NSW Law Reform Commission

REPORT 64 (1990) - COMMUNITY LAW REFORM PROGRAM: DAMAGES FOR VENDOR'S INABILITY TO CONVEY GOOD TITLE: THE RULE IN BAIN V FOTHERGILL

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Community Law Reform Program

The Community Law Reform Program was established on 24 May 1982 by the then Attorney General, the Honourable F J Walker, QC, MP, by letter addressed to the Chairman of the Commission. The letter included the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act, 1967.

The background to the Community Law Reform Program and its progress since 1982 are described in detail in the Commission's Annual Reports.

This is the seventeenth Report in the Program.

Terms of Reference and Participants

To the Honourable J R A Dowd LLB, MP,
Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

THE RULE IN *BAIN v FOTHERGILL*

Dear Attorney General,

We make this Report pursuant to the reference received from the then Attorney General for New South Wales, the Honourable T W Sheahan BA, LLB, MP on 16 March 1987.

Hon R M Hope QC

(Chairman)

Helen Gamble

(Commissioner)

Ronald Sackville

(Commissioner)

July 1990

Terms of Reference

On 16 March 1987 the then Attorney General for New South Wales, the Honourable T W Sheahan, BA, LLB, MP, made the following reference to the Commission:

To inquire into and report on:

1. Whether the rule known as the rule in Bain v Fothergill (1874) LR 7 HL 158, which precludes recovery of loss of bargain damages for breach of a contract to sell land in certain circumstances, ought to be wholly or partly repealed; and

2. Any related matter.

Participants

Division Members

For the purpose of the reference a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

Professor J L R Davis	(1988-1989)
Dr John Carter	(1988-1989)
Keith Mason QC	(1989-1990)
Mr Ronald Sackville	(1988-)
The Hon R M Hope QC	(1990-)
Professor Helen Gamble	(1988-)

Executive Director

Mr William J Tearle	(to 7 July 1989)
Mr Peter Hennessy	(from 10 July 1989)

Research and Writing

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1. Overview and Recommendation

1.1 The subject of this Report is a common law rule which, in particular circumstances, limits the amount of damages which a purchaser may recover for the vendor's breach of a contract for the sale of an interest in land. Named after the case which authoritatively re-stated it in the nineteenth century, the Rule in *Bain v Fothergill*[1] is a unique exception to the general law governing the assessment of damages for breach of contract. For example, in the case of a contract for the sale of goods, if the seller fails to deliver the goods which he or she has contracted to sell, the purchaser is entitled to be compensated by an amount that would put the purchaser in the same position as if the contract had been performed by delivery of the goods. If the price of the goods increased between the date of the contract and the date on which the seller breached the contract, the purchaser is entitled to receive the amount of the increase. The difference in prices in this case is awarded by the court as damages for the purchaser's loss of the bargain of the contract. The same rules apply generally to contracts for the sale of land. However, under the Rule in *Bain v Fothergill,*

> the purchaser's right to damages for breach of the contract is governed by the special rule that, where the breach of the contract is occasioned by the vendor's inability, without his own fault, to show a good title, he shall be entitled to recover, as damages, his deposit, if any, with interest, and his expenses incurred in connection with the agreement, but not more than nominal damages for loss of his bargain.[2]

1.2 As interpreted by the Courts over the years, the Rule (as we shall call it) has become quite limited in its application. The Rule applies only where the vendor is not at fault for his or her inability to perform the contract, and only where the obstacle preventing the sale is a defect in *title*.[3] Also, an important exception states that in order to rely on the Rule the vendor must have used his or her "best endeavours" to remove the defect in the title. Since, under modern conveyancing conditions, a defect of title which cannot be removed is normally the fault of the vendor, there are very few cases in which the Rule is applied, particularly if the land is under the Torrens system of registered title. As Priestley JA said in the most recent Australian case in which the Rule has been argued,

> The circumstances in which the rule in *Bain v Fothergill* has any chance of being followed under modern conveyancing conditions of Torrens Title land in Australia seem to be nearing vanishing point.[4]

Nevertheless, since the Rule may substantially reduce the vendor's liability, it is sometimes claimed to apply as a defence against a purchaser seeking damages after a conveyance has fallen through.

1.3 Ever since its formulation, the Rule has been subjected to criticism, both judicial and academic, on the grounds that it unjustifiably deprives a purchaser of compensation which is fairly awarded for breaches of other types of contract. It has also been argued that the Rule is inappropriate for Torrens title land. But because the Rule only applies in very unusual circumstances, and was developed by courts of high authority, it has never been abrogated judicially in Australia or in England. Instead, the courts have preferred to limit it by distinguishing the facts of cases before them from those in which the Rule applies.

1.4 Because of the technical nature of the reference, the Commission decided to engage in limited consultation only. In September 1989 copies of a draft version of the Report were circulated to several specialists in conveyancing as well as interested organisations. Replies were received from Associate Professor Peter Butt,[5] Mr Andrew Lang,[6] the Conveyancing Practice and Conveyancing Review Committees of the Law Society of New South Wales, and the Land Titles Office. The Commission wishes to thank them for their useful comments and advice.

1.5 The Commission has concluded that the Rule should not apply to future conveyances of interests in land in New South Wales. A draft bill, prepared by the Office of Parliamentary Counsel, to amend the Conveyancing Act 1919 to this effect is contained in the Appendix.

1.6 The following chapters of this Report examine the origins and rationale for the Rule, its applicability to modern conveyances of old system and Torrens title land, and the arguments for and against its abolition.

FOOTNOTES

1. (1874) LR 7 HL 158.

2. T Cyprian Williams *A Treatise on the Law of Vendor and Purchaser* Vol 2, 3rd ed, Sweet & Maxwell, London, 1923, at 1027.

3. *Day v Singleton* [1899] 2 Ch 320.

4. *Holmark Construction Co Pty Ltd v Tsoukaris* (Unreported) No 363/86, 6 May 1988, New South Wales Court of Appeal, transcript at 3.

5. Of the Faculty of Law at the University of Sydney, and author of *The Standard Contract for Sale of Land in New South Wales*, Law Book Co, Sydney, 1985 and supplements.

6. Formerly Associate Professor in the School of Law at Macquarie University, and editor of *New South Wales Conveyancing Law and Practice*, CCH, Sydney, loose-leaf service.

2. History and Operation of the Rule

I. CONTRACT DAMAGES: GENERAL PRINCIPLES

2.1 Before examining the development, rationale and operation of the Rule in *Bain v Fothergill*, it is first necessary to outline briefly the common law principles governing the award of damages for breach of contract and, in particular, the bases on which the amount (or quantum) of damages is assessed.

2.2 Damages for breach of contract are a monetary sum awarded by the Court as compensation to the promisee for the promisor's breach of his or her obligations under the contract. The general principle for determining the quantum of such damages 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.[1]

This principle is said to protect the promisee's expectation interest by giving the promisee "the value of the expectancy which the promise created".[2] This includes profits which the promisee expected to receive as a result of the contract: in other words, the promisee is entitled to compensation for the loss of a bargain gained by the contract.

2.3 While the expectation interest is the one normally compensated, there are other bases on which damages may be assessed. Damages may also be awarded to protect the promisee's reliance interest by placing the promisee in as good a position as before the promise was made. Thus expenses made and effectively wasted in the belief that the contract would be performed, and which would not have been incurred apart from a reliance on the contract, are recoverable on this basis. Normally such reliance expenses are less than the expectation loss, and would therefore be adequately compensated by an award for loss of bargain, but they are sometimes used as the basis for assessment when there is no means of quantifying the loss of bargain damages.[3] When damages are awarded on this basis, expenses may be recovered even though the promisee was not required to incur them. In some cases the promisee may also recover amounts expended before a proposed agreement became a binding contract.[4]

2.4 In allowing the purchaser of an interest in land to recover only the deposit together with interest and expenses reasonably incurred in investigating the title, the Rule in *Bain v Fothergill* arbitarily restricts the promisee (the purchaser) to obtaining damages for part of his or her reliance loss, but precludes recovery for expectation loss. Not all elements of the purchaser's reliance loss are recoverable under the Rule: for example, the costs of arranging a loan or mortgage, drawing up building plans, arranging development approval and obtaining a survey of the property are excluded.[5]

II. ORIGINS AND DEVELOPMENT OF THE RULE

A. Origins: *Flureau v Thornhill*

2.5 The Rule was originally laid down in 1776 in the case of *Flureau v Thornhill.* The plaintiff had purchased a long-term lease at auction, apparently for much less than its value. After the auction the vendor found that the title was defective and that he was therefore unable to convey the interest as sold. He offered the plaintiff the choice of either taking the defective title or being repaid the deposit together with interest and the costs incurred. But the plaintiff insisted on being paid to compensate him "in the loss of so good a bargain": in other words the difference between the sale price and the supposed value of the leasehold interest. On appeal, the full bench of the Court of Common Pleas held that the plaintiff was not entitled to recover more than the deposit and interest. The report of the case is sketchy, and only two judges gave reasons. De Grey CJ (who had presided over the case at first instance) simply asserted that as a matter of law:

> 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.[6]

Evidence had been adduced that the leasehold was not sold below its value; De Grey CJ's comments suggest that he considered an evaluation of the plaintiff's loss of bargain as groundless or pure speculation.

2.6 Blackstone J decided on different grounds:

> These contracts are merely upon condition, frequently expressed, but always implied, that the vendor had a good title. If he had not, the return of the deposit, with interest and costs, is all that can be expected.[7]

The use of the term "condition" is ambiguous, but it would appear that Blackstone J found an implied term in the contract which limited damages if the title which had been contracted for could not be conveyed. An alternative interpretation of this decision is that such contracts are subject to an implied condition precedent, such that if the vendor cannot convey a good title the contract is void.[8] This view is, however, open to criticism on the grounds that if there were no contract the purchaser would only be entitled to the deposit as restitution, and because the vendor is clearly under a duty to make a good title.[9] As the author of the great *Commentaries on the Laws of England* (and, incidentally, the author of the sole report of the case), Blackstone's pre-eminent reputation as a jurist no doubt led to his view being adopted in later cases as settled law.

2.7 The decision in *Flureau v Thornhill* seems to have been original: no authorities were cited by the judges and there are no previous decisions which support it.[10] There is some doubt that the principle it stated was in accordance with the general view of contract law at the time. Legal historians disagree as to whether judges in the eighteenth century accepted that damages for breach of contract could be awarded on the basis of expectation loss. The decision in *Flureau v Thornhill* can be explained as either an instance of a series of rules which limited damages to actual loss, or as an aberration resulting from the contradictory evidence produced in the case and the conjectural nature of the loss claimed.[11] The Courts at the time seem to have disapproved of damages awards based on losses that were merely speculative or were incapable of quantification. But as damages were awarded at the complete discretion of the jury, judges found little need to develop general principles on which damages would be assessed. Also, in contracts for sale of land especially, the rule of *caveat emptor* was applied rigorously unless the vendor had specifically convenanted that the title was good. Without such a covenant, if the title proved bad the purchaser was not entitled to any damages.[12] Apart from the Rule, if no title was conveyed the purchaser could only recover the deposit in a quasi-contractual action for money had and received.[13] In some respects, then, the decision in *Flureau v Thornhill* was more generous to the purchaser than eighteenth-century contract principles otherwise allowed.

B. Reception

2.8 The decision in *Flureau v Thornhill* was quickly accepted by conveyancers and was followed in two unreported cases.[14] It may have been bolstered by the tendency of the Court of Chancery, at least for a time, to award damages which included the purchaser's expenses if specific performance of a contract to sell land could not be decreed because the vendor had already sold the property.[15] Also, courts of common law established that in the case of land transactions a purchaser could recover interest on the deposit, contrary to the general rule that interest was not recoverable unless specifically provided for in the contract.[16] While these cases were not founded on *Flureau v Thornhill*, they were consistent with it. It is important to remember that at the same time as the Rule was established, the modern general principles for the assessment of damages for breach of contract were only beginning to be formulated. As property in land was subject to complex legal rules and practices, and carried a social significance distinct from other forms of property, it was considered reasonable in the case of conveyancing to adopt a special rule as an exception to the principles governing contracts generally.

2.9 The Rule was first questioned judicially in 1826 in *Hopkins v Grazebrook*.[17] The defendant, who was a sub-purchaser under an uncompleted contract, sold the subject property to the plaintiff at auction. At the time of the auction the defendant possessed at best only an equitable title and was aware that he might never obtain the full legal title to the property, although it was found that he did not act fraudulently in selling to the plaintiff. When

he was unable to convey the legal title the defendant vendor refused to recompense the purchaser for the value of his bargain. The Court of King's Bench, on appeal, distinguished *Flureau v Thornhill* and allowed substantial damages for the plaintiff's loss of bargain, on the ground that the earlier case only applied to cases where the vendor possessed a legal title, however imperfect. The Court clearly disapproved of the defendant's conduct in re-selling the property before obtaining the full estate. Bayley J further contradicted Blackstone J's earlier dictum that sales of real property were conditional upon the vendor having a good title, and said:

> where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own, that which is not so, I think he may fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted.[18]

That the Court regarded the defendant's conduct as, if not fraudulent in the common law sense, at least culpable so as to invite full liability, is illustrated by a converse case which came before it three years later.[19] There the plaintiff had purchased real estate from the defendant and, before inspecting the title, sold it to several sub-purchasers. When the title deeds were finally perused, an outstanding interest was discovered which made the defendant's (and therefore the plaintiff's) title defective. The plaintiff then brought an action in contract for his lost profits and his liability to the sub-purchasers. The Court refused his claim, following *Flureau v Thornhill* and saying that since "each party cannot but know that the title may prove defective"[20] the plaintiff had acted at his peril in re-selling so hastily. Bayley J reconciled the decision with *Hopkins v Grazebrook* by suggesting that a plaintiff might recover the full measure of damages if there had been bad faith on the part of his vendor; but here, the damage resulted not from the defendant's misrepresentation but from the plaintiff's premature acts.

2.10 The decision in *Flureau v Thornhill* was thus confirmed as an exception to the emerging general principles governing contract damages. In turn, *Hopkins v Grazebrook* was accepted as an exception to the exception, applying only if the vendor knew he had no title, which allowed the purchaser to recover the full measure of damages. The case which finally established the general principle to be applied in determining the amount of damages to be awarded for a breach of contract, *Robinson v Harman*,[21] involved the sale of a lease to which the vendor knew he had no title. Baron Parke, after stating the rule that a party who suffers loss by reason of a breach of contract must be placed in the same position as if the contract had been performed, went on to recognise that *Flureau v Thornhill* qualified this rule but held that the purchaser in the instant case was, as the result of the exception to the special rule, entitled to damages for the loss of his bargain.

2.11 Over time the weight of the authority of the two decisions led to their being given the status of rules of law, both in England and in the United States.[22] There were, however, misgivings since the distinction between them was tenuous and depended upon a finding of fault. By the nineteenth century, liability in contract was generally supposed to be absolute and independant of any misconduct on the part of the party in breach. The older rules which applied to the sale of land were inconsistent with this philosophy and could not be justified in terms of modern contractual theory. For example, in Sedgwick's influential American contracts text, it was stated that "the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement". But he added:

> To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter, he is entitled to damages resulting from the loss of his bargain. The exception cannot, I think, be justified or explained in principle, but it is well settled in practice.[23]

The eminent conveyancer, Edward Sugden (later Lord St Leonards LC), resolved the problem by criticising *Hopkins v Grazebrook* as wrongly decided because the vendor had an equitable title, and wrote that "short of circumstances amounting to fraud, the case seems to fall within the general rule".[24] If there were actual fraud, he argued, the contract was voidable and the purchaser would have an action in deceit, so there was no reason for the exception; if there were no fraud, the rule in *Flureau v Thornhill* should apply.

2.12 The importation of a concept of fault, similar to the broader notion of fraud recognised by courts of equity, into the law of damages in such cases appears to have served a number of purposes. Firstly, it was used to discourage the purchase of interests in land without full investigations into the title. Secondly, it was a means of limiting a purchaser's recovery to damage that was attributable to the vendor. The Rule thus acted as a test of remoteness of damage. For it was not until 1854 with *Hadley v Baxendale*[25] that the general rules as to remoteness of damage in contract were laid down, and it was established that a plaintiff could only recover for such damage as arose "according to the usual course of things" or could reasonably be supposed to have been in the contemplation of the contracting parties. Older, more specific rules, such as that in *Flureau v Thornhill,* were accommodated to this new regime by presuming that the parties must have been aware of the special rules.[26]

2.13 Thirdly, the Rule in its limited form was used to protect vendors from the complexity of English land law. Thus, in one case, where a vendor's title was defective through a lack of formality, the vendor was liable for only limited damages because, as a layman, "he had a fair right to believe he had the power to sell [that] which he professed to have."[27] The circumstances in which the Rule was excluded were later reduced when it was established that the exception laid down in *Hopkins v Grazebrook* applied only when the vendor knew of the defect but withheld this knowledge from the purchaser.[28]

2.14 Two further exceptions to the Rule were also established by the mid-nineteenth century. Firstly, the vendor was liable for the full measure of damages if the defect was a problem of conveyancing rather than of title. In *Engell v Fitch*[29] the defendant sold the leasehold of two houses to the plaintiff under a mortgagee's power of sale, with vacant possession to be given on completion. The mortgagor claimed that the power of sale had been incorrectly exercised and refused to leave, so the defendant failed to complete the sale rather than incur the considerable expense of ejecting him. The Court awarded the plaintiff damages for lost profit on a resale because the defendant's failure to convey was not the result of an inability to make out a good title. Secondly, where the contract was uncompleted and the plaintiff sued on the express covenants in the contract, such as a covenant in a lease not to disturb the lessee's possession (the covenant for quiet enjoyment), subtantial damages for loss of the bargain could be recovered.[30] The reason for this exception would seem to be that the express covenant ousted the condition implied by law, so the Rule did not apply. All these exceptions were really limitations on the Rule, so that until the position was re-examined in *Bain v Fothergill*, the Rule only applied when the vendor had, without any specific covenant of good title, unwittingly contracted to convey a defective title which could not be perfected.

C. Restatement: *Bain v Fothergill*

2.15 The first opportunity for a reconsideration of the Rule by a court of sufficient authority to overrule the original decision came with *Bain v Fothergill* in 1874.[31] The defendants had arranged to purchase the lease of a mining royalty containing a condition that the lessor's consent was required for any transfer of the lease. The lessors had not consented to this purchase so it remained uncompleted. The defendants then contracted to sell their interest to the plaintiffs, without informing them of the condition or seeking to obtain the lessors' consent to the transfer. The defendants later found that the lessors refused to consent to the transfer of the lease to them unless the defendants sold it to another party. After trying unsuccessfully to obtain the lessors' consent to the sale, the defendants sold their interest to the third party and purported to terminate their contract with the plaintiffs. The plaintiffs then sought to recover damages for loss of bargain on the ground that the case was governed by the exceptions to the Rule since the defendants had contracted to sell property which they knew they did not own, though admittedly without fraud. The questions whether the Rule was good law and should apply in the circumstances were taken to the House of Lords, which summoned the judges to give their opinions.

2.16 Five judges thought that the case fell squarely within the Rule, which they expressed as being that where a vendor "without his default is unable to make a good title", the purchaser is not entitled to damages for loss of bargain.[32] By formulating the Rule in this way, they left open the type of conduct by the vendor which would exclude the Rule. Baron Pollock thought the Rule applied only when the vendor had acted bona fide; while Baron Pigott argued that a vendor's default which caused the breach would amount to fraud and oust the Rule, although he concluded that in the instant case the Rule applied even if the defendants knew of the defect but honestly believed that they would obtain the lessors' consent to the sale.[33] Denman J dissented, believing *Flureau v Thornhill* to have been correctly decided but limited to cases involving a vendor in possession and with a holding title without any knowledge of any defect in the title "discovering for the first time, on investigation of the

matter, that he had not such a title as a purchaser could be compelled to take." The present case did not come within the Rule thus defined because the defendant knew of the defect but expected it to be cured.[34]

2.17 The case was decided by the judgments of two law lords after consideration of the judges' opinions. Lord Hatherley appeared to approve *Engel v Fitch* in saying that whenever the obstacle to completion of the contract

> is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in their conveyance.[35]

Expressly overruling *Hopkins v Grazebrook*, Lord Chelmsford said:

> the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of real estate knowing that he had 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.[36]

This formulation appears to go far beyond the original statement of the Rule by Grey CJ in *Flureau v Thornhill* since it would seem to limit damages even in cases of actual fraud; indeed, his Lordship accepted that any distinction as to damages based on whether the vendor acted bona fide could not be justified.[37] The purchaser's remedy in all cases lay rather in the tort of deceit. At that time this statement was made, there was doubt whether this remedy was available for careless as well as wilful misrepresentations. Lord Chelmsford himself, when Lord Chancellor, had said that "if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit".[38] This statement was taken as importing the notion of equitable or constructive fraud into the tort of deceit,[39] and it was not until the landmark case of *Derry v Peek*[40] in 1889 that it was finally settled that only wilfully false representations founded an action for deceit. Thus Lord Chelmsford may have contemplated tort damages for situations, as in *Bain v Fothergill* itself, where a vendor believed without foundation though without fraud that his title would be perfected automatically. Yet fifteen years later this possibility was overturned. In any case, it has often been pointed out that deceit is an inadequate remedy in such circumstances since damages for loss of bargain are not available in tort. The measure of tort damages for deceit aims to put the plaintiff in the same position as if the misrepresentation had not been made, so a vendor could only recover for expenses incurred on the basis of the contract. As Professor Treitel has said, "it is hard to see why the fact that the defendant is guilty of the tort of deceit should affect the damages for which he is liable in a contractual action."[41]

2.18 Their Lordships gave several reasons for the continuation of the Rule. It was thought that the Rule was so well-established and acted upon for so long that all vendors and purchasers must be assumed to bargain on the basis that it was a term of the conveyance. Given the uncertainty of titles, it was said to be assumed that the purchaser will not re-sell until the title is fully investigated. Unlike the sale of goods, interests in land were not thought to be made with a view to re-sale. Lord Chelmsford also considered that the loss of bargain in contracts for the sale of land is of a "purely speculative character" and would be too difficult to determine; even if it could be proved, he thought that the loss of a profitable resale was too remote from the breach to be compensable.[42]

D. Later Qualifications

2.19 The restatement of the Rule by the House of Lords was received with misgivings, especially the statement that loss of bargain damages in cases of fraud could only be recovered in tort.[43] Later cases laid down a number of limitations on the statement of the Rule by Lord Chelmsford. In *Day v Singleton*[44] the plaintiff had agreed to purchase a hotel lease, subject to the consent of the lessors. The vendor died before the contract was completed and his personal representative, anxious to annul the sale, persuaded the lessors to refuse their consent to the transfer of the lease, and subsequently re-sold the lease for a price above that of the original contract. The English Court of Appeal held that it was the defendant's duty to use his best endeavours to obtain the lessor's consent to the sale. If he was unable to do so, the Rule applied; but if it was within his power to obtain consent and he omitted to do so, he was liable for the full measure of damages. The court distinguished

Bain v Fothergill, where the vendors had done all they could to obtain the lessor's consent. While it conceded that this approach was at odds with some of the statements in *Bain v Fothergill*, the Court thought it prevented the Rule "from leading to grievous injustice."[45] As the Rule was an anomalous one based on the difficulties of showing a good title to real property, it should not be extended to cases in which the reasons for it did not apply. The extent of the restriction of the Rule was illustrated in *In Re Daniel*[46] where the refusal of mortgagees to consent to a conveyance was held not to invoke the Rule because it was caused by the vendor's financial inability to discharge the mortgage.

III. THE PRESENT STATE OF THE RULE

A. When is the Rule Applied?

2.20 In view of the small number of cases in which the Rule has been argued successfully, and the circumstances in which it has been held to be inapplicable, there is some doubt as to the true extent of the Rule at present. Broadly speaking, the Rule applies only if the vendor, acting in good faith, is unable to complete the conveyance because of a defect in the vendor's title. It applies to the sale of all interests in land, whether freehold, leasehold, easements or *profits a prendre*, including options to purchase land or to renew a lease.[47]

1. Defects in Title

2.21 The Rule only applies in cases where the inability of a vendor to complete the conveyance is caused by a defect in title, as opposed to a matter of conveyancing. The smallest defect in the vendor's title, such as a restrictive convenant, is sufficient to invoke the Rule; but the defect must truly relate to the title which the vendor has agreed to sell, and must be a defect which cannot be remedied by the vendor. Conveyancing matters are generally those which the vendor has power to resolve by performing an act either solely or with the concurrence of another person whose co-operation may be compelled by law, and the act relates to the form of the conveyance or transfer document. Examples of conveyancing matters include cases where the vendor has failed or refused to:

- have a caveat removed;[48]
- deliver an abstract of title;
- pay off a subsisting mortgage;
- acquire the legal estate which the vendor has the equitable right to obtain;
- sell under a power of sale in order to eject a mortgagor;
- apply to the courts to eject an occupier.[49]

If the contract was breached by the vendor's own repudiation, as by wrongfully selling the property to another person, the Rule does not apply.[50] Nor does it apply where the vendor fails to give vacant possession as promised: this is an express contractual provision on which the purchaser is entitled to rely, even where the purchaser knew that there was an occupant on the premises at the time of the contract.[51] And where the conveyance has been completed though without the full title contracted for, the purchaser may obtain full damages in an action on the convenants for title.[52]

2.22 In *Wroth v Tyler*[53] Megarry J held that a wife's statutory personal right against the vendor husband not to be evicted from the property was not within "the spirit or the letter" of the Rule. This decision has been criticised as over-zealous,[54] but it has not been overruled; so the class of title defects covered by the Rule could now be limited to those stemming from the inherent uncertainty of showing title.

2. Bona Fides of Vendor

2.23 If the obstacle is a conveyancing matter the vendor cannot rely on the Rule. But even if there is a true defect in title, in order to be protected by the Rule the vendor must show that he or she has done all that could reasonably have been done to perfect the title. Unless this is proved, the purchaser is entitled to full damages because the vendor did not act bona fide. In short, the Rule does not apply when the vendor was "the author of his own misfortunes".[55]

2.24 The Rule most commonly arises when a transaction is blocked because the assignor has failed to obtain the approval of a co-owner or the consent of a lessor or mortgagor. Where the consent of another person is required for the transfer to be completed, the vendor must have used his or her best endeavours in order to obtain that consent. The courts will closely scrutinise the efforts of the vendor to have the defect removed. However, the vendor is not required to embark on difficult or uncertain litigation in order to secure consent or vacant possession.[56]

2.25 The older cases are divided as to the degree of culpability by the vendor which is sufficient to displace the Rule. Since *Day v Singleton* it has been settled that bad faith not amounting to actual fraud will render the vendor liable to full damages. The test was expanded in *Malhotra v Choudhury* where it was held that the burden of proof is upon the defendant vendor to prove that he or she has done everything that could reasonably be done to remove the defect and

> unwillingness to use best endeavours to carry out a contractual promise is bad faith and for there to be bad faith which takes the case out of this exceptional rule, it is not necessary that there should be either a deliberate attempt to prevent title being made good or anything more than the unwillingness which I find it inevitable to infer in this case. If a man makes a promise and does not use his best endeavours to keep it, it cannot take much and... may not need more to make him guilty of bad faith and to entitle the victim of his bad faith to his full share of damages to compensate him for what he has lost by reason of that breach of contract and bad faith.[57]

That decision was followed in *Sharneyford Supplies Ltd v Edge,*[58] although their Lordships differed as to whether a vendor should be required to pay whatever sum a lessee required in order to obtain vacant possession. As was noted by Balcombe LJ in that case, if a vendor were required to seek to perfect his or her title *at any cost*, the circumstances in which the Rule applied would effectively disappear. Yet if the courts imposed some test of reasonable payment which the vendor might be expected to pay, the difficulties of determining the requisite amount in individual cases could prove insuperable.

B. What Damages may be Recovered?

2.26 When the Rule applies the measure of general damages is the amount of the deposit paid, plus interest on the deposit calculated from the date of payment to the date of judgment,[59] and limited expenses incurred in investigating the title. Within the last category, recoverable expenses have included:[60]

- preparing, executing and stamping the contract;
- searching the title;
- preparing the conveyance (if the preparation was not premature);
- insuring the property.

If no deposit was paid and no such expenses were incurred, the purchaser is not entitled to more than nominal damages.[61]

2.27 The purchaser may also, as in any contract, recover for such consequential losses as are held to have been within the contemplation of the parties; but as general damages are curtailed by the Rule, the consequential losses are confined to further expenses actually incurred and are very limited. Usually costs associated with the conveyance or other expenses have been disallowed because it has been thought that a prudent purchaser should wait until the vendor shows title before acting. Expenses considered premature and too remote have included:[62]

the cost of obtaining a survey of the property;

the cost of preparing the conveyance in anticipation of completion;

expenses incurred in compensating sub-purchasers;

costs of negotiating the contract, and other pre-contract expenses;

alterations and improvements made after entering into possession before completion, as agreed in the contract;

costs associated with the purchaser's intended use of the land, such as the creation of a business association.

It may be, however, that the costs of obtaining surveys and inspections together with the preparation of the conveyance would now be considered as sufficiently within the contemplation of the parties to be recoverable under the Rule, particularly as there is authority that pre-contract expenses may be recovered in ordinary contract actions.[63] Also, since it is now normal conveyancing practice to obtain surveys and inspections before completion, such expenses would fall within the traditional ambit of the Rule as "proper conveyancing expenses".[64]

2.28 It is clear, then, that the full measure of reliance loss is not compensated under the Rule. Other losses that presumably could not be recovered, even though incurred on the faith of the contract being completed, would include those associated with:

the preparation of building plans;

obtaining development approval;

financing the purchase of the property;

preparations for commercial use of the property, such as advertising for tenants.[65]

FOOTNOTES

1. *Robinson v Harman* (1848) 1 Exch 850 at 855; 154 ER 363 at 365.

2. L L Fuller and William R Purde "The Reliance Interest in Contract Damages" (1936-37) 46 *Yale LJ* 52 at 54.

3. See for example *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; see K E Lindgren, J W Carter and D J Harland *Contract Law in Australia,* Butterworths, Sydney, 1986, at 691; A S Burrows "Contract, Tort and Restitution - A Satisfactory Division or Not" (1983) 99 *Law Quarterly Review* 217 at 228.

4. *Lloyd v Stanbury* [1971] 1 WLR 535.

5. Harvey McGregor *McGregor on Damages* 15th ed, Sweet & Maxwell, London, 1988 at 573-574.

6. *Flureau v Thornhill* (1776) 2 W Bl 1078 at 1078; 96 ER 635 at 635.

7. *Ibid*.

8. This view was preferred by Isaacs J in *Coronet Homes Pty Ltd v Bankstown Finance and Investment Co Pty Ltd* (1966) 85 WN (NSW) 69 at 75, 78; [1966] 2 NSWR 351 at 358, 360-361.

9. A I Ogus *The Law of Damages*, Butterworths, London, 1973, at 303-304. For a discussion of "condition" see F M B Reynolds "Warranty, Condition and Fundamental Term" (1963) 79 *Law Quarterly Review* 534-555.

10. *Brig's Case* (1623) Palmer 364; 81 ER 1125 bears a factual similarity to *Flureau v Thornhill*. The plaintiff paid a lump-sum in return for the defendant's promise to grant a lease; but before the lease could be executed, the defendant was dispossessed. The Court of King's Bench held that the plaintiff could recover in assumpsit "for loss of the benefit of the bargain, and will recover not only as much money as he gave for the lump sum, but also damages for the breach of contract" (translated from the law French). Insofar as it is relevant, therefore, it is at odds with *Flureau v Thornhill*, although nothing was said about the actual quantum recoverable.

11. Grant Gilmore *The Death of Contract* Columbus State University Press, Columbus, 1974, at 51; Morton J Horwitz "The Historical Foundations of Modern Contract Law" (1974) 87 *Harvard Law Review* 917 at 921; P S Atiyah *The Rise and Fall of Freedom of Contract*, Clarenden Press, Oxford, 1979, at 195; 200, 428-9; cf A W B Simpson "The Horwitz Thesis and the History of Contracts" (1979) 46 *University of Chicago Law Review* 533 at 547-553; A W B Simpson *A History of the Common Law of Contract*, Clarendon Press, Oxford, 1975, at 123, 582.

12. *Bree v Holbech* (1781) 2 Dougl 655, 99 ER 415; *Cripps v Read* (1796) 6 TR 606; 101 ER 728.

13. *Johnson v Johnson* (1802) 3 B & P 162; 127 ER 98.

14. *Bratt v Ellis* and *Jones v Dyke*, both noted briefly in appendixes to Edward Sugden *The Law of Vendors and Purchasers of Estates* 14th ed, 1862, at 812-813, and earlier editions.

15. *Denton v Stewart* (1786) 1 Cox 258; 29 ER 1156; *Greenway v Adams* (1806) 12 Ves Jun 395; 33 ER 149; per contra *Todd v Gee* (1810) 17 Ves Jun 273; 34 ER 106; *Sainsbury v Jones* (1839) 5 My & Cr 1; 41 ER 272 at 273.

16. *De Bernales v Wood* (1812) 3 Camp 258; 170 ER 1375; *Farquahar v Farley* (1817) 7 Taunt 592, 129 ER 236; cf *Carlton v Bragg* (1812) 15 East 223; 104 ER 828.

17. (1826) 6 B & C 31; 108 ER 364.

18. (1826) 6 B & C 31 at 34; 108 ER 364 at 365.

19. *Walker v Moore* (1829) 10 B & C 416; 109 ER 504.

20. (1829) 10 B & C 416 at 422; 109 ER 504 at 506 per Littledale J.

21. *Robinson v Harman* (1848) 1 Ex 850 at 855; 154 ER 363 at 365.

22. For American authorities, see the argument of Serjeant Shee in *Pounsett v Fuller* (1856) 17 CB 660 at 668-673; 139 ER 1235 at 1239-1240.

23. Theodore Segdwick *A Treatise on the Measure of Damages* 2nd ed, 1852 at 208; 4th ed, 1868 at 234.

24. Edward Sugden *Vendors and Purchasers* 14th ed, 1862, at 360.

25. (1854) 9 Ex 341; 156 ER 145.

26. see *Hadley v Baxendale* (1854) 9 Ex 341 at 355; 156 ER 145 at 151 per Alderson B, where the rules as to non-payment of money and the sale of land are mentioned.

27. *Pounsett v Fuller* (1856) 17 CB 660; 139 ER 1235 at 1242 (supposed incorporeal hereditament not executed by deed).

28. *Sikes v Wild* (1863) 4 B & S 423; 112 ER 517. This development was probably the result of the retreat by courts of common law from the broader equitable notion of fraud adopted by Lord Mansfield.

29. *Engell v Fitch* (1868) LR 3 QB 314, affirmed (1869) LR 4 QB 659.

30. *Lock v Furze* (1866) LR 1 CP 441.

31. (1870) LR 6 Ex 59, affirmed (1874) LR 7 HL 158.

32. (1874) LR 7 HL 158 per Pollock B (with whom four judges agreed) at 170, per Pigott B at 193.

33. (1874) LR 7 HL 158 per Pollock B at 174, per Pigott B at 194, 200.

34. (1874) LR 7 HL 158 at 178, 184-186. Denman J cited as support the dissenting opinion of Erle CJ in *Sikes v Wild* (1861) 1 B & S 587; 121 ER 832.

35. (1874) LR 7 HL 158 at 209.

36. (1874) LR 7 HL 158 at 207.

37. (1874) LR 7 HL 158 at 206, discussing the statement by Sedgwick quoted in para 2.11.

38. *Western Bank of Scotland v Addie* (1867) LR 1 HL(Sc) 145 at 162.

39. *Weir v Bell* (1878) 3 Ex D 238 per Cotton LJ at 242; *Smith v Chadwick* (1882) 20 Ch D 27 per Jessell MR at 44.

40. (1889) 14 App Cas 337, HL(E).

41. G H Treitel *Law of Contract* 7th ed, Stevens, London, 1987, at 767.

42. (1874) LR 7 HL 158 at 202, 209, 211.

43. See for example *Colonial Investment and Agency Co Ltd v Cobain* (1888) 14 VLR 740 at 747.

44. [1899] 2 Ch 320.

45. [1899] 2 Ch 320 at 330.

46. *In Re Daniel: Daniel v Vassall* [1917] 2 Ch 405.

47. *Bain v Fothergill* (1874) LR 7 HL 158, *Day v Singleton* [1899] 2 Ch 320, *J W Cafes v Brownlow Trust* [1950] 1 All ER 894 (lease); *Rowe v School Board for London* (1887) 36 Ch D 619 (right of way); *Morgan v Russell* [1909] 1 KB 357 (right to take cinders); *Ontario Asphalt Block Co v Montreuil* (1916) 27 DLR 514, *Wright v Dean* [1948] Ch 686 (option to purchase); *Gas Light and Coke Co v Towse* (1887) 35 Ch D 519 (option to renew lease).

48. *Noske v McGinnis* (1932) 47 CLR 563 per Rich J at 583.

49. *Jones v Gardiner* [1902] 1 Ch 191; *Engel v Fitch* LR 4 QB 659; *In Re Daniel* [1917] 2 Ch 405; *Braybrooks v Whaley* [1919] 1 KB 435.

50. *Ridley v De Geerts* [1945] 2 All ER 654; *Diamond v Campbell-Jones* [1961] 1 Ch 22; *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512.

51. *Wroth v Tyler* [1974] Ch 30; *Hensley v Reschke* (1914) 18 CLR 452 at 464; *Kahlbetzer v Cincotta* (1983) CCH NSW Conv R 56-806.

52. *Locke v Furze* (1866) LR 1 CP 441; *Beard v Porter* [1948] 1 KB 321.

53. *Wroth v Tyler* [1974] Ch 30.

54. C T Emery “In Defence of the Rule in *Bain v Fothergill*” [1978] *Conveyancer* 338; A J Oakley “Pecuniary Compensation for Failure to Complete a Contract for the Sale of Land” (1980) 39 *Cambridge Law Journal* 58 at 69; Law Commission of England and Wales *Transfer of Land: The Rule in Bain v Fothergill: Report,* Law Com No 166; Cm 192, 1987, at 16.

55. *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512 per Needham J at 516.

56. *Williams v Glenton* (1866) 1 Ch App 200 at 208; *Wroth v Tyler* [1974] Ch 30 at 50.

57. *Malhotra v Choudhury* [1980] Ch 52 per Stephenson LJ at 72-73, also 71, 76; Cumming-Bruce LJ at 77.

58. *Sharneyford Supplies Ltd v Edge* [1987] 1 Ch 305 per Balcombe LJ at 322-323, per contra Parker LJ at 326.

59. *Keen v Mear* [1920] 2 Ch 574.

60. *Hanslip v Padwick* (1850) 5 Ex 615; *Keen v Mear* [1920] 2 Ch 574; *Conn v Bartlett* [1923] GLR 729; *Staples v Lomas* [1944] NZLR 150; see G W Hinde, D W McMorland and P B A Sim *Land Law*, Butterworths, Wellington, 1979, vol 2 at 1087.

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

62. For a summary of the cases, see Harvey McGregor *McGregor on Damages* 15th ed, Sweet & Maxwell, London, 1988, at 573-574.

63. Law Commission of England and Wales, note 54 at 14.

64. *Jones v Gardiner* [1902] 1 Ch 191 per Byrne J at 195.

65. Charles Harpum “*Bain v Fothergill* in Chains” [1983] *Conveyancer* 435 at 436; cf MP Thompson “The Impact of *Bain v Fothergill* on *Raineri v Miles*” [1982] *Conveyancer* 191.

3. Considerations for Reform

I. SUPPORT FOR THE RULE

3.1 Although the Rule has faced widespread condemnation from judges and academics, some voices have been raised in its support.[1] The arguments in favour of retention have not progressed beyond those propounded by their Lordships in *Bain v Fothergill* (see para 2.18). The first justification is the uncertainty of titles to land. As the result of legislative innovations outlined in Parts IV and V below, title to land in New South Wales is now far more certain than was the case two centuries ago in England when the Rule was established. Title to land is also more certain, and more easily ascertained, than title to most goods. Hence we believe that this argument no longer has any force in this State.

3.2 The second justification for the Rule is that it creates an exception for the sale of interests in land because land itself is an exceptional form of property. In some respects this argument is simply a variation on the argument that title to land is inherently uncertain, unlike title to chattels. In *Bain v Fothergill* their Lordships also argued that land is not a commodity bought and sold with a view to resale. That is certainly not the case today, and it was probably untrue in 1874 when the Rule was re-stated.[2] Nowadays speculation and investment in real property are common, and vendors must be aware of the likelihood that a purchaser intends to make a profit by a quick resale.

3.3 The third justification for the Rule is that it is long-established and has been acted upon by conveyancers. There is much to be said for certainty in the law, but *stare decisis* by itself cannot justify a rule which is anomalous and rarely applied. In fact, the Rule in *Bain v Fothergill* may be said to create uncertainty because it is so eroded by qualifications and exceptions that it is often difficult to predict whether and to what extent it applies in particular cases.

II. INCONSISTENCIES

3.4 The main argument against the Rule is that it is inconsistent with modern contractual principles. Although it is now accepted that damages for breach of contract are not affected by the motives or intentions of the defendant,[3] the Rule uniquely imports a concept of fault into the law of contract. In denying a purchaser expectation loss flowing from a vendor's breach of contract, the Rule produces a unique exception to the modern law of damages which is difficult, if not impossible, to justify. As we have shown in chapter 2, the Rule was laid down before those principles were established and has continued (with severe limitations being placed on it) despite developments in the law of contract damages.

3.5 The Rule was devised at a time when ownership of law was limited and carried with it special privileges. Because land was an unusual form of property, it was considered reasonable that contracts disposing of interests in land should not conform to ordinary contracts principles. That this position is changing is indicated by the decision of the High Court in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[4] where it was held that the ordinary principles of contract apply to leases.[5]

3.6 The Rule was not the only circumstance in which damages for loss of bargain were excluded in actions for breach of contract during the nineteenth century. In 1877 the English Court of Appeal decided that where the delivery of a cargo transported by sea was delayed, the owner of the cargo could not obtain damages for loss of profit from the carrier.[6] The reason for this rule was similar to that advanced in *Bain v Fothergill*: the uncertainties of carriage by sea meant that the consignor was assumed to agree that lost profits could not be recovered under the contract. The rule in relation to carriage of goods by sea was apparently never applied, and was subsequently overruled by the House of Lords in 1969.[7]

3.7 The results of the exception made by the Rule are not merely theoretical. The main purposes of the modern law of contract are to compensate a contracting party for the consequences of breach, and to discourage the repudiation of contractual terms by placing the burden of those consequences on the shoulders of the party which caused the expectations created by the contract to be unfulfilled. The distribution of responsibilities in this way adds certainty to commercial affairs by encouraging parties to enter into only those contracts which they

know they can fulfil, by allowing them to act on the faith of contracts already made, and by discouraging them from terminating contracts unilaterally. The effects of the Rule, on the other hand, are to place the burden of breach on the purchaser and to encourage the vendor not to make a full investigation of the state of his or her title before agreeing to sell it.

3.8 The effects of the Rule can be particularly harsh when chain conveyances are involved. In these cases, which are the most common form of conveyancing transaction, X sells a house (Blackacre) to Y, who partly finances the purchase by selling his or her existing property (Whiteacre) to Z. If X's sale of Blackacre falls through as the result of a defect in title, and if X is able to rely on the Rule, Y is nevertheless liable to Z for the full measure of damages because Y's default is not the result of a defect in his or her title. In a rising property market Y might renege on the sale to Z but is liable for the increase in the value of Whiteacre. Alternatively, Y must complete the sale and incur the cost of finding somewhere else to live as well as the costs of the abortive purchase of Blackacre which are not recoverable under the Rule. This result is so unjust as to be a powerful argument for abolition of the Rule: there is no reason why Y should bear this loss when it is caused by X contracting to give a title which could not ultimately be made out.

3.9 A further problem arises when the ability of courts to award damages in equity is considered. Under the successor legislation to Lord Cairns' Act, where the Supreme Court has power to order specific performance of a contract it may award damages in addition to or in substitution for the order.[8] The Court will not make such an order where it would be futile, as when the vendor has no title at all, and of course cannot award damages in equity where it has no power to order specific performance. But as the Court has wide powers to award damages in equity so as to do complete justice particularly when common law damages would be an inadequate remedy,[9] it is conceivable that this power could be used to circumvent the Rule. The point has not been specifically decided, but it is a further indication of the anomalies raised by the Rule.[10]

III. MODERN CONVEYANCING PRACTICE

3.10 Several changes in conveyancing practice have diminished the operation of the Rule. These relate to the knowledge which the vendor normally has of the state of his or her title before contract and the rights which the vendor has under the contract. In the eighteenth and nineteenth centuries, when the Rule was devised, it was normal practice for titles to be investigated only after a contract for sale was concluded. As title to interests in land was complex and uncertain, vendors frequently found that they did not possess the title which they had contracted to sell. These circumstances gave rise both to the Rule and to the inclusion of terms in the contract which allowed the parties to settle any differences over the state of the title or the condition of the property. However, it is now common and prudent practice for a solicitor acting for a vendor to undertake investigations of the vendor's title prior to contract in order to minimise possible liability for professional negligence. Also, under recent amendments to the Conveyancing Act 1919, several matters which might result in title defects must now be disclosed by the vendor prior to contract; if the vendor breaches the disclosure and warranty requirements, the purchaser may rescind the contract at any time before completion.[11] Thus many problems relating to the state of the title, which might formerly have caused the vendor to invoke the Rule, are now discovered before a contract for sale is entered into. This change in conveyancing practice has reduced considerably the circumstances in which a vendor is placed in such a position as to rely on the Rule. Although the Rule applies when, at the time of the contract, the vendor was aware of the defect in title and did not reasonably believe that there was some means of having it removed,[12] it is unlikely that a vendor would enter into a contract in such circumstances. Apart from the uncertainty of successfully relying on the Rule by evading its qualifications, a vendor who enters into a contract of sale knowing of a defect in the title but without disclosing it to the purchaser may be liable in the tort of deceit if, prior to the contract, the vendor had represented to the purchaser by words or conduct that the title was not defective.[13] Even if the vendor entered into the contract in mere bad faith, without believing that a good title could be made prior to completion, the purchaser might be able to recover damages in tort for either fraudulent or perhaps negligent misrepresentation.[14]

3.11 Because of the inherent uncertainty of titles, historically several terms were included in contracts of sale which gave the purchaser the opportunity to issue objections or requisitions in relation to the title or other matters.

These terms allowed the vendor to satisfy objections within a reasonable period and, if necessary, to adjust the purchase price by way of compensation or to rescind the contract. Such terms have been incorporated as conditions in the standard contract for sale of land. The most important of these for present purposes is condition 8 of the standard contract (1988 edition) which provides that if the purchaser either makes a claim for compensation exceeding five percent of the contract price, or issues any objection or requisition (including those as to title),[15] and the vendor is unable or unwilling to comply with the claim for compensation or comply with or remove the objection or requisition, the vendor is entitled to rescind the contract. This condition applies whether or not the vendor attempts to satisfy the claim, objection or requisition; however, the vendor must give the purchaser the opportunity to waive the claim, objection or requisition within 14 days of the vendor giving written notice of his or her intention to rescind the contract. If the contract is rescinded in this fashion, condition 19 of the standard contract provides that the purchaser is entitled to have the deposit and any other money paid under the contract refunded but (apart from some limited exceptions) cannot recover damages, costs or expenses (including interest).

3.12 Condition 8 is subject to restrictions in interpretation which limit the vendor's power to rescind. Thus the vendor cannot use it simply to repent a bad bargain: the reason for exercising the power to rescind must be related to the purpose for which the clause was devised, namely unexpected circumstances arising from the inherent complexity of title to land. Secondly, the vendor must exercise the power in good faith for the proper purpose for which it was intended. Thirdly, the vendor's rescission must be reasonable in all the circumstances: the vendor must not have entered into the transaction recklessly without a reasonable expectation of being able to convey the title which was the subject of the contract, and will not be permitted to rescind where it would be arbitrary or capricious to do so.[16] If the subject of the objection or requisition constitutes a mere "passing cloud" which may be rectified by the vendor without onerous steps, the power to rescind may not be invoked.[17]

3.13 From this summary it is apparent that a vendor can rely on condition 8 in many, if not most, cases in which the Rule in *Bain v Fothergill* applies.[18] If the vendor reasonably and unwittingly entered into a contact for sale which could not be completed because the title was defective, and provided that the vendor acts reasonably in attempting to remove the defect, both the Rule and the power to rescind under condition 8 may be invoked. They have, however, different effects on the amount recoverable by the purchaser. The contractual condition does not usually allow the purchaser to recover interest on the deposit or the limited expenses allowed under the Rule such as the cost of preparing the contract. A rescission by a vendor under condition 8 excludes liability for "damages, costs or expenses" other than for a breach of an express or implied condition or term of the contract, so a purchaser may not be able to recover damages permissible under the Rule once the vendor has properly exercised the right to rescind.[19]

3.14 Condition 7 of the standard contract provides that errors and misdescriptions, including those as to title, may be compensated by the vendor and the amount determined by arbitration. The purchaser may, however, rescind the contract if he or she would otherwise be required to take a substantially different property from the one contracted for, and cannot be forced to take the property if the compensation awarded is more than five percent of the purchase price. The inclusion of title matters in this condition is relatively recent[20] and the relationship of the condition to the Rule in *Bain v Fothergill* remains uncertain.[21]

IV. APPLICABILITY TO TORRENS SYSTEM LAND

3.15 As already stated (in para 2.13), one of the justifications for the Rule in *Bain v Fothergill* was the difficulty of proving title to land under English law. At the time the Rule was formulated, the sale of interests in land was generally carried out by the execution of deeds under what is now called the Old System of conveyancing. That system consisted of rules based on the practices of specialist conveyancers, accepted and modified by the Courts. In a conveyance under that system, a vendor was required to prove his or her right to the interest being conveyed by showing the purchaser an unbroken chain of instruments disposing of the property. The chain of title was to be traced back to a single document (the "good root of title") at least 60 years old,[22] which presumptively showed the title to the interest being conveyed. Any of the instruments in the chain of title could, for any number of reasons, later prove to be defective, so the whole process of conveyancing contained inherent risks that the vendor did not possess the title which he or she purported to convey.

3.16 It was principally to remedy these uncertainties that Robert Richard Torrens introduced the system of land tenure and conveyancing that bears his name.[23] The principal aim of the Torrens system has been described as being

> to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.[24]

The objects of certainty and accuracy are achieved by providing that once an interest is entered on the Register it is indefeasible and cannot be defeated by earlier unregistered interests. The Torrens system is one of title by registration, so that each purchaser, once registered as proprietor, holds in effect a fresh Crown grant which is immune from any defects in the vendor's title. Subject to certain stated exceptions, such as fraud,[25] a vendor's title is easily ascertained by an inspection of the interests disclosed by the Register and by routine inquiries to a limited number of statutory authorities.

3.17 It must be admitted that the Torrens system has not fulfilled the original expectations that the Register would reflect a completely accurate picture of the state of registered titles. Errors in registration are sometimes made by the Land Titles Office, while equitable interests fit uneasily within a framework of determinate registered interests. Overriding interests created by statute also reduce the Register's accuracy, so that purchasers must make further searches.[26] But the Torrens system has greatly diminished the instances in which a vendor is mistaken as to the state of his or her title, and has thus reduced the scope for application of the Rule in *Bain v Fothergill.*

3.18 Although the rationale of the Rule was largely removed by the Torrens system, it was accepted without argument as binding authority by Australian courts in early cases involving registered as well as unregistered land.[27] In most of the cases in the colonial period, the Rule was not actually applied because the vendor was found to have simply failed to convey.[28] The willingness of Courts to find that the reason for the vendor's failure to complete was a conveyancing obstacle rather than a defect in title meant that the Rule's applicability to Torrens land was assumed rather than argued. *West v Read*[29] is generally regarded as deciding that the Rule applies to Torrens land in New South Wales. In that case a new trial was granted on the ground that the trial judge had wrongly decided that the purchaser could not sue on the vendor's covenant to give a good title; Cullen CJ clearly indicated that the measure of damages recoverable by the purchaser was governed by the Rule.[30] The matter was fully argued and discussed in *Boardman v McGrath* where MacNaughton J of the Queensland Supreme Court, after repeating that the basis of the Rule was in the inherent uncertainty of title to land compared with goods, said:

> For the plaintiff it was urged that this reason does not apply to transactions in land under the Real Property Acts, the effect of which is to make dealings in realty as simple as those in personalty. If the matter were *res integra* [not decided in law], something might be said in favour of this contention, but it is too late to raise it now. No authority in support of it can be found in the reports of the High Court or of any of the Australian State Courts, and the cases... show that the general understanding has been that the rule does apply to land under the Real Property Acts.[31]

On the facts, though, the Rule was not applied because the vendor had refused to complete the conveyance. Finally, the Rule was approved by the High Court in *Noske v McGinnis,*[32] though again on the facts the vendor was held to be unable to rely on it both because the alleged defect was one of conveyancing not title and because the vendor had refused, rather than been unable, to complete. The Rule was also applied in cases involving leases pursuant to the Crown Lands Acts, under which tenure is less secure though title is at least ascertainable.[33]

3.19 In New Zealand, an early decision of the Court of Appeal held that the Rule did not apply to the sale of a government lease under a land registration system. The court did not, however, expressly overrule *Flureau v Thornhill*, leaving the question open as to whether the Rule applied to registered land.[34] Later judicial opinion was divided over the applicability of the Rule to land registered under a Torrens system,[35] although it was eventually regarded as settled that the Rule did apply.[36] It has often been recognised that "in view of the

provisions of the Land Transfer Act this rule can seldom have application in New Zealand".[37] In the most recent case in which the Rule was discussed, Chilwell J thought that the reasons for the Rule no longer pertained to New Zealand as:

> Certainty of title under the Land Transfer Act 1952 and the precision of surveys is such that it must be a rare case indeed where some substantial defect in title is demonstrated to exist which a vendor ought not himself to have known.... In the majority of instances a sale of land is, apart from the necessity to obtain and register the memorandum of transfer, of little more difficulty than the sale of a chattel.[38]

3.20 An early Canadian case also expressed the strong *obiter* opinion, for the same reasons, that the Rule was inappropriate in those provinces where a Torrens system was in operation.[39] Although the contrary view later held sway[40] the Rule was, in fact, rarely applied. The Supreme Court of Canada, in *AVG Management Science Ltd v Barwell Developments Ltd*[41] has since expressed strong opinion that the Rule should no longer be followed in those provinces having a title registration system or even (as in the Maritime provinces) a deeds registration system. The Court's remarks have since been taken as repudiating the Rule judicially.[42]

3.21 The Commission believes that the Rule in *Bain v Fothergill* has no relevance to interests in land registered under the Torrens system. This is apparent from the characteristics of the Torrens system, which greatly reduces uncertainties as to titles, and from the consequent paucity of cases in which the Rule has been held to apply in relation to registered real property interests. The Rule has rarely been applied in these circumstances because the obstacle complained of has almost invariably turned out to be a problem of conveyancing rather than a defect in title.

V. UNREGISTERED INTERESTS

3.22 The proportion of land titles not registered under the Torrens system in New South Wales is small and decreasing. At present registered titles account for approximately 95% of all land parcels.[43] In 1988-89, there were only 4,738 conveyances under the Registration of Deeds system, under which conveyances of unregistered land are made.[44] The Land Titles Office is currently embarking on a long-term program which should eventually see all land titles being brought under the Torrens system.

3.23 Unregistered titles suffer uncertainties similar to those which prompted the development of the Rule, even in Australia where relatively short chains of transactions separate the current landholder from the original Crown grant. Given the rationale for the Rule it could be argued that it still has a part to play in relation to unregistered interests. However, the registration of deeds system, under which conveyancing instruments must be registered in the Land Titles Office in order to retain their priority over later registered instruments, greatly reduces the uncertainties of Old System conveyancing. Statutory reforms such as those achieved by the Conveyancing Act 1919, have also simplified the assignment of interests in land outside the Real Property Act. In short, the state of Old System conveyancing is now far removed from that which existed in the eighteenth century when the Rule in *Bain v Fothergill* was originally stated.

3.24 As the Rule applies to all interests in land, the disposition of interests which are not registrable (such as the assignment of a short-term leasehold) should also be considered. However, in the great majority of cases in which such titles cannot be shown, it is the result not of the complexities of the law but of the assignor failing to obtain the consent of a person (for example, a lessor or mortgagee) whose permission is required to order to perfect the assignment.

VI. REFORM IN OTHER JURISDICTIONS

3.25 The Rule has been examined by several law reform agencies in recent years. The view of the majority of their reports has been that the Rule ought to be abolished for interests in both registered and unregistered land. The Law Reform Commission of British Columbia (where a modified Torrens system operates extensively) issued a report in 1976 which concluded that none of the possible reasons for the Rule's existence (its status as an implied contractual term, the notion that liability should be based on fault, and the difficulties of ascertaining title) justified its retention. In particular, the Commission argued that

> the existence of the Torrens system of certification of title in this Province, with its concomitants of increased reliability of title, efficiency, and protection for individuals who rely on the system, justifies a policy decision that, as between a vendor and purchaser, it is the vendor who ought to bear the loss if the agreement fails because he cannot sell the land.[45]

That Commission's recommendation that the Rule should be abolished absolutely was implemented by legislative amendment in 1978 which stated that "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."[46] In 1978 the Supreme Court of Canada expressed strong *obiter dicta* that, having regard to effective land registry systems in all provinces of Canada in the form of either a Torrens system or systems of deeds registration, the Rule should no longer apply. Larkin CJC, speaking on behalf of the court, said 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.[47]

This statement has been taken by Canadian courts as abolishing the Rule, and a recent Canadian textbook has summarised the position by stating that "having regard to the number of exceptions and to the anomaly caused by the rule, it may be assumed that the rule no longer applies in Canada."[48] It might also be noted that in the United States, where state operated land registration systems are exceptional and common law conveyancing is the normal method of land transfer, the Rule has received only qualified support and the better view is that it is indefensible.[49]

3.26 The Law Commission of England and Wales has also examined the subject as a part of its review of the law relating to the transfer of land. In a working paper published in 1986 it proposed "abolishing the rule altogether and not confining the abolition to registered land."[50] The reasons for this proposal were the increased use of land registration and the lack of justification for a special rule for land transfer contracts. The Law Commission argued:

> 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, ie 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. 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.[51]

The Working Paper was cited with approval by the English Court of Appeal in *Sharneyford Supplies Ltd v Edge*.[52] Although the Rule was held not to apply in that case, Balcombe LJ (after discussing the strictures on its application) said:

> But even limited in this way to defects in the vendor's *title*, the rule in *Bain v Fothergill* is today impossible to justify. Its rationale depends, as has been seen, on the difficulties of making title to land under English law. Now that registered title to land is the general rule, this rationale is no longer valid, if indeed it ever was.[53]

Kerr and Parker LJJ, delivering separate judgments, agreed with this view and urged that the Rule be abolished immediately. They both referred to the injustice resulting where a vendor who knows or ought to know of the defective state of the title escapes ordinary damages for breach of contract.[54] Fortified by the opinions of their Lordships and overwhelming support for abolition of the Rule, the Law Commission issued a report which reiterated its earlier view.[55] Its recommendation that the Rule be abrogated for future contracts in relation to both registered and unregistered land has recently been implemented by legislation.[56]

3.27 The Queensland Law Reform Commission briefly considered the Rule in its general review of conveyancing and property law in 1973. It considered that a vendor failing to transfer registered land as agreed should not escape the ordinary measure of damages for breach of a contract "which, although perhaps not occasioned by default on his part, is even less due to any fault on the part of the purchaser."[57] The report recommended that the Rule be maintained for Old System land on the ground that the difficulties of making title to such land were "notoriously difficult", and the legislation which implemented its recommendations excepted unregistered land.[58] However, it should be noted that those land titles in Queensland which are not held under the Torrens system are extremely limited in number and confined to only a few areas. The Law Reform Commission of Victoria has recently recommended that the Rule be abolished, apparently in relation to all interests in land.[59] Thus, in almost all jurisdictions where it has been subjected to recent scrutiny, the Rule has either been abolished entirely or recommendations to that effect have been made. The only exception is Queensland where conveyances of unregistered titles, and therefore the likelihood of the Rule being applied, are almost insignificant.

VII. INCIDENTAL MATTERS

A. Express Agreements

3.28 Since the main explanation of the Rule is that it imposes an implied condition limiting damages, it is currently possible to exclude its operation by, for example, including a liquidated damages clause in the contract. The question also arises: if the Rule is abolished by statute, should the contracting parties be able to effectively reinstate the Rule by including its terms in the contract, thus making a condition formerly implied by law an express condition agreed to by the parties? The Commission is reluctant to interfere with the freedom of contract of vendor and purchaser in this matter. Even if such a clause were to be included in the standard contract, it would be a simple matter for the parties to excise it, if both were so minded.[60]

B. Vendor's Refusal to Complete

3.29 The ordinary measure of damages for a vendor's refusal to complete a conveyance when able to do so, is the purchaser's loss of bargain. While the purchaser is entitled to the difference between the market value and the purchase price of the property, the purchaser cannot also recover the conveyancing and other costs expended in reliance on the contract, since these costs would have been incurred if the contract had been completed.[61] To allow compensation for both reliance and expectation loss would, contrary to the general principles of damages, put the purchaser in a better position than if the contract had been performed. In some cases however, where the purchaser has been unable to prove any loss of bargain (because the value of the property is not greater than the purchase price), the purchaser has been awarded as damages the expenses incurred in anticipation of the conveyance. The allowance of damages for reliance loss in these circumstances derives from a comparison with the result when the vendor is unable to convey and the Rule in *Bain v Fothergill* applies. In *Wallington v Townsend*[62] Morton J thought it would be incongruent if a vendor who was unable to complete owing to a defect in title were in a worse position than one who merely refused to convey. His Lordship was concerned that such an outcome might well encourage a vendor who regretted the bargain made under the contract, to refuse to carry it out. This dictum was applied in *Lloyd v Stanbury*[63] where Brightman J further held that:

> a disappointed buyer suing for damages because the vendor is not willing to implement the bargain is not limited to compensation for expenditure incurred strictly after the execution of the contract. In my judgment the damages which he is entitled to recover include 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 that the act is performed in anticipation of the execution of the contract. 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.[64]

However, improvements to the property made by the purchaser between contract and conveyance were held usually to lie outside the contemplation of the parties and were therefore not recoverable.

3.30 Since it rests on a comparison with the effects of the Rule in *Bain v Fothergill*, it is possible that the abolition or restriction of the Rule might affect the principle established in *Wallington v Townsend*. However, there has developed a line of authority, in England at least, which establishes that in general a plaintiff in an action for breach of contract may elect between damages for expectation loss and reliance loss. This doctrine rests in part on the sale of land cases already cited[65] but was re-stated in *Anglia Television Ltd v Reed*. That case involved the repudiation of a performance contract by a film actor. As no suitable replacement for the defendant could be found, the film was aborted and the plaintiffs, being unable to establish the profits they would have made if the film had been completed, sought to recoup their wasted expenses incurred both before and after the contract was finalised. Lord Denning MR, with whom the other judges concurred, held that:

> a plaintiff in such a case as this has an election: he can either claim for loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits - or if he cannot prove what his profits would have been - he can claim in the alternative the expenditure which has been thrown away, that is, wasted, by reason of the breach.[66]

While this proposition is not universally recognised,[67] it is at least accepted that a plaintiff who is unable to prove any loss of bargain may nevertheless obtain damages for wasted expenditure.[68] However, damages for wasted expenditure will not be awarded simply because the plaintiff has made a bad bargain or if the expenditure would have been wasted whether or not the contract had been performed.[69] It would appear, then, that even apart from reliance on an analogy with cases in which the Rule in *Bain v Fothergill* applies, a purchaser whose vendor refuses to complete but who cannot prove any expectation loss, can in general law recover wasted expenses incurred in reliance on the contract being performed. Hence abolition of the Rule should not affect a plaintiff's recovery in this type of situation.

VIII. CONCLUSION AND RECOMMENDATION

3.31 In view of the reasons for the existence of the Rule, and the absence of a rationale for its continuance either in theory or in practice, the Commission believes that it should be abolished. Abolition of the Rule should apply to both registered and unregistered interests in land. Any justification for the Rule which might previously have existed has been negated by the Torrens system of land titles and modern conveyancing practices which have minimised the circumstances in which the Rule can apply. The possibility that a vendor of Old System land will be able to rely on the Rule is quite remote, and is outweighed by the potential for wasteful litigation which the present state of the Rule allows, indeed encourages. In those few cases in which the Rule can be invoked successfully, the results are anomalous and unjust. We can see no reason why contracts for the disposition of interests in land should not be treated like all other contracts so far as the assessment of damages is concerned.

3.32 Accordingly, we recommend that:

> The Rule in *Bain v Fothergill* should be abolished for all future contracts for the disposition of estates or interests in land. Parties to such contracts should, however, be able to restrict the vendor's liability to pay damages by express agreement. The Rule should be abolished by an amendment to the Conveyancing Act 1919 in the form of the Appendix to this Report.

FOOTNOTES

1. C T Emery “In Defence of the Rule in *Bain v Fothergill*” [1978] *Conveyancer* 338; SM Waddams *The Law of Contracts*, Canada Law Book Co, Toronto, 1977, at 444-446.

2. See the remarks of Bacon VC in *Edwardes v Edwardes* (1877) 5 Ch D 378 at 390.

3. *Butler v Fairclough* (1917) 23 CLR 78 per Griffith CJ at 89.

4. (1984) 157 CLR 17.

5. (1984) 157 CLR 17 per Mason J at 29, Deane J at 53.

6. *The Parana* [1877] 2 PD 118.

7. *Czarnikow v Koufos* [1969] 1 AC 350; see Harvey McGregor *McGregor on Damages* 15th ed, Sweet & Maxwell, London, 1988, at 561, 691.

8. Supreme Court Act 1970 s68(b).

9. *Madden v Kevereski* [1983] 1 NSWLR 305; *Wroth v Tyler* [1974] Ch 30; *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512; cf *Johnson v Agnew* [1980] AC 367.

10. See R P Austin “Contract For Sale of Land: Two Recent English Cases” (1974) 48 *Australian Law Journal* 273 at 275; C T Emery “In Defence of the Rule in *Bain v Fothergill*” [1978] *Conveyancer* 338 at 340 n15.

11. Conveyancing Act 1919, s52A; Conveyancing (Vendor Disclosure and Warranty) Regulation 1986.

12. In *Bain v Fothergill* (1874) LR 7 HL 158, Lord Chelmsford said (at 207) that the Rule applied even if the vendor knew that there was no means of removing the defect. However, McGregor (Note 7 at 563-565) states that bona fides are required: there must be an honest, but not necessarily reasonable, belief that the defect will be removed. The original statement of the Rule in *Flureau v Thornhill* (1776) 2 W B1 1078; 96 ER 635 stated that it did not apply in cases of fraud.

13. *Bain v Fothergill* (1874) LR 7 HL 158 per Lord Chelmsford at 207.

14. *Watts v Spence* [1976] Ch 165 per Graham J at 175; *Sharneyford Supplies Ltd v Edge* [1987] 1 Ch 305 per Balcombe LJ at 323; McGregor, note 7 at 566-567.

15. *Pierce Bell Sales Pty Ltd v Frazer* (1973) 130 CLR 575.

16. *Gardiner v Orchard* (1910) 10 CLR 722 per Isaacs J at 738-740; *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415.

17. *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* (1972) 128 CLR 529 per Stephen J at 554.

18. In *Bowman v Hyland* (1878) 8 Ch D 588 it was held that the contractual right to rescind cannot be exercised by a vendor who had no title at all, but that case involved the interpretation of a clause which stated that the vendor could rescind only if “unwilling” to comply. The modern standard contract, which states that the vendor may rescind if “unable or unwilling”, contemplates situations where the vendor has no title: see P J Butt *The Standard Contract for Sale of Land in New South Wales*, Law Book Co, Sydney, 1985, at 409-410.

19. This is subject to a possible remedy under the covenant of full power to convey implied by the Conveyancing Act 1919, s78. This covenant is not breached by a vendor who never had title: it only applies where the vendor has lost the title.

20. It was included in 1982 as the result of deficiencies shown up in *Travinto Nominees Pty Ltd v Vlattas* (1973) CLR 1; see Butt, Note 18 at 359.

21. C J Rossiter *Vendor and Purchaser*, Law Book Co, Sydney, 1985, at 210. The matter was raised but not decided in *Solomon v Litchfield* (1916) 16 SR (NSW) 610.

22. Now reduced to 30 years: Conveyancing Act 1919 s52(1).

23. S Robinson *Transfer of Land in Victoria*, Law Book Co, Sydney, 1979, at 2-4; D Whalan *The Torrens System in Australia*, Law Book Co, Sydney, 1982, at 14-17.

24. *Gibbs v Messer* [1891] AC 248 at 254.

25. *Bahr v Nicolay (No 2)* (1988) 62 ALJR 268; (1988) 78 ALR 1.

26. Thomas W Mapp *Torren's Elusive Title*, Alberta Law Review, Edmonton, 1978, ch. 9.

27. *Merry v AMP Society (No. 3)* (1872) 3 QSCR 40 at 63-64; *Ross v Robinson* (1886) 12 VLR 764.

28. *Wiper v O'Shannassy* (1875) 1 VLR(L) 10 at 12; *Edwards v Freeborn* (1877) 11 SALR 128 at 130; *Ross v Robinson* (1886) 12 VLR 764 at 773; *Mailer v Clayton* (1899) 1 WALR 3 at 12 per Onslow CJ: "This case [*Engell v Fitch*] was the subject of considerable, and not altogether favourable, comment in *Bain v Fothergill;* but its validity as a decision binding upon this Court is unimpeachable".

29. (1913) 13 SR (NSW) 575; 30 WN (NSW) 204.

30. (1913) 13 SR (NSW) 575 at 580; cf *Solomon v Litchfield* (1916) 16 SR (NSW) 610 where the Rule, though accepted, was distinguished in the case of arbitrated compensation under a standard compensation clause for misdescription of Torrens land.

31. *Boardman v McGrath* [1925] QWN 14 at 15.

32. (1932) 47 CLR 563, per Rich J at 584; Dixon J at 591.

33. *Musk v Doscas* (1911) 13 WALR 55; *Hensley v Reschke* (1914) 18 CLR 452 at 464.

34. *Slack v Lockhart* (1863) 1 NZ Jur App 1. Similarly in an early Fijian case the view was expressed that the certainty of titles registered under a Torrens system rendered the Rule inappropriate: *Joske v Huon* (1882) 1 Fiji LR 68 at 76.

35. *Stewart v Taylor* (1904) 24 NZLR 785; contra *Fleming v Munro* (1908) 27 NZLR 796; *Munro v Pedersen* [1921] NZLR 115.

36. *Staples v Lomas* [1944] NZLR 150; see G W Hinde, D W McMorland and P B A Sim *Land Law*, vol 2, Butterworths, Wellington, 1979, at 1086.

37. *Jacobs v Bills* [1967] NZLR 249 at 254; *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515.

38. *Waring v S J Brentnall Ltd* [1975] 2 NZLR 401 at 412.

39. *O'Neil v Drinkle* (1908) 8 WLR 937. The judge, Lamont J, later became a member of the Supreme Court of Canada.

40. *Stephens v Bannan* (1913) 14 DLR 333 at 343-344; *Peacock v Wilkinson* (1915) 23 DLR 197.

41. (1979) 92 DLR (3d) 289, reversing (1977) 83 DLR (3d) 702, (1976) 69 DLR (3d) 741; noted in (1981) 44 *Modern Law Review* 571.

42. *Kopec v Pyret* (1987) 36 DLR (4th) 1 at 10.

43. Figures supplied by Land Titles Office. The Office estimates that there are approximately 80,000 Old System parcels out of a total of 2,750,000 land parcels in the State. Since 1980 there have been about 70,000 conversions to the Torrens system.

44. New South Wales Land Titles Office *Annual Report 1989* at 48. There are no comparable figures for Torrens conveyances, since Land Titles Office figures are only collected for dealings, which include non-dispository transactions.

45. Law Reform Commission of British Columbia *The Rule in Bain v Fothergill*, LRC 28, 1976, at 19.

46. Conveyancing and Law of Property Act, SBC 1978, c16, s33. See now Property Law Act, RSBC 1979, c340, s33.

47. *AVG Management Science Ltd v Barwell Developments Ltd* (1978) 92 DLR (3d) 289 at 301-302.

48. Paul M Perell *Remedies and the Sale of Land*, Butterworths, Toronto, 1988, at 185.

49. Walter H E Jaeger *Williston on Contracts* 3rd ed, Baker Vourhis & Co, Rochester, NY, 1968, vol 11 at 524-527.

50. Law Commission of England and Wales *Transfer of Land: The Rule in Bain v Fothergill*, WP 98, 1986, at para 3.12.

51. *Id* at para 3.13.

52. [1987] Ch 305.

53. [1987] Ch 305 at 325.

54. *Ibid.*

55. Law Commission of England and Wales *Transfer of Land: the Rule in Bain v Fothergill*, Law Com 166; Cm 192, 1987.

56. Law of Property (Miscellaneous Provisions) Act 1989 (Eng) s3, which states that "the rule of law known as the rule in *Bain v Fothergill* is abolished in relation to contracts made after this section comes into force." The date of abolition was, by virtue of s5, set at 27 September 1989. The Rule was last applied in *Seven Seas Properties Ltd v Al-Essa* [1988] 1 WLR 1272.

57. Queensland Law Reform Commission *Report ... on a Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing*, QLRC 16, 1973, at 53.

58. Property Law Act 1974 (Qld) s68.

59. Law Reform Commission of Victoria *Sale of Land*, Report No 20, 1989, at 18-19.

60. Law Commission of England and Wales, note 55 at 26-27.

61. *Re Daniel, Daniel v Vassal* [1917] 2 Ch 405.

62. [1939] Ch 588 at 591; [1939] 2 All ER 255 at 238-239.

63. [1971] 1 WLR 535; [1971] 2 All ER 267.

64. [1971] 1 WLR 535 at 546; [1971] 2 All ER 267 at 275.

65. *Wallington v Townsend* [1939] Ch 588; [1939] 2 All ER 255; *Lloyd v Stanbury* [1971] 1 WLR 535; [1971] 2 All ER 267. Also cited as authority for the right to elect is *Cullinane v British "Rema" Manufacturing Co*

Ltd [1954] 1 QB 292 at 303 per Evershed MR, although the High Court has not followed this interpretation: see *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289.

66. [1972] 1 QB 60 at 63-64; see also *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16.

67. See DW Greig and JLR Davis, *Law of Contract*, Law Book Co, Sydney, 1987, at 1356-1359.

68. *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 413-415.

69. *C & P Haulage v Middleton* [1983] 1 WLR 1461 at 1468.

Appendix

CONVEYANCING (AMENDMENT) BILL 1990

NEW SOUTH WALES

[STATE ARMS]

NO , 1990

A BILL FOR

An Act to amend the conveyancing Act 1919 to abolish the rule of law known as the rule in Bain v Fothergill.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Conveyancing (Amendment) Act 1990.

Amendment of conveyancing Act 1919 No 6

2. The Conveyancing Act 1919 is amended by inserting after section 54A the following section:

Damages: defective title

54B. (1) The rule of law known as the rule in Bain v Fothergill is abolished in relation to contracts for the sale or other disposition of land or any interest in land made after the commencement of this section.

(2) The Court may award damages for loss of bargain against a vendor who cannot perform such a contract because of a defect in the vendor’s title unless the contract provides that the vendor is not so liable.

(3) This section applies to land under the provisions of the Real Property Act 1900.