title defect, or the purchaser does have knowledge of the title defect, whether actual or imputed, a Court is more likely to find that the first limitation does not apply. It will go on to consider the second limitation in order to decide whether the vendor did all that it could to make good the title before permits the vendor to repudiate the contract”; and
3. the Court confirmed that the test for ”recklessness” applies at the time the contract is entered into, but left open whether the test is that the vendor showed “unacceptable indifference” (the test in *Selkirk v. Romar*) or showed a “falling short” (the test from *Jackson v. Haden’s Contract*).

Unfortunately some decisions since 11 Suntract have potentially reinstated that judicial fumbling. For example, in *Progressive Recycling Inc. v. 1530937 Ontario Inc.*[[18]](#footnote-18), the Ontario Superior Court reverted to stating (or inferring) that the test at the time the contract is entered into may be determined solely on the basis of whether the vendor had brought about the deficiency. That is not the test. The test is recklessness.

However, there have been decisions that have worked to solidify *11 Suntract* and to summarize in better terms the law of the land today.

In *Toth v. Ho*[[19]](#footnote-19), the court added (or if not added, recharacterized) one important element of the consideration of whether a vendor can rely on the rescission clause. The court hived off “matters of conveyance” as being distinct from “matters of title” and stated that requisitions that are a matter of conveyance never lead to the right of rescission, because they are by nature matters that the vendor can compel the delivery of. The law has long recognized matters of conveyance as being subject to their own “bucket” of requisitions. The notion was that certain discharges of instruments (for example) are completely within the control of the vendor to obtain or deliver, and therefore the vendor cannot rely on the “unable or unwilling” concept in order to avoid delivering them on closing. In this case the court considered whether a requisition for the discharge of a closed mortgage was a matter of conveyance or a matter of title, and concluded that it was a matter then went to title because the vendor could not compel the discharge of a closed mortgage simply by redirecting closing funds to the mortgagee.

A reasonable summary of the current state of the law is contained in the 2015 decision in *Business Development Insurance Ltd. v. Caledon Mayfield Estates Inc.*[[20]](#footnote-20), which decision provides us with confirmation that the following long-determined principles of equity will govern a court’s determination:

1. “rescission is not readily available to a vendor who entered into the agreement recklessly and with full knowledge or his or her inability to remove a defect in title.” This is considered at the time the vendor enters into the agreement. If the vendor has no knowledge of the title defect, or if the purchaser does have knowledge of the title defect, whether actual or imputed, a court is more likely to find that this limitation does not apply.
2. “for a vendor to rely on the annulment clause in an agreement of purchase and sale, the vendor must exercise his rights reasonably and in good faith. This means that those rights must not be exercised in a capricious or an arbitrary manner.” This is considered at the time the vendor is asked by the purchaser to consider an objection to title. The court went to say that “the vendor is obligated to act in good faith and to make efforts to rectify the defect in title that has been raised by the purchaser. However the law does not require the vendor to engage in litigation to remove an objection to title”.
3. “A matter of conveyance was defined as an encumbrance which the vendor can compel and has a right to discharge. A matter of conveyance involves an element of control in the hands of the vendor to address the matter or thing to which the requisition applies, and to compel or insist on the performance of a legal right to discharge that matter or thing. If a vendor is not entitled as a right to discharge an encumbrance, it is an objection to title. It is an objection to title that allows a vendor to rely on the annulment clause or right of rescission in an agreement of purchase and sale”.

Although the foregoing three principles are now considered good law in Ontario, one must be careful when relying on the distinction between matters of conveyancing and matters of title. Most of the cases before *Toth v. Ho* were careful not to rely on this particular distinction when determining whether the rescission clause was available, in part (for example) because there may be matters that are entirely within the vendor’s control to compel, but that it may only compel at great cost (and which in the absence of this distinction, a court might have found the vendor to be acting in good faith in declining to do). And so while this is the law, now doubly affirmed, this author considers the matter not yet completely explored.

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1. *Dames v. Wood, In re* (29 Ch D 626; 54 L.J. Ch 771; 53 L.T. 177; 33 W.R. 685 [↑](#footnote-ref-1)
2. *Crabbe v. Little* 1907 CarswellOnt 604, 14 O.L.R. 631, 9 O.W.R. 551 [↑](#footnote-ref-2)
3. *Hurley v. Roy* 1921, CarswellOnt 243, 50 O.L.R. 281, 64 D.L.R. 375 [↑](#footnote-ref-3)
4. *Louch v. Pape Avenue Land Co* 1928 CarswellOnt 47, [1928] 3 D.L.R. 620, [1928] S.C.R 518 [↑](#footnote-ref-4)
5. *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412 [↑](#footnote-ref-5)
6. *Merrett v. Schuster*, [1920] 2 Ch. 210 [↑](#footnote-ref-6)
7. *Lavine v. Independent Builders Ltd.* (1932) CarswellOnt 72, [1932] 4 D.L.R. 569 [1932] O.R. 669 [↑](#footnote-ref-7)
8. *Freedman v. Mason* [1958] CarswellOnt 73, [1958] S.C.R. 483, 14 D.L.R. (2d) 529 [↑](#footnote-ref-8)
9. *Paulter Holdings Ltd. v. Karrys Investment Ltd.* [1961] CarswellOnt 122 [1961] O.R. 579, 28 D.L R. (2d) 642 [↑](#footnote-ref-9)
10. *Selkirk v. Romar Investments Limited* [1963] 1 W.L.R. 1415, [1963] 3 All ER 994 (94) [↑](#footnote-ref-10)
11. *Mitz v. Wiseman* [1971] CarswellOnt 192 [↑](#footnote-ref-11)
12. *Koccoris v. Cordery* [1982] CarswellOnt 683, [1982] O.J. No 2314, 20 A.C.W.S. (2d) 57, 28 R.P.R 75 [↑](#footnote-ref-12)
13. *Mink Printing Inc. v. K.J. Choi Ltd.* [1988] CarswellOnt 624, 2 R.P.R. (2d) 170, 55 D.L4th) 614, 66 O.R. (2d) 737 [↑](#footnote-ref-13)
14. *777829 Ontario Ltd. v.616070 Ontario Inc* [↑](#footnote-ref-14)
15. *Grant v. Tiercel Digital Ltd.* ([1993] CarswellOnt 602, 32 R.P.R. (2d) 51, 40 A.C.W.S. (3d) 369, 9 C.L.R. (2d) 1 [↑](#footnote-ref-15)
16. *Grant v. Tiercel Digital Ltd.* [1994] CarswellOnt 4539, 48 A.C.W.S. (3d) 1278 [↑](#footnote-ref-16)
17. *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd* (1997) CarswellOnt 4804, [1997] O.J. No. 5003, 15 R.P.R (3d) 201, 36 O.R. (3d) 328, 49 OTC 112, 76 A.C.W.S. (3d) 207) [↑](#footnote-ref-17)
18. *Progressive Recycling Inc. v. 1530937 Ontario Inc.*, (2007) CarswellOnt 4163 [↑](#footnote-ref-18)
19. *Toth v. Ho* (1998) CarswellOnt 5215 [↑](#footnote-ref-19)
20. *Business Development Insurance Ltd. v. Caledon Mayfield Estates Inc.* (2015) CarswellOnt 4290, 2015 ONSC 1978, 253 A.C.W.S. (3d) 489, 54 R.P.R. (5th) 300 [↑](#footnote-ref-20)