The Law Commission

Working Paper No. 98

Transfer of Land

The Rule in Bain v. Fothergill

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This Working Paper, completed on 30 April 1986, is circulated for comment and criticism only. It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments on this Working Paper before 30 November 1986. All correspondence should be addressed to:

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THE RULE IN BAIN v. FOTHERGILL

SUMMARY

In this Working Paper, the Law Commission examine, as part of our programme for the simplification of conveyancing, the rule of law that limits damages recoverable by a purchaser of land when the vendor cannot fulfil his contractual obligation to show a good title. We provisonally recommend that this rule, generally known as the rule in Bain v. Fothergill, should be abolished. Instead, the normal rules relating to recovery of damages should apply to all breaches of contract. The law relating to damages would in consequence be changed so that, unless the parties expressly agree otherwise, the vendor's liability to pay damages will not be reduced or removed because his breach of contract is occasioned by a defect in title.

All the proposals in this paper are merely provisional and its purpose is to obtain views on them, not only from practitioners and other legal experts, but also from the public.

THE LAW COMMISSION

ITEM IX OF THE FIRST PROGRAMME
TRANSFER OF LAND
THE RULE IN BAIN v. FOTHERGILL

PART I
INTRODUCTION

1.1 In Item IX of the First Programme, the Law Commission undertook to examine those areas of property law where reform would lead to the simplification of conveyancing. As part of that programme we are now examining the law relating to the recovery of damages by a purchaser of land when a breach of contract by the vendor is occasioned by his failure to make a good title. Broadly speaking, the law as it stands currently imposes a restriction on the damages recoverable in these circumstances. It has been suggested from time to time that this rule, generally known as the rule in Bain v. Fothergill[1], is inappropriate in modern conveyancing and can cause injustice.[2] Our initial view is that this criticism is valid. In addition, we consider the law to be uncertain in its application both in determining when the rule will apply and what the effect of the rule is when it does apply. We are therefore putting forward proposals for change. We would emphasise, however, that we have not formed any final views, and we hope that there will be wide-ranging discussion of our proposals.

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1 (1874) L.R. 7 H.L. 158.

2 For example, Angela Sydenham, "The Anomalous Rule in Bain v. Fothergill" (1977) 41 Conv. (N.S.) 341; Charles Harpum, "Bain v. Fothergill in Chains" [1983] Conv. 435; M.P. Thompson, "Bain v. Fothergill - An Unwarranted Relic" (1985) 82 L.S. Gaz. 2402. Cf. C.T. Emery, "In Defence of the Rule in Bain v. Fothergill" [1978] Conv. 338.

1.2 We should at the outset make clear the scope of this project. We are not concerned with the general law relating to remedies for breach of conveyancing contracts. Rather, we are concerned with the desirability of the exception to the general principles which is caused by the rule in Bain v. Fothergill. To this end, it is necessary to outline briefly the general principles governing the award of damages in conveyancing, in order to assess the operation of the rule. It may be that other aspects of the law relating to remedies require examination, and we would be pleased to receive views on this. In making our provisional recommendation that the rule should be abrogated, we have sought to have regard to the practical consequences that will flow from this change in the law, and so we should be glad if any unforeseen consequences were pointed out to us.

1.3 The Law Commission is extremely grateful to Mr Mark Thompson LL.B., LL.M., Lecturer in Law at Leicester University, who, at the request of the Commission, undertook further research into this topic and prepared this working paper. The Commission have considered and approved all the views and proposals contained in the paper and are pleased to adopt them as the views and proposals of the Commission.

The recovery of damages for breach of conveyancing contracts

1.4 Apart from the rule in Bain v. Fothergill, the principles governing the recovery of damages in conveyancing are those which apply in the law of contract generally. The general aim of damages in contract was stated by Parke B., who said:

> "The rule of the common law is, that where a person sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[3]

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3 Robinson v. Harman (1848) 1 Exch. 850, 855.

1.5 Little need be said about recovery of damages by the vendor, when it is the purchaser who is in breach of contract, as the vendor is not affected by the rule in Bain v. Fothergill. It will suffice simply to say that the vendor will recover the difference between the contract price and the present value of the land, assuming the former to be greater. Although this difference may be a considerable sum,[4] in practice the vendor is content, subject to the court's discretion under section 49(2) of the Law of Property Act 1925, simply to forfeit the deposit.

1.6 So far as the purchaser is concerned, in situations where the damages recoverable are unaffected by Bain v. Fothergill, the principle articulated by Parke B. is generally applied.[5] The principle is limited by the normal rules relating to remoteness of damage and mitigation of loss. In cases where the purchaser is suing to recover for his loss of bargain, his claim will be for the difference between the contract price and the current market value of the land assuming, as will often be the case, that the latter figure is higher, and, in addition, for any loss of profits caused by his inability to use the land in the way he intended.

1.7 With regard to the former head of damages, few problems arise. The task of assessing the current market value of the land is essentially a matter of valuation. In performing this task, if the property is resold at an increased price, then the second figure will be taken as prima facie evidence of the market value.[6] An important issue, however, particularly when house prices are rising rapidly, is the date at which damages are assessed. This problem was well illustrated by the facts of

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4 Re Scott and Alvarez's Contract [1895] 2 Ch. 603.

5 For the recovery of damages, to compensate for expenditure incurred under the contract, see below, paras. 1.14-1.20.

6 Engell v. Fitch (1869) L.R. 4 Q.B. 659. See Barnsley's Conveyancing Law and Practice 2nd ed., (1982), p. 589.

Wroth v. Tyler.[7] The contract price for the sale of a house was £6,000. At the date when completion was to take place, the house was worth £7,500 but by the date of the hearing it had risen to £11,500. Megarry J. held that, at common law, damages fell to be assessed at the date of breach, which would entitle the plaintiffs to only £1,500. To avoid this result, he awarded damages in lieu of specific performance under section 2 of the Chancery Amendment Act 1858[8] in order to assess them as at the date of the hearing.

1.8 The approach taken in Wroth v. Tyler was rejected, however, by the House of Lords in Johnson v. Agnew.[9] Lord Wilberforce expressed the view that, apart from cases where damages can only be awarded in equity, for example, upon breach of a restrictive covenant, the principles of assessment of damages are the same in law and at equity.[10] He went on to say, however, that there was no inflexible rule that damages had to be assessed at the date of breach. He expressed the view that:

> "In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."[11]

Hence the relevant date for assessment of damages is when the contract is lost.[12]

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7 [1974] Ch. 30. The case is discussed further below, Part II, para. 2.22.

8 See now the Supreme Court Act 1981, s. 50.

9 [1980] A.C. 367.

10 Ibid., at p. 400.

11 Ibid., at p. 401.

12 See Domb v. Isoz [1980] Ch. 548; J.T. Farrand, Contract and Conveyance 4th ed., (1983), p. 212.

1.9 With regard to lost profits, the major hurdle which the plaintiff faces is to establish that the loss is not too remote. The resolution of this question will depend upon the application of the principles first enunciated in Hadley v. Baxendale[13] as being:

> "the damages ... should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."[14]

1.10 In the present context, it is the second of these rules that is in issue. That rule was itself subjected to considerable examination by the House of Lords in Koufos v. C. Czarnikow Ltd.[15] as a result of which the latest statement of the principle is in slightly different terms. The rule relating to remoteness of damages is now:

> "that to be recoverable in an action for damages for breach of contract the plaintiff's loss must be such as may reasonably be supposed would have been in the contemplation of the parties as a serious possibility had their attention been directed to the possibility of the breach which has, in fact, occurred."[16]

1.11 In the conveyancing context, this principle has been applied strictly in so far as recovery for lost profits is concerned. In Diamond v.

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13 (1854) 9 Exch. 341; Victoria Laundry (Windsor) Ltd. Newman Industries Ltd. [1949] 2 K.B. 528.

14 (1854) 9 Exch. 341, 354, per Alderson B. See generally, G.H. Treitel, The Law of Contract 6th ed., (1983), pp. 726-734.

15 [1969] 1 A.C. 350.

16 H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd. [1978] Q.B. 791, 806, per Scarman L.J.

Campbell-Jones[17] the plaintiff had contracted to purchase leasehold property in Mayfair. This property was ripe for development and the plaintiff had for many years carried on business as a dealer in real estate and had previously bought and converted many houses in central London. Although the plaintiff claimed in his affidavit that his purpose in acquiring the property was to develop it by subdividing it, damages for loss of profits that would have been gained by converting the property were not recoverable. Buckley J. held that the defendant did not know that the plaintiff was in fact going to convert the property himself. Nor should such knowledge be imputed to him:

> "The vendor of a shop equipped for use as a butcher's shop would not ... be justified by that circumstance alone in assuming, and ought not to be treated as knowing, that the purchaser would intend to use it for the business of a butcher rather than that of a baker or candlestick-maker .... Special circumstances are necessary to justify imputing to a vendor of land a knowledge that the purchaser intends to use it in any particular manner."[18]

1.12 The special circumstances referred to by Buckley J. seem to mean simply that the vendor knows, at the time of the contract, that the purchaser has a specific plan in mind to develop the land profitably. Thus in Cottrill v. Steyning and Littlehampton Building Society[19] the plaintiff recovered damages for lost profits on development, when the vendor breached the contract knowing of the plaintiff's development plans. It can be said, therefore, that the increase of price of land from the date of the contract is damage flowing naturally from the vendor's breach of contract, whereas lost profits stemming from the purchaser's inability to use the land must be within the contemplation of the parties to be recoverable: the vendor must actually know of the use to which the purchaser plans to put the land.

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17 [1961] Ch. 22.

18 Ibid., at p. 36.

19 [1966] 1 W.L.R. 753.

1.13 In cases where the purchaser is claiming damages for breach of contract, he is under the duty imposed generally by the common law to mitigate the loss he has suffered.[20] This principle indeed applies equally to both parties and in practical terms is more likely to affect the quantum of damages obtained by the vendor. Thus if he has contracted to lease a building to a purchaser, on the purchaser's breach of contract, the damages may be affected by the vendor's ability to let elsewhere.[21] So far as the purchaser is concerned, the duty to mitigate does not significantly affect the recovery of damages. In Strutt v. Whitnell[22] the defendants had contracted to sell a house with vacant possession. At completion, however, it was occupied by a Rent Act protected tenant. On an action for breach of contract, the Court of Appeal rejected the vendors' argument that they were entitled simply to repurchase the property at the contract price. Rather the purchaser was entitled to retain the property and recover, as damages, the difference between the value of the land with and without vacant possession.

Actions for recovery of expenditure

1.14 The foregoing principles with regard to the recovery of damages, where compensation is sought for loss of the bargain, presuppose that the purchaser has made a good bargain. If a purchaser has contracted to buy a house for his own occupation at a time when house prices are static, there will be no difference between the contract price and the market value of the property. Neither will there be any lost profits on a proposed use of the land. In these circumstances no damages will be recoverable for loss of bargain, and yet the purchaser will be out-of-pocket, having incurred conveyancing and possibly other expenses. The question which then arises is whether the purchaser can opt to recover

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20 Payzu Ltd. v. Saunders [1919] 2 K.B. 581.

21 See Techno Land Improvements Ltd. v. British Leyland (U.K.) Ltd. (1979) 252 E.G. 805.

22 [1975] 1 W.L.R. 870.

damages to compensate him for this expenditure: his expense incurred in reliance on the contract.[23]

1.15 The first judicial acceptance of the view that such expenditure could be recovered as an alternative to damages for loss of bargain, appears to have been in Wallington v. Townsend[24] where damages were not sought for loss of bargain after default by the vendor. Morton J. ordered that the deposit with interest be returned and that the vendor compensate the purchaser for expenses incurred pursuant to the contract. The leading decision in this area is that of Brightman J. in Lloyd v. Stanbury.[25] The purchaser, to the vendor's knowledge, had contracted to buy land for use as a poultry farm. A dispute ensued concerning how much land was to be included in the contract, as a result of which the contract was terminated and the purchaser claimed damages. No claim was made for loss of profits; instead the claim was for expenditure actually incurred by him.

1.16 Brightman J., in awarding damages to the purchaser for wasted expenditure, distinguished carefully what items of damage could be recovered. He held that expenses incurred by the plaintiff in anticipation of performing his contractual obligation to build a bungalow on the land were recoverable. As a matter of principle, he was "entitled to recover ... expenditure incurred prior to the contract representing (1) legal costs of approving and executing the contract and (2) the costs of performing an act required to be done by the contract notwithstanding

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23 For a full discussion of this and other related issues, see Lon L. Fuller and William R. Perdue, "The Reliance Interest in Contract Damages" (1936-37) 46 Yale L.J. 52, 373. See too A.S. Burrows, "Contract, Tort and Restitution - A Satisfactory Division or Not?" (1983) 99 L.Q.R. 217.

24 [1939] Ch. 588. For a fuller exposition, albeit not in a conveyancing context, see Cullinane v. British "Rema" Manufacturing Co. Ltd. [1954] 1 Q.B. 292.

25 [1971] 1 W.L.R. 535.

that the act is performed in anticipation of the execution of the contact. In addition the buyer is entitled on general principles to damages for any other loss which ought to be regarded as having been within the contemplation of the parties."[26]

1.17 The only limitation on recovery of these damages is that expense incurred in improving the property will not normally be recoverable. This is because it is not usually anticipated that a purchaser let into possession prior to completion will effect improvements to the property at that stage and, secondly, if he is treating the contract as repudiated, he is not entitled to increase the loss suffered.

1.18 This important decision establishes two things. First, the principles governing remoteness in the context of recovery of expenditure incurred in reliance on the contract are the same as those governing damages for loss of bargain. This is illustrated by Wadsworth v. Lydall[27] where the plaintiff agreed to surrender his tenancy to the defendant for £10,000. In reliance on this contract, he contracted to purchase property from a third party for the same sum, the two completion dates being synchronised. The defendant delayed considerably in paying the £10,000 and, as a result, the plaintiff had to take out a mortgage to finance his own purchase. The Court of Appeal held that as the defendant either knew or ought to have known that the plaintiff would need to acquire another property and would also need to borrow money to finance the purchase if there was delay, the defendant was liable to pay the additional expense incurred, namely the interest paid and the arrangement fee on the mortgage.

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26 Ibid., at p. 546.

27 [1981] 1 W.L.R. 598.

1.19 A more controversial aspect of the decision in Lloyd v. Stanbury was that damages could be recovered with regard to pre-contract expenditure.[28] This statement of the law was, however, approved by the Court of Appeal in Anglia Television Ltd. v. Reed[29] where it was held that the plaintiff could recover for such expenditure provided that it was reasonably in the contemplation of the parties as likely to be wasted if the contract were to be broken. In the conveyancing context, the most likely item of pre-contract expenditure to be claimed in a domestic transaction would be, in addition to legal fees, the cost of a survey.[30] Such expenditure will, in practice, only be incurred when the parties have agreed on the transaction "subject to contract" and thus be in substantial agreement as to the terms of the contract.[31] In addition, the vendor will inevitably know that this expenditure is being incurred, as access to the property will have to be arranged with him. Thus the purchaser would, in principle, be able to recover the cost of his survey when claiming damages under the principles of Lloyd v. Stanbury. In other conveyancing transactions, it is not unusual for the contract to be dependent on development being possible. In such cases, the purchaser may well incur expense in obtaining planning permission. Again, it would seem to follow from Lloyd v. Stanbury that such pre-contract expenditure could be recovered.

1.20 It is important to realise that the recognition of this new head of damages does not entitle a purchaser to claim damages both for his loss of bargain and for his wasted expenditure. As was said in Anglia

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28 Criticised in McGregor on Damages 14th ed., (1980), p. 507.

29 [1972] 1 Q.B. 60. Perestrello & Companhia Limitada v. United Paint Co. Ltd., The Times, 16 April 1969, to the contrary, was disapproved.

30 See further, Part II, para. 2.16.

31 See A.I. Ogus, "Damages For Pre-Contract Expenditure" (1972) 35 M.L.R. 423, 425.

Television Ltd. v. Reed, the purchaser "can either claim for loss of profits; or he can claim for his wasted expenditure. But he must elect between them. He cannot claim both."[32] This is because if he claims loss of profits, he is seeking to be put into the position he would have been in had the contract been performed; ex hypothesi, therefore, such expenditure would have been incurred.[33] Conversely, damages for loss of expenditure seek to put the purchaser in the position he was in before entering the contract and consequently loss of profits are necessarily excluded. An additional limitation is that the purchaser cannot recover damages for wasted expenditure when he has simply made a bad bargain. In other words, he is not to be awarded damages where that would place him in a better position than he would have been in had he never entered into the contract.[34] If, however, he merely cannot show for certain that a profit would have been made on the contract, the purchaser has an unfettered right to opt for damages for wasted expenditure.[35]

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32 [1972] 1 Q.B. 60, 63-64, per Lord Denning M.R.

33 Re Daniel [1917] 2 Ch. 405, 412, per Sargant J. Cf. the unusual case of Ridley v. De Geerts [1945] 2 All E.R. 654.

34 C. & P. Haulage v. Middleton [1983] 1 W.L.R. 1461.

35 C.C.C. Films (London) Ltd. v. Impact Quadrant Films Ltd. [1985] Q.B. 16, 32, per Hutchison J.

PART II

THE RULE IN BAIN v. FOTHERGILL

2.1 Having summarised the general principles relating to the recovery of damages pursuant to the breach of a contract for the sale of land, it is now necessary to examine the impact on these principles of the rule in Bain v. Fothergill.[1] The scheme of this Part of our Working Paper is first to consider in what circumstances the rule will apply and the consequences of its application. Consideration will then be given in Part III to the rationale of the rule and, in particular, whether this rule can still be justified in current conditions. This will entail consideration of how other common law jurisdictions have dealt with this issue. Finally, provisional proposals for reform will be made.

2.2 The naming of the rule as the rule in Bain v. Fothergill is customary but technically inaccurate, in that the rule itself originated nearly one hundred years earlier. In Flureau v. Thornhill[2] the vendor was unable to make a good title. He offered the purchaser the option of taking the title with all its faults or recovering his deposit with interest. The purchaser instead sought damages for the loss of the good bargain he had made. This claim was rejected. No reasons were given, however, De Grey C.J. simply asserting that:

> "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost."[3]

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1 (1874) L.R. 7 H.L. 158.

2 (1776) 2 Wm. Bl. 1078.

3 Ibid. See also Blackstone J. at pp. 1078-1079.

2.3 This statement of principle in Flureau v. Thornhill was applied in a number of nineteenth century cases. For example, in Walker v. Moore,[4] the plaintiff had contracted to buy land from the defendant who delivered an abstract showing a good title. Before the title was verified, the plaintiff contracted to re-sell various portions of the land at a considerable profit. It was subsequently discovered that the title was defective, and thereupon the sub-purchasers refused to complete and the plaintiff also refused to complete the purchase from the defendant. In an action for damages, the plaintiff sought to recover his own expense in investigating title, the profit that would have accrued from the re-sale and the expense attending the re-sale, including the expenses he had had to pay to the sub-purchasers. It was held that the plaintiff was limited to the recovery of his own expenses in investigating title and for nominal damages for loss of bargain, with no other damages being awarded.

2.4 The rule in Flureau v. Thornhill, which precluded a purchaser from recovering damages for loss of bargain when the contract went off owing to a defect in the vendor's title, was a severe limitation on the ordinary rules governing damages. It was not, however, applied universally, but instead had exceptions engrafted onto it. Of these exceptions, the earliest to be recognised was that the rule did not apply if the vendor had no title to the land at all. In Hopkins v. Grazebrook[5] the vendor contracted to sell land at auction without at that time having the legal title to it. Upon his inability to acquire the legal title, he declined to pay as damages any sum for loss of profit by the purchaser. It was held, however, that he was liable to pay such damages. A distinction was drawn between cases where the vendor could convey only an imperfect title and cases where he could convey no title at all. Although doubts were cast on whether the rule in Flureau v. Thornhill should in any event

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4 (1829) 10 B. & C. 416. See also Pounsett v. Fuller (1856) 17 C.B. 660; Sikes v. Wild (1863) 4 B. & S. 421.

5 (1826) 6 B. & C. 31.

be accepted as a general principle of law,[6] it was held that it only applied to the former situation and not to the latter.

2.5 The decision in Hopkins v. Grazebrook was regarded as controversial[7] and, as will be seen, failed to survive the restatement of the rule in Bain v. Fothergill. The other exceptions were less controversial. The limitation on the recovery of damages is only applied if the conveyancing problem is a matter of title rather than a matter of conveyance. Thus, in Engell v. Fitch[8] mortgagees exercising a power of sale were held liable to pay damages for loss of bargain to the purchaser on their failure to give vacant possession. That failure to complete was caused not by an inability to make title, but by not taking the requisite steps to perfect it, and therefore full damages were recoverable. The remaining exception is that the rule was applied only to cases where the contract was uncompleted. If the purchaser sued on the covenants for title then, for no convincing reason, the rule was held to be inapplicable.[9] It is, however, difficult to see the reason for this exception, which is not generally recognised in those jurisdictions in the United States where the rule is applied.[10]

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6 Ibid., at p. 33, per Abbott C.J.

7 See Sugden's Vendor and Purchaser of Estates 14th ed., (1862), pp. 358-364 where Flureau v. Thornhill is strongly supported and Hopkins v. Grazebrook strenuously criticised.

8 (1869) L.R. 4 Q.B. 659.

9 Lock v. Furze (1866) L.R. 1 C.P. 441.

10 See A.I. Ogus, The Law of Damages (1973), p. 300; Law Reform Commission of British Columbia, Report on The Rule in Bain v. Fothergill (1976) p. 11.

Bain v. Fothergill

2.6 The rule in Flureau v. Thornhill was not regarded as a settled part of English law, partly because of the doubts expressed in Hopkins v. Grazebrook. In addition, if the case did accurately state the law, the question arose as to whether the exceptions to it were themselves valid. These matters arose for consideration in the leading case of Bain v. Fothergill. The case concerned a contract to assign a mining lease. The vendor required a licence to assign which ultimately could not be obtained. The purchaser then sued for damages and the issue was whether he could recover more than simply the expenses he had incurred. The House of Lords summoned the judges for advice and then reaffirmed the rule in Flureau v. Thornhill.[11] That rule has ever since this case been known as the rule in Bain v. Fothergill. The rule was stated in the following terms by Lord Chelmsford:

> "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."[12]

2.7 This passage, it will be observed, is in terms inconsistent with Hopkins v. Grazebrook which was expressly overruled.[13] The status of the other exceptions was unaffected, however; one being approved and the other not being mentioned. The rationale of Flureau v. Thornhill was explained by Lord Hatherley, who said:

> "the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale

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11 Three members of the House of Lords were originally empanelled to hear the case but Lord Colonsay died prior to judgment being delivered. Of the judges summoned to give advice, Martin B. retired before any opinions were given.

12 (1874) L.R. 7 H.L. 158, 207.

13 Ibid., at p. 207, per Lord Chelmsford; at p. 213, per Lord Hatherley.

> of real estates, it is recognised on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating that matter."[14]

2.8 This statement of principle refers to the vendor being incapable of making a good title. This necessarily refers to matters of title rather than matters of conveyance so that Engell v. Fitch remained as good law. The exception established in Lock v. Furze, that the rule applies only to executory rather than executed contracts, was not, however, mentioned. In cases subsequent to Bain v. Fothergill it has been held that normal contractual damages can be obtained when an action is brought after the completion of the contract where it subsequently transpires that there is a defect in the vendor's title.[15] It therefore seems well settled that the rule applies only to contracts which have not been completed.

2.9 The statement that the vendor must be incapable of making good title has continually given difficulty since the decision in Bain v. Fothergill. The problems involved concern distinguishing between matters of title and matters of conveyance and establishing how hard the vendor must try to clear his title in order to obtain the protection of the rule. These questions will be considered shortly. First, however, the effect of the rule, when it is applied, must be ascertained.

2.10 To determine the effect of the rule, it is at this stage necessary to pay some attention to the principle upon which it is based. When the rule was originally stated, a rationale given for it by Blackstone J. was that:

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14 Ibid., at pp. 210-211. See also Lord Hatherley at p. 209.

15 Baynes & Co. v. Lloyd & Sons [1895] 2 Q.B. 610; Beard v. Porter [1948] 1 K.B. 321.

> "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected."[16]

2.11 This statement of principle is potentially misleading. One interpretation of it is that the vendor showing a good title is a condition precedent to the formation of the contract. This view of the rule cannot, however, be sustained. If it was correct, then the damages recoverable by the purchaser would be limited solely to the recovery of money paid under a void contract. Consequently, the purchaser would be unable to recover his costs in investigating title. Yet this has always been held to be a recoverable head of damages. In addition, if the vendor showing a good title was a condition precedent to the formation of a contract, then the purchaser would be unable to elect to take such title as the vendor may have. Because of this, it is incorrect to see the basis of the rule as being that land contracts are subject to a condition that the vendor has a good title.[17]

2.12 Although other reasons for the rule have been advanced,[18] the most convincing is that, because of the uncertainty surrounding contracts for the sale of real property, there is implied into them what is, in effect, an exclusion clause which precludes the purchaser from obtaining more than nominal damages for his loss of bargain. This is borne out by the explanation of the rule in Walker v. Moore,[19] that:

> "In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the

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16 Flureau v. Thornhill (1776) 2 Wm. Bl. 1078, 1078-1079.

17 Bain v. Fothergill (1874) L.R. 7 H.L. 158, 210, per Lord Hatherley. See also C.T. Emery, "In Defence of the Rule in Bain v. Fothergill" [1978] Conv. 338, 338-339.

18 See below, Part III, paras. 3.4-3.16.

19 (1829) 10 B. & C. 416, 423, per Parke J.

ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

2.13 That the rule in Bain v. Fothergill is an implied liquidated damages clause excluding damages for loss of bargain has two results. First, it would seem that if the parties choose to do so, they can expressly exclude the operation of the rule. Thus if the parties expressly agree on a liquidated damages clause in the event of breach of contract by the vendor, the rule will be excluded.[20] The use of such a clause is not, however, normal practice in England. Secondly the question has to be raised as to the amount of damages obtainable when the rule does apply.

2.14 As has been seen, the modern rules relating to the recovery of damages permit the purchaser to elect whether he claims damages for his loss of bargain or damages to place him in the position which he would have been in had the contract not been entered into.[21] The rule in Bain v. Fothergill excludes the purchaser from obtaining damages for loss of bargain; it may well be that it leaves unaffected the purchaser's right to claim in full for expenses incurred in reliance on the contract. Given that modern case law establishes that pre-contractual expenditure can be recovered when the parties are in substantial agreement, then items such as a survey would appear to be recoverable.[22]

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20 Knapp v. Carley (1904) 3 O.W.R. 940; Law Reform Committee of British Columbia op. cit., p. 13.

21 See above, Part I, paras. 1.14-1.20.

22 M.P. Thompson, "The Impact of Bain v. Fothergill on Raineri v. Miles" [1982] Conv. 191, 195-197. See also Deverell v. Lord Bolton (1812) 18 Ves. 505, 515, criticised in Sugden op. cit., p. 363. Such expenditure would seem to be recoverable in Ireland when the rule applies: McQuaid v. Lynam [1965] I.R. 564, 574, per Kenny J.

2.15 It has been doubted whether such damages could be recovered when the rule is applied.[23] This is based on normal statements of the rule being to the effect that the purchaser "can recover the expenses he has been put to in investigating title, and what I may call proper conveyancing expenses, but nothing more".[24] It may be commented, however, that when such sentiments were expressed, there was no possibility of pre-contractual damages being obtained.[25] In addition, a pre-contract survey was regarded as premature; but if carried out after a good title had been shown on the abstract, then the expenditure incurred on this could be recovered, even if the rule applied.[26]

2.16 In modern conveyancing, it is normal practice that a professional person inspects the property prior to the contract being entered into. The nature of this inspection, however, varies. Where the purchase is to be financed by a building society mortgage, it is the invariable practice for a valuation report to be prepared. There is evidence that, in domestic conveyancing, some 90 per cent of purchasers rely exclusively on this report.[27] The cost of it is borne by the purchaser as, of course, is a survey commissioned solely for his own purpose. This type of expenditure will, in the majority of cases, be known to the vendor, with whom access to the property must be arranged. If the effect of the rule is simply to deny the purchaser damages for loss of bargain, such expenditure should, in principle, be recoverable. In the commercial

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23 Charles Harpum, "Bain v. Fothergill in Chains" [1983] Conv. 435, 435-437.

24 Jones v. Gardiner [1902] 1 Ch. 191, 195, per Byrne J.

25 Hodges v. Earl of Litchfield (1835) 1 Bing. (N.C.) 492, 499.

26 Williams on Vendor and Purchaser 4th ed., (1936), p. 1022. See also p. 1021 for a list of expenditure items that were recoverable.

27 Yianni v. Edwin Evans & Sons [1982] Q.B. 438, 455, per Park J.

setting surveys may be less common. In principle, however, provided that this type of expenditure is known by the vendor, it should also be recoverable.

2.17 If the true effect of the rule is simply to preclude recovery of damages for loss of profit, then in cases where completion is delayed owing to a defect in title damages may still be substantial, if, for example, the purchaser now has to move into temporary accommodation and place his furniture in storage. The quantum of damages recoverable in these circumstances is unclear, not least because, until the recent House of Lords decision in Raineri v. Miles,[28] it was not finally settled that a purchaser could obtain damages at all if there was a delay in completion when time was not of the essence of the contract.

2.18 In Rowe v. School Board for London[29] damages were claimed for breach of contract arising out of a delay in completion occasioned by a defect in title. Kekewich J. held that Bain v. Fothergill applied and consequently damages were not recoverable. It should be pointed out, however, that the judge thought that the damages claimed might be too remote and in any event seemed to represent a lost opportunity of using the land to be sold. As such, therefore, the case is weak authority for denying a purchaser damages to compensate him for expenditure arising out of delayed completion in circumstances when the rule applies. It is true that in Raineri v. Miles views were expressed that the rule would preclude damages from being obtained in the event of delayed completion.[30] These views were, however, entirely obiter, no argument at all being presented as to the assessment of contractual damages.

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28 [1981] A.C. 1050.

29 (1887) 36 Ch. D. 619.

30 [1981] A.C. 1050, at p. 1086, per Lord Edmund-Davies; at p. 1094, per Lord Fraser of Tullybelton. See also Jones v. Gardiner [1902] 1 Ch. 191; Phillips v. Lamdin [1949] 2 K.B. 33.

2.19 It seems, therefore, that it is not certain what heads of damage a purchaser can claim when the rule applies. It has always been accepted that the purchaser can recover his conveyancing expenses, which are part of his reliance interest.[31] Subject to the principles governing remoteness of damage, there seems to be no reason to limit him to recovering those expenses alone. On the other hand, however, it might be that, owing to the weight of authority, a purchaser is so limited and that the effect of the rule is not merely to preclude damages being obtained for loss of bargain, but also to limit severely recovery of damages with respect to the reliance interest. As the point has yet to be raised squarely in the courts, this important question must be regarded as unanswered.

When does the rule apply?

2.20 In Bain v. Fothergill, Lord Hatherley expressly distinguished contracts involving realty from contracts for the sale of goods.[32] The rule has only ever applied to contracts involving land, but has not been limited to cases involving contracts to sell a freehold interest. In addition to such contracts, included in the rule are contracts to grant a lease,[33] options to purchase[34] or to renew a lease,[35] as well as contracts relating to easements[36] or profits à prendre.[37] Provided that the

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31 See above, para. 2.14.

32 (1874) L.R. 7 H.L. 158, 211.

33 J.W. Cafés Ltd. v. Brownlow Trust Ltd. [1950] 1 All E.R. 894.

34 Wright v. Dean [1948] Ch. 686.

35 Gas Light and Coke Co. v. Towse (1887) 35 Ch. D. 519.

36 Rowe v. School Board for London (1887) 36 Ch. D. 619.

37 Pounsett v. Fuller (1856) 17 C.B. 660.

subject-matter of the contract involves land, the rule is potentially applicable.[38]

2.21 As was stated in Bain v. Fothergill itself, the rule only applies so as to limit the vendor's liability to pay damages where there is a defect in title, as opposed to a matter of conveyance,[39] adversely affecting the property. A matter of title is something which detracts from the vendor's ownership and is not capable of being rectified as of right by the vendor. Conversely, a matter of conveyance can be rectified by the vendor without requiring the consent of any other person.[40] Thus if a licence to assign is required by the vendor, this cannot be obtained as of right and is therefore a matter of title to which the rule applies if such consent cannot be obtained.[41] Similarly, if one co-owner contracts to sell the property without the other's consent and that consent cannot be secured, this too is a matter of title and the rule is applicable.[42] To be contrasted with such defects in title are matters which can be dealt with by the vendor as of right. In Re Daniel[43] the vendor had insufficient funds to redeem a mortgage affecting the property. As he could, in theory, if not in practice, insist on the removal of the defect, it was held that the rule did not apply.

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38 See Morgan v. Russell & Sons [1909] 1 K.B. 357. (Slag and cinders had become part of the land.)

39 (1874) L.R. 7 H.L. 158, 209, per Lord Hatherley. See too Barnes v. Cadogan Developments Ltd. [1930] 1 Ch. 479, 488, per Farwell J.

40 Farrand op. cit., p. 92.

41 Bain v. Fothergill, above; Vangeen v. Benjamin (1976) 239 E.G. 647.

42 Keen v. Mear [1920] 2 Ch. 574.

43 [1917] 2 Ch. 405; Thomas v. Kensington [1942] 2 K.B. 181; Leominster Properties Ltd. v. Broadway Finance Ltd. (1981) 42 P. & C.R. 372.

2.22 Some doubt was cast on this dichotomy, however, by the decision in Wroth v. Tyler.[44] At a time of rapidly escalating house prices, the defendant contracted to sell his house to the plaintiffs for £6,000. After exchange of contracts, the defendant's wife lodged a caution to protect her statutory right of occupation under the Matrimonial Homes Act 1967,[45] with the consequence that the vendor was unable to fulfil his contractual obligations to give vacant possession. Despite the vendor being unable to remove this caution as of right, Megarry J. held that the rule was inapplicable and awarded substantial damages for loss of bargain. The learned judge took the view that the statutory charge was "highly idiosyncratic" and therefore outside the spirit of the rule.[46] Despite this refusal to apply the rule being described by one commentator as "most welcome",[47] it does, it is submitted, cast doubt on the principles on which the rule is applied. We would agree with those critics who see the refusal to apply the rule to these facts as stemming from the judge's dislike of the rule, rather than a correct application of the principles upon which it is based.[48]

2.23 The fact that the vendor, at the time of contracting, knows that he has not got a good title nor the means of acquiring it will not, of itself, make the rule inapplicable. This was stated in terms by Lord

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44 [1974] Ch. 30.

45 See now Matrimonial Homes Act 1983. Protection of a spouse's right of occupation against a registered title must now be by notice only, not by caution - section 2(9).

46 [1974] Ch 30, 56.

47 D.G. Barnsley, "Conveying the Matrimonial Home - Some Problems Facing Solicitors and their Clients" (1974) C.L.P. 76, 78.

48 R.J. Smith, "Matrimonial Homes Act 1967 - Worth the Trouble?" [1973] C.L.J. 223, 225; H.W. Wilkinson, "The Effect of a Defect in Title" (1973) 123 N.L.J. 393; C.T. Emery, "In Defence of the Rule in Bain v. Fothergill" [1978] Conv. 338, 339; A.J. Oakley, "Pecuniary Compensation for Failure to Complete a Contract for the Sale of Land" [1980] C.L.J. 58, 69.

Chelmsford, who went on to say that other damages could only be obtained by bringing an action in deceit.[49] This as a statement of principle is both misleading and too narrow. It is misleading because what the rule prevents is the recovery of damages for loss of bargain, and this type of damages is not obtainable in an action for deceit. Damages in deceit are to put the plaintiff in the position he would have been in had the tort not been committed, not to put him in the position he would be in were the contract completed.[50] Consequently, the effect of fraud by the vendor is generally thought simply to be the removal of the bar imposed by the rule rather than the foundation of a separate cause of action. It is also too narrow, in that it is now clear that it is not necessary for the purchaser to show that the vendor was fraudulent; it is sufficient to show that the vendor has not used his best efforts to convey what he has contracted to convey.

2.24 The requirement that the vendor must use his best efforts to make a good title if he is to enjoy the protection of the rule has frequently proved difficult to apply.[51] The leading case which establishes this principle is Day v. Singleton.[52] A vendor contracted to assign a lease. He died before a licence to do so could be obtained. The vendor's personal representative was anxious to free the estate from the

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49 Bain v. Fothergill (1874) L.R. 7 H.L. 158, 207. See too, J.W. Cafés Ltd. v. Brownlow Trust Ltd. [1950] 1 All E.R. 894, 897, per Lord Goddard C.J.

50 McGregor op. cit., p. 498; Law Reform Commission of British Columbia, op. cit., p. 8. See further the discussion of the Misrepresentation Act 1967, below, paras. 2.29-2.35 and A.V.G. Management Science Ltd. v. Barwell Developments Ltd. (1979) 92 D.L.R. (3d) 289, 291, per Laskin C.J.C.

51 In Bain v. Fothergill itself, Denman J., while approving of the rule, thought it should not be applied on the facts: (1874) L.R. 7 H.L. at p. 184.

52 [1899] 2 Ch. 320. Cf. the surprising decision in Compton v. Bagley [1892] 1 Ch. 313.

contract and, to this end, persuaded the lessor to refuse his consent to the assignment. It was held that damages were not limited by the rule. The case was not decided, however, solely on the basis that the personal representative had dissuaded the lessor from giving his consent. Instead, the principle was said to be that the duty was on him to show he had used his best endeavours to obtain that consent.[53] Even if those endeavours would ultimately prove to be unsuccessful, the vendor had to make genuine attempts to remedy the defect, or else full damages could be obtained.

2.25 In applying this general principle, the courts have not gone to the length of insisting that the vendor embark on speculative litigation to perfect his title.[54] Where the vendor's right to clear the title is not speculative, however, then it would seem that active steps to do so are necessary.[55] It may well be unclear to the vendor into which category he falls. Leaving aside the question of litigation to remedy the defect, it is clear that if any consents are necessary to effect the transaction, the vendor will not be able to rely on the rule unless a bona fide attempt is made to secure those consents.[56]

2.26 When efforts must be made to give a good title, the courts will consider closely the efforts made by the vendor. In Keen v. Mear[57] two brothers were co-owners of land. One of the brothers then entered into a

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53 See also Lehmann v. McArthur (1868) L.R. 3 Ch. App. 496.

54 Williams v. Glenton (1866) L.R. 1 Ch. App. 200, 208-209, per Turner L.J.; Wroth v. Tyler, above.

55 Royal Bristol Permanent Building Society v. Bomash (1887) 35 Ch. D. 390.

56 Braybrooks v. Whaley [1919] 1 K.B. 435.

57 [1920] 2 Ch. 574.

contract to sell the land. He had not, however, secured his brother's consent to the sale. Damages for breach of contract were held to be limited by the rule, because Russell J. considered "that [the defendant] acted in perfect good faith ... and that he did his best to induce his brother to complete the sale."[58] By way of contrast, in Malhotra v. Choudhury[59] the defendant had contracted to sell a house which he owned jointly with his wife. He then repented of the contract and sought the shelter of the rule when defending an action for damages. The Court of Appeal held, reversing Blackett-Ord V.-C., that the rule did not apply. The evidence was to the effect that he was an unwilling vendor who had made no attempt to persuade his wife to concur in the sale. Had some effort been made, however, there would have been real difficulty in assessing whether the rule applied.

2.27 The difficulty of assessing whether the vendor has used his best endeavours to perfect his title was recently illustrated in Sharneyford Supplies Ltd. v. Edge.[60] The vendor contracted to sell a maggot farm to the plaintiff with vacant possession. The farm was subject to a business tenancy, however, so that vacant possession could not be given. The plaintiff sought damages for loss of profits, amounting to some £131,544, but it was held that the rule applied and he could recover only £472.05 as conveyancing costs. Mervyn Davies J. held first that the business tenancy was a matter of title and not a matter of conveyance. He further held, however, that the defendant had done all he could reasonably have done to clear the title. This was so, despite an offer having been made by the tenants to vacate the property in consideration of £12,000: a sum the plaintiff did not have. It seems questionable whether this finding was correct. The defendant was not

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58 Ibid., at p. 581.

59 [1980] Ch. 52.

60 [1986] 1 Ch. 128. See M.P. Thompson, "An Anomaly That Lingers On" [1985] Conv. 137.

required to embark on speculative litigation to clear his title. While he did not have the right to insist that the tenants vacate the property, it seemed clear that, had he accepted their offer, they would have gone. His own impecuniosity should not have excused his breach of contract.

2.28 In Ray v. Druce[61] a purchaser sought damages for breach of a contract for sale which had been created pursuant to the exercise of an option to purchase. The difficulty was that there was a discrepancy between the plan and the parcels in a previous conveyance that the vendor had executed in favour of his son. If the former was accurate, the vendor did not own the land he had contracted to sell, whereas if the latter was correct he did. Judge John Finlay Q.C., sitting as a High Court judge, held that damages were limited by Bain v. Fothergill. He thought that the rule did not apply in cases where the vendor had voluntarily disabled himself from completing the contract.[62] If this was the basis on which the rule is not applied, then the vendor seems to have been treated leniently. In reality, however, the test is not whether the vendor created the defect, but whether he was in good faith and had done all he could to perfect the title.[63] As such, the rule may be said to have been correctly applied but for the wrong reason. This pair of recent cases does demonstrate, however, the difficulty that can arise in determining whether the rule applies to a particular transaction.

The Misrepresentation Act 1967

2.29 As has been seen, in Bain v. Fothergill Lord Chelmsford referred to the possibility of a purchaser obtaining damages denied him by the rule by bringing an action in deceit. A different method of escaping

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61 [1985] 1 Ch. 437.

62 See Goffin v. Houlder (1920) 90 L.J. Ch. 488. Cf. Grindell v. Bass [1920] 2 Ch. 487, a case which was not followed.

63 See Charles Harpum, "Muddles, Maggots and the Rule in Bain v. Fothergill" [1985] C.L.J. 348.

from the confines of the rule may have been introduced by the Misrepresentation Act 1967. Section 2(1) of the Act provides:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the representation would be liable in damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

2.30 The relevance of this section to the present context emerged in Watts v. Spence.[64] A husband was co-owner of a house with his wife. Without securing her agreement, he contracted to sell it to the plaintiff. On her refusal to join in the sale, the plaintiff sued for damages which it was held were not limited by the rule in Bain v. Fothergill. Graham J. held that the purchaser could obtain damages for loss of bargain under section 2(1) of the Act. He found that:

> "the evidence given satisfied me that [the vendor], by his conduct, clearly made a representation to the plaintiff that he was the owner of the house in question and therefore able to sell to the plaintiff. The plaintiff relied on this representation and was induced to enter into the contract by it. [The vendor], as I find, in the words of the section, 'had no reasonable ground to believe, nor did he believe up to the time the contract was made, that the facts represented were true.'"[65]

2.31 This important decision, if correct, limits dramatically the effect of the rule. Because of the terms of the sub-section, the onus is on the vendor to establish reasonable grounds for his belief that he had a

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64 [1976] Ch. 165. See J.T. Farrand, "Representable Conduct" (1975) 39 Conv. (N.S.) 381.

65 [1976] Ch. 165, 175.

good title.[66] Upon the vendor's failure to discharge that onus, the purchaser can claim full contractual damages. The decision rests, however, on two premises: first that simply entering into a contract for sale constitutes a representation of a good title and secondly, that if the Act applies, damages for loss of bargain are available under it.

2.32 With regard to the first premise upon which the decision is based, there is some doubt as to its accuracy. Although Watts v. Spence was followed without comment in Errington v. Martell-Wilson,[67] doubts were expressed in Malhotra v. Choudhury where Stephenson L.J. referred, seemingly with approval, to the remark of Blackett-Ord V.-C. at first instance that the grant of an option implies no warranty or representation as to title and neither does the entry into a contract for sale.[68] These doubts have themselves been criticised,[69] and the position is unclear as to whether an express representation as to title is necessary, or whether such a representation will be implied merely from the fact that the vendor entered into a contract for sale. The decision in Sharneyford Supplies Ltd. v. Edge, which considered the 1967 Act, is of no assistance on this point as an express representation that vacant possession would be given on completion was made. Although the matter is not entirely clear, the better view seems to be that entering into a contract of sale implies a representation by the vendor that he has a good title.[70]

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66 Howard Marine & Dredging Co. Ltd. v. A. Ogden & Sons (Excavations) Ltd. [1978] Q.B. 574.

67 (1980) 130 N.L.J. 545; J.T. Farrand, "Deduced You So" [1981] Conv. 167.

68 [1980] Ch. 52, 70.

69 J.T. Farrand, "Titular Deductions" [1979] Conv. 314.

70 See e.g. Rowe v. School Board for London (1887) 36 Ch. D. 619, 625, per Kekewich J; Halsbury's Laws of England (4th ed.), Vol. 42, (1983), para. 270. See too the Theft Act 1968, s. 15, and J.C. Smith, The Law of Theft 5th ed., (1984), paras. 27, 170.

2.33 On the assumption that the Misrepresentation Act 1967 does, in principle, apply, the second question is whether damages for loss of bargain can properly be awarded under section 2(1). The award of such damages in Watts v. Spence was subjected to adverse comment.[71] This criticism seems well founded, as the aim of the section is to compensate for loss caused by the representation and is achieved by extending the ambit of the tort of deceit. Consequently the aim of damages under this section should be to return the plaintiff to the position he would have been in had the representation not been made, rather than the position he would be in had the contract been performed. This criticism was vindicated in Sharneyford Supplies Ltd. v. Edge, where Mervyn Davies J. declined to follow Watts v. Spence and award damages for loss of bargain under section 2(1). The judge did not finally decide this question and, in any event, in the absence of an appellate decision, this matter remains open.[72]

2.34 The better view does seem to be, however, that damages for loss of bargain should not be awarded under the 1967 Act. Nevertheless, it does not follow from this that the Act should not render the rule inapplicable. In Bain v. Fothergill, Lord Chelmsford referred to the purchaser obtaining damages denied to him by the rule by bringing an action in deceit. Because damages for loss of bargain are not recoverable in tort, it is generally accepted that the effect of the deceit is simply to remove the bar to the recovery of full damages.[73] It would, therefore, seem reasonable to hold that the effect of section 2(1) in this context would simply be to widen the exception to the rule, so as to

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71 McGregor op. cit., p. 497; Treitel op. cit., pp. 274-276.

72 Emmet On Title 18th ed., 2nd (Cumulative) Supplement, (1985), note to p. 113.

73 See above, para. 2.23.

include negligent misrepresentation. This was rejected, however, in Sharneyford Supplies Ltd. v. Edge although the reasoning is unconvincing.[74]

2.35 Sharneyford Supplies Ltd. v. Edge concerned a commercial transaction where the damages claimed were for lost profits which would have been made from using the land had completion taken place in accordance with the contract. As such, the damages claimed must necessarily be assessed using contractual principles. This is not necessarily true in the residential context. It has been argued that even under the principles of tort, an award of damages may reflect the increase in house prices between the contract price and the present value of that type of house. If a purchaser contracts to buy a house for £30,000 and, at the time when the vendor fails to complete, this type of house is selling for £32,000, it has been argued that restoring the purchaser to the position he was in before the representation of good title was made, should necessitate the payment of £2,000 damages, thereby giving him the same purchasing power as he had before the tort was committed.[75] There is, however, no authority to support this view and it is unlikely to be accepted by the courts.[76] Nevertheless, the existence of this argument adds to the uncertainty pertaining to the effect of the Misrepresentation Act 1967 on the rule in Bain v. Fothergill.

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74 See further M.P. Thompson, "An Anomaly That Lingers On" [1985] Conv. 137, 139-141.

75 C.T. Emery, "In Defence of the Rule in Bain v. Fothergill" [1978] Conv. 338, 343; A.J. Oakley, "Pecuniary Compensation for Failure to Complete a Contract for the Sale of Land" [1980] C.L.J. 58, 79; M.P. Thompson, "An Anomaly That Lingers On" [1985] Conv. 137, 140.

76 Charles Harpum, "Bain v. Fothergill in Chains" [1983] Conv. 435, 437-438.

PART III

THE RATIONALE OF THE RULE AND PROPOSALS FOR REFORM

3.1 It is evident from the foregoing discussion that the scope of the rule is uncertain. Because the rule was formulated when the principles governing the law of damages were at only an embryonic stage of development, the effect of the rule when it does apply is unclear. In addition, it is often difficult to ascertain whether the rule applies. This stems from a judicial reluctance to extend the ambit of the rule and from the inherent difficulty of determining whether the vendor has used his best endeavours to perfect his title. This uncertainty is compounded by the somewhat confused state of the law with regard to the Misrepresentation Act 1967. This confusion relates both to when the Act applies and then also as to the effect upon the rule when it is applied.

3.2 We have formed the provisional view that, even were the rule to be retained, some reform is necessary, in order to clarify the law. To this end, we would recommend that if the rule is retained, legislation should be enacted to make clear that, when the rule is applied, the purchaser is entitled to recover as damages all the expenditure which he has incurred that would have been in the reasonable contemplation of the parties at the time of contracting. We feel that this reform does not go far enough, however, because we would favour the total abrogation of the rule. We would appreciate any views as to whether limited reform along the lines indicated would be preferable to total abolition.

3.3 Although the law relating to the Misrepresentation Act 1967 is uncertain, we are reluctant to suggest legislative reform of it simply to deal with Bain v. Fothergill. If the approach taken in Watts v. Spence is correct, then the rule itself is, to all intents and purposes, already abrogated. That decision is, however, suspect in that it is highly questionable as to whether damages for loss of bargain are properly recoverable under section 2(1) of the Act. We feel that the approach taken to this question in Sharneyford Supplies Ltd. v. Edge is correct in principle and likely to be followed. Although we intend to propose the

abolition of the rule, we feel that using the 1967 Act to achieve this end is not the best way of doing so and we would prefer to tackle the rule directly.

The rationale of the rule

3.4 The rule in Bain v. Fothergill has for a long period of time been seen as an exception to the normal principles governing damages for breach of contract.[1] Various reasons have been offered for it. One such reason seems to have been that for the purchaser to make a profit on the transaction must be regarded as too remote. This can be seen in Flureau v. Thornhill, where De Grey C.J. spoke, somewhat disparagingly, of awarding damages "for the fancied goodness of the bargain"[2] and in Bain v. Fothergill itself, where Lord Chelmsford seemed to regard a profit on a re-sale as being of too remote and speculative a character to be compensated by damages.[3] This reason now seems to be untenable. It is commonplace for lost profits to be claimed in damages, either resulting from an aborted re-sale,[4] inability to use the land for the intended purpose[5] or simply from a general rise in house prices.[6]

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1 E.g. Lock v. Furze (1866) L.R. 1 C.P. 441, 453, per Blackburn J.; Zakrzewski v. Chas. J. Odhams & Sons (1980) 260 E.G. 1125, 1126, per Mr. R.G. Rougier Q.C.

2 (1776) 2 Wm. Bl. 1078.

3 (1874) L.R. 7 H.L. 158, 202. See the observations on this in Waring v. S.J. Brentnall Ltd. [1975] 2 N.Z.L.R. 401, 415, per Chilwell J.

4 See in the context of sale of goods, R. & H. Hall Ltd. v. W.H. Pim (Junior) & Co. Ltd. (1928) 33 Com. Cas. 324. A comparable rule in the case of carriage of goods by sea established in The Parana (1877) 2 P.D. 118 was overruled as obsolete in Koufos v. C. Czarnikow Ltd. [1969] 1 A.C. 350.

5 Cottrill v. Steyning and Littlehampton Building Society [1966] 1 WLR 753.

6 Re Daniel [1917] 2 Ch. 405.

3.5 Remoteness of damages is no longer relied upon as a justification for the rule. Although some reliance was placed upon that principle in Bain v. Fothergill, the principal reason for the rule was said to be the difficulties in making title to land. This has since been accepted as the justification for the rule. Because of these difficulties the rule was established that the liability of the vendor to pay damages was limited. As explained earlier,[7] this problem in connection with contracts for the sale of land operates as an implied exclusion clause limiting the damages recoverable. A vendor who fails to make a good title in accordance with the contract is in breach of contract; the effect of the rule is simply to limit the damages that he is liable to pay.

3.6 The difficulties in making title to land at the time when the rule originated, should not be underestimated. Prior to 1874, the vendor would have to deduce title for a period of at least sixty years.[8] The period was reduced to forty years by the Vendor and Purchaser Act 1874, section 1, and was reduced again to thirty years by the Law of Property Act 1925, section 44(1). Pursuant to the recommendation of the Law Commission in 1966,[9] this period of investigation of title was further reduced to fifteen years by the Law of Property Act 1969, section 23. In so far as unregistered land is concerned, therefore, the vendor's task in deducing title has been considerably facilitated. While it is true that it is unlikely that a vendor will be able to find a conveyance to use as a root of title which is precisely fifteen years old,[10] the title shown in modern conveyancing is likely to be considerably shorter than was the case when the rule was formulated. As a corollary to this, one would anticipate that it would be likely that fewer defects in title would be evident.

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7 See above, Part II, paras. 2.12-2.15.

8 Barnwell v. Harris (1809) 1 Taunt 430, 432, per Heath J.

9 Interim Report on root of title to freehold land (1966) Law Com. No. 9, para. 36.

10 Re Cox and Neve's Contract [1891] 2 Ch. 109, 118, per North J.

3.7 It is not simply the case that the period of investigation of title has been shortened. Coupled with that reform there has been a substantial simplification of the law relating to land.[11] At the time when the rule originated, the difficulties facing a vendor making title to land have been described thus:

> "This process of examining and abstracting all previous titles and facts relevant thereto had to be gone through whenever a new sale or mortgage took place, for a mistake in a link of title would probably make the solicitor liable to a ruinous action for negligence. Add to the uncertainty, complication and expense inevitable in such system, the lengthy recitals and parcels of the purchase-deed, its formality of seal and delivery, the doctrine of constructive notice, the technicalities of the wording in premises and habenda, the fiction of the legal estate and its sequela in the case of mortgages, the shadowy equities 'born of fraud and fear' haunting the most perfect conveyances, the subtleties of the judicial amendments and repeals of the Statute of Uses, weak-kneed remainders without an antecedent estate, or limitations of chattels real without a trust, receipts for consideration sacrilegiously omitted from the endorsement of a deed, scholastic 'possibilities on possibilities' stalking through modern daylight, usual covenants, 'fruitful mothers of costs,' and estate clauses barren of estates, covenants for title that may be construed as notice of a flaw in title, and the constant fear of long and complex proceedings in the courts from some unsuspected deed coming to light..."[12]

3.8 This passage illustrates well the difficulties facing the nineteenth-century conveyancer. This rule was laid down for defects in title which lay concealed in title deeds which were often, in the phrase attributed to Lord Westbury, "difficult to read, disgusting to touch, and impossible to understand",[13] and is a quite understandable reaction to the

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11 But see Williams & Glyn's Bank Ltd. v. Boland [1981] A.C. 487; City of London Building Society v. Flegg, The Times, 23 December 1985; The Implications of Williams & Glyn's Bank Ltd. v. Boland (1982) Law Com. No. 115, para. 69.

12 Duffy and Eagleson, The Transfer of Land Act 1890, cited in Law Reform Commission of British Columbia, op. cit., p. 6.

13 Wroth v. Tyler [1974] Ch. 30, 56, per Megarry J.

very real difficulties that existed at the time. Given the major reforms effected to substantive land law by the 1925 property legislation, together with the progressive reduction in the length of the title to be deduced, it seems inappropriate to defend the existence of the rule by reference to a state of the law which has long since been altered.[14] In the context of unregistered land, where short titles are the norm, the rule has an anachronistic air to it.

3.9 In the Second Report of the Conveyancing Committee, a strongly recommended proposal was to speed up the process of registration of title.[15] It is indeed hoped that by 1987, 85 per cent of the population will live in areas of compulsory registration of title. Under the system introduced by the Land Registration Act 1925, as is wellknown, once title has been registered, investigation of title in the old sense becomes redundant. Subject to overriding interests, the true state of the vendor's title will be revealed by searching the register.[16] Should loss be caused to the registered proprietor by rectification of the register then, broadly speaking, he is entitled to an indemnity from central funds.[17] Given "the aseptic certainty and clarity"[18] of the registration of title system, it seems highly questionable whether the rule should apply at all to this system of land ownership.

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14 But see Ray v. Druce [1985] 1 Ch. 437, 446, per Judge John Finlay Q.C.

15 Para. 9.19.

16 With the possible exception of anomalous cases such as Peffer v. Rigg [1977] 1 W.L.R. 285, and Lyus v. Prowsa Developments Ltd. [1982] 1 W.L.R. 1044. See M.P. Thompson, "Registration, Fraud and Notice" [1985] C.L.J. 280.

17 Land Registration Act 1925, s. 83, as amended by the Land Registration and Land Charges Act 1971.

18 Wroth v. Tyler [1974] Ch. 30, 56, per Megarry J.

3.10 It is instructive to observe that elsewhere in the Commonwealth the rule has been abrogated in so far as registration systems are in operation. In A.V.G. Management Science Ltd. v. Barwell Developments Ltd.[19] a vendor contracted to sell land to X but then, mistakenly thinking that this contract had fallen through, contracted to sell the same land to the plaintiff. X obtained specific performance of the contract and the plaintiff sought damages. If he was entitled to damages for loss of bargain, he was entitled to $37,000, whereas if the rule in Bain v. Fothergill applied, he could obtain just over $6,500. The Supreme Court of Canada held that the rule was inapplicable as the vendor had voluntarily disabled himself from completing the contract. The Court went further, however. Laskin C.J.C. said:

> "it would be my opinion, if it was necessary, in order to decide this case, to come to a conclusion on the matter, that the rule in Bain v. Fothergill should no longer be followed in respect of land transactions in those Provinces which have a Torrens system of title registration or a near similar system."[20]

3.11 This dictum virtually abrogated the rule in Canada at common law. In British Columbia, the rule has been abolished by statute[21] and this has also occurred in Queensland, in so far as registered land is concerned.[22] The approach taken by the Supreme Court in Canada was also taken by the Supreme Court of Auckland, where Chilwell J. said:

> "It is my judgment that a general application of the rule would be out of tune with conveyancing practices in New Zealand having regard to the precision and certainty which the provisions of the Land Transfer Act 1952 have created. It

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19 (1979) 92 D.L.R. (3d) 289.

20 Ibid., at p. 301.

21 Property Law Act, R.S.B.C., 1979, C. 340, s. 33 implementing the proposals of the Law Reform Commission of British Columbia.

22 Property Law Act 1974, s. 68(1), (3). See Duncan and Weld, The Standard Land Contract in Queensland, 2nd ed., (1984), p. 250.

> seems to me that the most that can be said is ... that the rule can 'seldom' have application in New Zealand when land is subject to the Act. I find that to be the law in New Zealand. Stating the law in that fashion will not introduce uncertainty into conveyancing. Vendors will assume the risk, which in the majority of instances in this country is no risk whatever, that they will be able to give title... As I see it there is no justification for the adoption of a rule which places purchasers in an inferior position to vendors in order merely to provide for the exceptional case where it can be demonstrated that the ordinary rule as to damages operates unfairly against a vendor."[23]

3.12 We would agree with these statements of opinion. In our view, the rule in Bain v. Fothergill should have no application to registered land in this country. We would propose, however, going further than the legislation in Queensland has gone and abolishing the rule altogether and not confining the abolition to registered land. As has been seen, the law pertaining to unregistered conveyancing has been simplified to such an extent since the rule originated that, in our view, the basis of it is no longer justifiable. It is also fair to point out, in proposing the total repeal of the rule, that the cases where the rule has been applied have nothing to do with the complexities of land law. Instead, it is generally applied to cases where consents to assignments have not been obtained prior to the contract or a co-owner has not been consulted and his concurrence to the sale secured. We would agree with Dr. H.W. Wilkinson, who commented:

> "On the facts of the 'defect in title' cases however one wonders at the leniency shown by the courts to the vendors. They may have sold 'in good faith' but they appeared to have had either unbounded optimism in assuming that consents would be given which had not been sought, or immense carelessness in drafting the agreement for sale."[24]

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23 Waring v. S.J. Brentnall Ltd. [1975] 2 N.Z.L.R. 401, 420. See also Jacobs v. Bills [1967] N.Z.L.R. 249, 254, per MacGregor J.

24 H.W. Wilkinson, "The Effect of a Defect in Title" (1973) 123 N.L.J. 393, 394.

3.13 We see no reason why, in the latter part of the twentieth century, a vendor should have the benefit of an implied term limiting his liability to pay damages, when the justification for implying such a term, i.e. the high complexity of land law, is considerably less persuasive than was formerly the case. Indeed, in modern times, in the vast majority of cases where the vendor is unable to show a good title in accordance with his contractual obligations, this stems from his own carelessness rather than any difficulty in the law. It is true that cases may occur when a defect in title which the vendor had no ready means of discovering, may come to light prior to completion.[25] Such cases are likely to be rare, and we do not feel it is justified to retain an outdated rule merely to protect a vendor in these unusual cases, at the expense of the purchaser.

3.14 We are conscious that the rule in Bain v. Fothergill is not without its defenders.[26] It has recently been argued that the rule does not act as a shield to negligent solicitors but rather as an insurance policy if the title turns out to be unforeseeably defective. The proponent of this view argued that in cases where the vendor knows at the time of contracting that he lacks title, then the purchaser can obtain full damages under the Misrepresentation Act 1967. In other cases, it is argued, it is fair to allow the loss to lie where it falls. The purchaser receives his out-of-pocket expenses; he should not also receive damages for loss of bargain when, through no fault of the vendor, the title cannot be completed owing to a defective title.

3.15 For various reasons, we would respectfully reject this view. First, even if the premise is correct that the vendor is not at fault in being unable to complete his contract, the general law appears to have

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25 See e.g. Wyld v. Silver [1963] Ch. 243. See also below, paras. 3.19-3.23.

26 C.T. Emery, "In Defence of the Rule in Bain v. Fothergill" [1978] Conv. 338.

little regard for such notions in apportioning contractual liability.[27] We do not, however, accept the premise that the vendor is not at fault in most cases where the rule is applied. Secondly, in cases where the vendor knows at the time of contracting that his title is defective, it is said that full damages can be obtained by the purchaser under the Misrepresentation Act 1967. As has been seen, however, the application of that Act to this context is far from clear,[28] and a purchaser ought not to have to take a risk which depends solely on which line of conflicting authority is to be followed. Finally, the defence of the rule overlooks the fact that most conveyancing transactions today form part of a chain of similar transactions.[29]

3.16 When a chain of transactions is involved, the application of the rule can cause severe injustice. Suppose that A contracts to buy a house from B for £35,000 and to sell his own to C for £30,000. Shortly before completion is due to occur it transpires that B cannot convey the property due to a defective title. If house prices have risen, say by £2,000, in the interim, A is placed in an invidious position. Because the rule in Bain v. Fothergill applies to A's contract of purchase, he can recover from B merely his conveyancing expenses. If, as is likely, he is now constrained to withdraw from the contract to sell to C, he cannot shelter behind the rule. Instead, he will be liable to pay £2,000 in damages to him. Alternatively, if this contract is completed, he will be homeless until he can find another property. We consider such a result would be unjust and accordingly, for this and other reasons rehearsed above, provisionally recommend that the rule in Bain v. Fothergill be reversed by legislation.

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27 Law Reform Commission of British Columbia op. cit., pp. 14-16.

28 See above, Part II, paras. 2.29-2.35.

29 See Charles Harpum, "Bain v. Fothergill in Chains" [1983] Conv. 435; M.P. Thompson, "Bain v. Fothergill: an Unwarranted Relic" (1985) 82 L.S. Gaz. 2402.

Practical consequences of abolition of the rule

3.17 In provisionally recommending that the rule in Bain v. Fothergill be abolished by legislation, we have thus far concentrated solely on the substantive merits of it. We now consider whether abolition would have any deleterious impact upon conveyancing practice. If the rule is abolished, then it clearly behoves the vendor to ensure that he has a good title prior to entering into the contract. This, however, is in accordance with long-established conveyancing practice. It is necessary for the vendor's legal adviser in drafting the contract to investigate his client's title to discover any defects in it, and they should then be dealt with by an appropriately drafted special condition of sale.[30] The existence of the rule could be seen as an insurance policy in the event of this pre-contract investigation being performed inadequately. If the rule is abolished, this insurance will disappear. Should the legal adviser have failed to exercise proper care in drafting the contract, by not discovering and then dealing with discoverable defects in title, it seems that he would be liable to his client for the loss the latter has suffered in having to pay damages to the purchaser. We see no objection to this as it should help to ensure that proper care is taken in the preparation of conveyancing contracts. We would, however, welcome views as to this matter.

3.18 The only other professional people who might conceivably be affected by the abolition of the rule are estate agents. We feel, however, that this is highly unlikely. Beyond stating whether the property is freehold or leasehold, something which is in any event likely to be checked independently by the purchaser, the role of the estate agent does not normally extend to making representations concerning the vendor's title. Should the estate agent make a material misrepresentation, however, for example relating to the permitted use of the property, the rule in Bain v. Fothergill would not, in any event, assist him. Should the

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30 See Barnsley op. cit., pp. 134-135; Emmet on Title 18th ed., (1983), pp. 125-131.

estate agent be liable to a purchaser for having made a misrepresentation, such liability would not stem from contract, because ordinarily there is no contractual relationship between the estate agent and the purchaser. Any liability would arise in tort under the principles expounded in Hedley Byrne & Co Ltd. v. Heller & Partners Ltd.[31] These are not affected by Bain v. Fothergill. Estate agents should not therefore be affected by the abolition of that rule.[32]

Should a vendor be able to exclude liability to pay damages?

3.19 Under the law as it currently is, the parties are taken to contract on the basis that, should the vendor's inability to complete the contract stem from a defective title, then his liability to pay damages would be limited to compensating the purchaser for the expense he has incurred in reliance on the contract.[33] Under our proposal no such intention to limit the damages payable is imputed to the parties, so that damages would be assessed in accordance with the normal principles of the law of contract. The question which then arises is whether the parties should be able, by express agreement, to limit the damages payable by the vendor should his title prove to be defective.

3.20 In considering this question, some attention must be paid to the method by which the vendor's obligation to show a good title is currently modified and also how his liability to pay damages on his failure

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31 [1964] A.C. 465.

32 In Blake & Co. v. Sohn [1969] 1 W.L.R. 1412, the rule in Bain v. Fothergill was relied upon by counsel as a ground to defeat an estate agent's claim to commission after the contract had been rescinded owing to a defect in the vendor's title. There were other, more convincing, reasons for the decision and we do not feel that abolition of the rule would affect this area of the law.

33 See e.g. Walker v. Moore (1829) 10 B. & C. 416, 423, per Parke J.

to do so is restricted by express contractual terms. With regard to the first point, the vendor is under a duty to show a good title. As a corollary to that, he is under a duty to disclose all latent defects in title i.e. incumbrances and other adverse matters of title which a prospective purchaser could not discover for himself by inspecting the property with reasonable care.[34] If the defect is fully and fairly set out in the contract, and the contract also precludes the purchaser from objecting to it, then, provided that there are no other defects in the title, the purchaser cannot complain:[35] the nature of the obligation has been modified. Matters such as these are dealt with by appropriately drafted special conditions of sale.

3.21 Each of the standard sets of conditions generally employed in the sale of land enables the vendor to rescind the contract and pay only limited compensation to the purchaser if requisitions on title are made which the vendor is unable or unwilling to satisfy.[36] In construing these conditions, the judges have shown themselves to be unwilling to countenance their being used as a facile method of terminating the contract. In particular, the vendor cannot rely on such a clause should he have no title to the land at all.[37] A second important limitation on the vendor's contractual right to rescind is that it cannot be relied on if the contract was entered into recklessly.[38]

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34 See e.g. Yandle & Sons v. Sutton [1922] 2 Ch. 199, at p. 210.

35 Barnsley op. cit., p. 159, Emmet op. cit., pp. 126-127.

36 Law Society's General Conditions of Sale (1984 Revision), G.C. 16; National Conditions of Sale (20th ed., 1981), G.C. 10. See H.W. Wilkinson, Standard Conditions of Sale of Land 3rd ed., (1982) pp. 96-105.

37 Bowman v. Hyland (1878) 8 Ch. D. 588.

38 Re Des Reaux and Setchfield's Contract [1926] Ch. 178.

3.22 In assessing whether or not the vendor has acted recklessly in entering into the contract, the courts are not concerned to see whether the vendor is guilty of fraud or dishonesty. Rather, recklessness here connotes:

> "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."[39]

In Baines v. Tweddle,[40] a vendor contracted to sell mortgaged property free from incumbrances, but he had not first ascertained whether the mortgagees would concur in the sale. He was held unable to exercise the contractual right to rescind when it transpired that they would not. It would seem, therefore, that if a vendor enters into a contract without first taking reasonable care to ensure that he has a good title, he cannot rely on the standard contractual right to rescind. This will be so, for example, if one co-owner contracts to sell property without first securing the agreement of the other co-owner.[41]

3.23 Under our proposal to abolish the rule in Bain v. Fothergill, the vendor's contractual right to rescind on favourable terms in the event of an unexpected defect in title coming to light would be unaffected. Our provisional view is that this is satisfactory. Such clauses are designed to strike a reasonable balance between vendors and purchasers, reducing or removing the vendor's liability to pay damages should his title unexpectedly prove to be defective. Should the defect have been apparent to the vendor had he taken reasonable care then, unless the matter is dealt with by a specific special condition of sale, which draws

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39 Selkirk v. Romar Investments Ltd. [1963] 3 All E.R. 994, 999, per Viscount Radcliffe.

40 [1959] Ch. 679.

41 Cf. Watts v. Spence [1976] Ch. 165.

the purchaser's attention to the problem before he commits himself to the purchase, the damages available should fall to be assessed in accordance with normal principles.

3.24 A more fundamental question is whether, if the rule in Bain v. Fothergill is to be abolished by legislation, it should be open to a vendor to re-impose the rule by an express contractual term. This could be done either by the introduction of a new general condition of sale to this effect or, alternatively, by a special condition of sale.

3.25 Should it be considered desirable to deny efficacy to such terms, a way of achieving this might be by amendment of the Unfair Contract Terms Act 1977. At present paragraph 1(b) of Schedule 1 to this Act provides that it does not apply to contracts for the sale of land. In addition, the restrictions on the use of exclusion or limitation clauses imposed by section 3 primarily apply to consumer contracts and the definition of consumer contracts contained in section 12(1) of the Act would not include most conveyancing contracts.[42] If, therefore, it was desired to prohibit clauses reintroducing the rule in Bain v. Fothergill, a simpler method than amending the Unfair Contract Terms Act 1977 would probably be to deal with the matter directly in legislation abolishing the rule.

3.26 Our provisional view is that such a course would be undesirable. Under existing law, it is open to a vendor to restrict his liability to pay damages with regard to matters unrelated to defects in title.[43] We find it difficult to see why matters relating to title should be singled out and treated differently from other conditions in conveyancing contracts.

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42 Section 3 of the 1977 Act also applies where neither party is a consumer but one deals on the other's standard terms of business, which appears uncommon in a conveyancing context.

43 See e.g. Raineri v. Miles [1981] A.C. 1050 and Law Society's General Conditions of Sale (1984 Revision), G.C. 22.

3.27 It might be thought that a more radical approach to this question should be taken by bringing all aspects of contracts for the sale of land within the operation of the Unfair Contract Terms Act 1977. Such a course of action would have far-reaching consequences which cannot properly be considered in the context of a report on the more limited problems caused by the rule in Bain v. Fothergill. Should there be a general view that the ambit of the Act should be extended in this way, a separate study of the area would be necessary.

3.28 If, as we provisionally recommend, the vendor should be permitted to reintroduce the rule in Bain v. Fothergill by an express contractual condition, the question might arise as to whether the purchaser could nevertheless obtain damages for his loss of bargain by suing under the Misrepresentation Act 1967. Should Watts v. Spence be followed, then it would seem that the purchaser could elect to sue under the Act rather than on the contract. An exclusion clause limiting damages payable under the contract should be construed restrictively and as not limiting damages payable for misrepresentation.

3.29 For reasons advanced earlier, we do not think that the award of damages for loss of bargain in Watts v. Spence is sound in principle. This point is not, however, settled. Should a vendor wish to exclude altogether the liability to pay damages for loss of bargain in the event of his title proving defective, then he would be advised to exclude liability under the Misrepresentation Act 1967. Such clauses, albeit not dealing with the rule in Bain v. Fothergill, have been held to be ineffective in the conveyancing context, under section 3 of the Misrepresentation Act 1967, as amended by section 8 of the Unfair Contract Terms Act 1977.[44] The clause which was held to be inapplicable, however, appeared only in the

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44 Walker v. Boyle [1982] 1 W.L.R. 495. See also Southwestern General Property Co. v. Marton (1982) 263 E.G. 1090.

general conditions and the attention of the purchaser's legal adviser was not specifically drawn to it. If liability under the Act for implied misrepresentation as to title were to be expressly excluded in a special condition, with independent solicitors acting for each of the parties, then such a condition might well be held to satisfy the test of reasonableness and would therefore be effective.[45]

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45 See Walker v. Boyle [1982] 1 W.L.R. 495 (which concerned a general condition of sale) per Dillon J. at p. 507E. "It has been submitted by [Counsel for the Defendant] that, as there were solicitors acting for both parties, it would be a very strong thing to say that any term of the contract which resulted is not a fair and reasonable one in the circumstances. That argument would have great force, no doubt, if the solicitors had specifically directed their minds to the problem and had evolved the clause which was under attack."

PART IV

PRÉCIS OF PROVISIONAL PROPOSALS

4.1 The rule in Bain v. Fothergill is uncertain both in its scope and in its application. Should the rule be retained, we would recommend that its effect should be clarified by statute. We would propose that, when the rule applies, the purchaser should be entitled to recover from the vendor his deposit and, in addition, all expenditure reasonably incurred in reliance on the contract, this latter head to include normal pre-contractual expenditure.

4.2 However, in our view, the continued existence of the rule is undesirable. Accordingly, we provisionally propose that a purchaser should be entitled to claim damages for loss of bargain, even if the vendor's inability to complete the contract is occasioned by a defect in title.

4.3 If proposal 2 (in paragraph 4.2) is accepted, the question arises as to whether the parties should be able, by an express term in the contract, to limit the vendor's liability to pay damages in the way that the rule in Bain v. Fothergill currently does by implication. We propose that they should be so entitled. If liability to pay damages is expressly excluded, then it should also be possible to exclude liability for any implied misrepresentation as to title arising under the Misrepresentation Act 1967.

4.4 If proposals 2 and 3 (in paragraphs 4.2 and 4.3) are accepted, the current uncertainty with regard to the Misrepresentation Act 1967 will become academic. Accordingly we make no proposals for clarifying this position.

4.5 If proposal 2 (in paragraph 4.2) is accepted, we would propose abolishing the rule in Bain v. Fothergill by legislation. A way of achieving this would be by enacting the following clause:[1]

Abolition of rule in Bain v. Fothergill

(1) There is hereby abolished the rule of law (known as the rule in Bain v. Fothergill) restricting the damages recoverable for breaches of contract occasioned by defects in title to land.

(2) Subsection (1) applies only in relation to contracts made after [date to be inserted].

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1 Cf. Property Law Act, Revised Statutes of British Columbia, 1979 C. 340, s. 33.

Damages: defective title

33. A court may award damages for loss of a bargain against a person who cannot perform a contract to dispose of land by reason of a defect in his title.

Also, Property Law Act 1974 of Queensland, s. 68.

68. Damages for breach of contract to sell land. (1) A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser in such sum as at the time the contract was made was reasonably foreseeable as the loss liable to result, and which does in fact result, from the failure of the vendor to perform the contract; and, unless the contract otherwise provides, the vendor shall not be relieved, wholly or in part, of liability for damages measured in accordance with this section by reason only of his inability to make title to the land the subject of the contract of sale, whether or not such inability was occasioned by his own default.

(2) This section shall not affect any right, power or remedy which, apart from this section, may be available to a purchaser in respect of the failure of a vendor to show or make good title or otherwise to perform a contract for the sale of land.

(3) This section shall not apply to contracts for the sale of unregistered land and shall apply only to contracts entered into after the commencement of this Act.

See para. 3.11 above.

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