LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

THE RULE IN BAIN V. FOTHERGILL

LRC 28

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The Law Reform Commission of British Columbia was established by the Law Reform Commission Act in 1969 and began functioning in 1970.

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.,
ATTORNEYGENERAL FOR BRITISH COLUMBIA.

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE RULE IN *BAIN* V. *FOTHERGILL*

This Report is concerned with a common law rule, known as the Rule in *Bain* v. *Fothergill* after the decision of the House of Lords in 1874 in which it was authoritatively restated. That rule denies the purchaser under a contract for the sale of land the right to receive compensation by way of damages for loss of his bargain where the vendor is unable to complete the transaction because of a defect in title. It is an anomalous rule in the context of the law concerning damages for breach of contract.

The Report examines the foundations of, and the reasons for, the development of the rule, and points out that it emerged out of the uncertainties of the English land title system which, in view of the provisions of the *Land Registry Act*, are nonexistent in British Columbia. The Commission recommends that the rule be abrogated by statute.

In view of the narrow compass of the issue considered in the Report, the Commission departed from its usual practice of distributing for comment a working paper containing tentative proposals for change. Instead, we consulted directly a number of persons experienced in real estate law and practice, and we are pleased to be able to say that all those consulted supported the recommendations of the Commission.

CHAPTER I THE PRESENT LAW

A. Introduction

One of the fundamental remedies for a breach of contract is an award of damages intended to compensate an individual for his losses when, in the absence of fault on his part, his expectations under an agreement have not been met.

This Report is concerned with a common law rule - set out by the House of Lords of England in *Bain* v. *Fothergill* - which limits the availability of contractual damages under certain circumstances.

In *McGregor on Damages* the normal measure of damages for breach of contract is defined in the following terms:

> Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the plaintiff is entitled to compensation for the loss of his bargain. This is what may best be called the normal measure of damages in contract.

In 1874, however, the English House of Lords restated an important and, some would say, anomalous exception to this general principle. Their statement takes its name from the case in which it appeared, and is known as the rule in *Bain* v. *Fothergill*.

Put in its simplest terms, the rule provides that:

> [A] purchaser under a contract for the sale of land is not entitled to compensation by way of damages for the loss of his bargain where this result

is the consequence of the vendor's inability to complete because of a defect in title.

In this chapter we set out what we conceive to be the rationale for the rule in *Bain* v. *Fothergill*, its applicability, its practical effect, and the limitations which have been placed upon it by the courts. Our research has revealed that the relevant law in British Columbia is, in most instances, the same as that in the other common law provinces of Canada, and as we shall see, the Canadian law is virtually indistinguishable from English law. This has made our task considerably easier.

B. **Rationale for the Rule**

The major premise[6] upon which the House of Lords based its decision in *Bain* v. *Fothergill* was the difficulty in determining whether or not a particular person held good title to a specific piece of real property. Lord Hatherley said:

> [H]aving regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor ...
>
> A contract for a sale of real estate is very different indeed from a contract for the sale of a chattel, where the vendor must know what his right to the chattel is ...

That reason was reiterated more recently in *Barnes* v. *Cadogan Developments Ltd.*, and again in *J.W. Cafe's Ltd.* v. *Brownlow Trust*.

There are, however, two aspects of the rule which, at least in some jurisdictions, detract from the logic of this argument.

The difficulty in showing good title to land in England arose, at least in part, from the land transfer system which existed in England when *Bain* v. *Fothergill* was decided. That system involved the production of deeds, and it has been said that:

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

6. N. 1 *supra* 210, 211; *see also Peacock* v. *Wilkinson* (1915), 51 S.C.R. 319.

> the constant fear of long and complex proceedings in the courts from some unsuspected deed coming to light *** add these, and it is not difficult to sustain the proposition that reform was desirable ***
>
> In British Columbia, however, the land registration system is one of "state affirmation of ownership of interests in land." The Torrens system was established in British Columbia in the late nineteenth century, and it is generally conceded that it greatly reduces the problems associated with the ascertaining of title to land.

This simplification and increased reliability provides some foundation for the argument that the rule in *Bain* v. *Fothergill* ought not to apply in this province, or in jurisdictions with similar land transfer systems. We consider that argument in greater detail in the following chapter.

The second aspect of the rule in *Bain* v. *Fothergill* which detracts from the forcefulness of the argument that the difficulty in determining title to land justifies its existence, is that the rule is applicable notwithstanding the fact that the vdndor may know of the defect at the time of contracting. The applicability of the rule in that context was at issue in *Bain* v. *Fothergill* itself, and it is not now a matter of judicial dispute.

C. Applicability of the Rule

The rule in *Bain* v. *Fothergill* limits the availability of damages for breach of contract concerning any interest in land, whether the agreement concerns the disposition of the fee simple, a leasehold interest, an easement, or a profitsa-prendre, and it applies also to options to purchase land, and covenants to renew leasehold interests in land.

It applies where the vendor did not know of the defect, as well as where the vendor contracted under the mistaken belief that the interest he did have was sufficient.

It must be noted, however, that the rule applies only to breaches of contract arising out of *defects in title*, and it follows that full contractual damages are available to a plaintiff where the vendor has title but nonetheless refuses to complete the agreement. In addition, if the defect is a matter of conveyancing rather than title, the rule in *Bain* v. *Fothergill* has no application.

These matters - the effect of a direct refusal to convey, and the distinction between matters of conveyancing and matters of title will be considered in detail in the following section.

Finally, the rule in *Bain* v. *Fothergill* not only limits a plaintiff's recovery of damages where the agreement cannot be completed because of a defect in the vendor's title, but also precludes his recovery where there is a delay in completion resulting from a defect in title.

D. ___Effect of the Rule

The principle that damages for loss of bargain are not recoverable where a Contract for the sale of an interest in land falls through because of a defect in title, effectively precludes a purchaser recovering anything more than his deposit, interest on the deposit, and his expenses incurred in investigating title.

Were it not for the rule, it is clear that, at the very least, the purchaser could recover damages measured by the market value of the property at the date of breach less the contract price. In this connection, however, it has been held recently that where the rule in *Bain* v. *Fothergill* does not apply, the damages for breach of a contract for the sale of land, should be calculated by subtracting the contract price (what the purchaser would have had to pay) from the market value of the property at the *date of judgment*.

In addition, damages for consequential losses, including recovery for loss of profit, and other expenses "which could properly be said to be within the parties contemplation," would be recoverable but for the tule in *Bain* v. *Fothergill*.

E. Exceptions to the Rule

The distinctive nature of the limitation enunciated in *Bain* v. *Fothergill* has given rise to a number of important exceptions. A significant exception first appeared in *Hopkins* v. *Grazebrook*, where it was held that a purchaser could recover full contractual damages for his loss of bargain where the vendor knew of the defect at the time of contracting.

The reason for the exception was explained in *Engel* v. *Fitch* by Cockburn C.J.:

> There is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a marketable title, and that of one who, not being the owner, but having only a contract for the purchase of real estate, takes upon himself to sell it to another as his own, and as if the title were his to convey. The difficulty of making out title, which exists in the one case and forms the foundation of the rule, and the justification of the exceptional departure from ordinary principles, is wholly wanting in the other.

_____

_____*Hopkins* v. *Grazebrook* however, was decided some fifty years prior to *Bain* v. *Fothergill* and was overruled in that case:

> Upon a review of all the decisions on the subject, I think that the case of *Hopkins* v. *Grazebrook* ought not any longer to be regarded as an authority ... 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 a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; ... [emphasis added]

There remain, however, four other exceptions to the rule in Bain v. *Fothergill* -

(a) fraud on the part of the vendor;

(b) bad faith on the part of the vendor;

(c) defects arising out of matters of conveyancing; and

(d) breach of covenants contained in an executed conveyance.

1. ___Fraud

Lord Chelmsford, in *Bain* v. *Fothergill*, advanced the view that, if the rule set out in that case applied, the purchaser could obtain full damages only by means of an action for deceit, and this dictum has been followed in a number of Canadian cases.

It has been argued, however, that in England and Canada (although not in the United States), the measure of damages in an action for deceit will be limited to an amount necessary to put the purchaser in the position in which he would have found himself had the fraudulent representation not been made:

> Thus in deceit it is settled that a plaintiff cannot recover damages for loss of his bargain: he is only entitled to be put in the position which he would have been in had the representation not been made. Yet in an action for breach of contract he is entitled to be put in the same position as if the representation had been true.

Fleming agrees with that view, had McGregor points out that:

> ... it is fallacious to think that damages for loss of bargain can be recovered in a deceit action. Such an action is in tort, and in tort the measure of compensation is intended to put the plaintiff in the position he would have been in had the tort never been committed, which in this case would be his position had the misrepresentation never been made. This measure, now firmly established for deceit, will not compensate the purchaser for the loss of his bargain ...

2. Bad Faith

In the leading case of *Day* v. *Singleton* Lindley L.J. held that the rule in *Bain* v. *Fothergill* was inapplicable where a vendor refused to make a reasonable attempt to obtain title to the property at issue. In that case the vendor (a lessee) failed to make a reasonable attempt to obtain the consent of his lessor, which was a necessary prerequisite to the validity of an assignment of the leasehold property to the plaintiff. The assignment failed and the plaintiff recovered full damages.

This decision was followed in *Braybrooks* v. *Whaley* where a mortgagee in possession failed to make the application to the court which was required by statute as a prerequisite to the sale of the property to the plaintiff.

Of course, if the defendant is able to prove that the attempt would have been unsuccessful he will be liable only for nominal damages. It is clear; however, that the onus is on the vendor to prove the futility of the attempt.

A corollary of the "bad faith" exception to the rule in *Bain* v. *Fothergill* is the awarding of full contractual damages where the vendor, after contracting to convey his interest in the land, disables himself from doing so. This often arises where the vendor, after agreeing to sell the land to the plaintiff, sells the land to a third party. In that case the plaintiff will recover damages for his loss of bargain, because as Eve J. noted in *Goffen* v. *Houlder*,

44. *Ibid*. 490. *See also Ridley* v. *De Geerts*, [1945] 2 All E.R. 654; *Edwards* v. *Freeborn*, (1877) 11 S.A.L.R. 128; *Stewart* v. *Gunn* (1974), 5 N. & P.E.I.R. 291 (P.E.I.C.A.).

> ... is not caused by any inherent defect or infirmity of title ... The defendant by her own act put it out of her power.

3. **Where the Breach is Not Due to a Defect in Title**

The House of Lords, in their judgments in *Bain* v. *Fothergill* itself, made it abundantly clear and indeed stressed the point, that the limitation enunciated in that case was restricted to instances where the breach of contract was due to a defect in title, and that the normal measure of damages applied in other cases. This exception to the rule arises in two instances. The first involves a failure arising from an outright refusal of a vendor to complete, notwithstanding the fact that he has the power to do so. The second, and more imdortant, exception involves the awarding of full contractual damages where the failure is due to a *matter of conveyancing* rather than to a defect in title.

Lord Hatherley, in his reasons for judgment in *Bain* v. *Fothergill*, referred with approval to a prior case in which this exception was noted.

> The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it 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 the conveyance ... There could be no doubt whatever in that case that he was acting in gross violation of his contract which he had the power of performing.

In *Engel* v. *Fitch*, the case of which Lord Hathepley spoke so favourably, a purchaser was awarded damages for his loss of bargain where the vendors (mortgagees) refused to turn out a mortgagor who was in possession.

In *re Daniel, Daniel* v. *Vassal*, a purchaser was awarded damages for his loss of bargain where a mortgagor (the vendor), failed to redeem a prior mortgage, not because of a legal disability (i.e. a defect in title), but because of financial difficulty. Because the vendor did have a *legal right* to obtain clear title to the property, the defect was said to arise as a matter of conveyancing and thus the rule in *Bain* v. *Fothergill* did not apply.

The difference between matters of conveyancing and matters of title has been summarized as follows:
51. *See Wroth* v. *Tyler*, [1973] 2 W.L.R. 405, 417420, 422.

> In the first place a distinction must be drawn between matters of conveyance and matters of title ... Matters of conveyance may be said to be those by which the vendor alone or with other persons whose concurrence he can require is in a position to convey the title to the property. They assume that the vendor has a right to make title or to cause it to be made and are concerned with the satisfaction of that right. As Lord Langdale said in *Sidebotham* v. *Barrington*:
>
> > Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the Court considers it a cuestion of conveyance only.
>
> If there are liens, charges or encumbrances on the property which the purchaser is not to assume these are only matters of conveyance if they can be discharged by the vendor as a matter of right - for example, if there is a right to prepay a mortgage. This is true even though they exceed the amount of the unpaid purchase money, unless it is admitted or proved that the vendor cannot furnish the money which is required to discharge them. Such liens, charges or encumbrances might include executions, a lien for corporation tax, a warrant for succession duty, a lien for estate tax, or a lien for public utilities. If the vendor is not entitled as of right to obtain a discharge of an encumbrance then it is an objection to title.

While the distinction is not always as self evident as that passage would suggest, the law is clear that a breach of contract which arises out of a matter of conveyancing, regardless of the complexity of the issue, will result to an award of full contractual damages for loss of bargain.

4. Damages for Breach of Covenants for Title

Most documents involving the transfer of an interest in land contain a number of covenants for title. They are commonly known as the covenant for a good right to convey, the covenant for quiet enjoyment, the covenant for freedom from encumbrances, and the covenant for further assurance.

A purchaser who suffers damage by reason of a breach of any of these covenants will be able to recover full contractual damages for his loss of bargain, notwithstanding the fact that the breach was caused by a defect in the vendor's title.

McGregor points out that the availability of damages after conveyance is in direct conflict with the rule in *Bain* v. *Fothergill*.

> If, after the conveyance, the purchaser is compelled to give up possession to the real owner because it is then discovered that the seller had no title, the normal measure of damages follows general principles and allows the purchaser to recover for the loss of his bargain. This is interestingly in direct contrast to the restrictive measure which is available to a purchaser where the defect is discovered before conveyance, viz., the return of the purchase price allowed under the rule in *Bain* v. *Fothergill*. Equally interesting is the fact that this difference is not blazoned over the authorities; on the contrary, although the cases agree in giving the plaintiff the benefit of his bargain, there is little or no argument on the point and in none is there any indication that the court realised that the measure adopted differed basically from that in actions by purchasers for breach of contract before conveyance. It is to a case concerning not a sale but a lease of land, to which the restrictive measure of *Bain* v. *Fothergill* also applies between contract and completion, that recourse must be had to find an express adjudication on the distinction. This makes the case in question, *Lock* v. *Furze* , in which the court expressly refused to impose the restrictive measure in actions after conveyance, one of importance; yet it can hardly claim to be well known. Blackburn J., after giving the familiar rationale of the restrictive rule as being based on our complicated law of real property, said: "This, however, is not the case of a contract for the sale of land; but the case of a conveyance by which the lessor conveys out and out the thing intended to be conveyed: and the conveyance contains a covenant for quiet enjoyment by the lessee, which covenant has been broken.... *Flureau* v. *Thornhill* does not apply to the case of an executed contract.

This exception to the rule in *Bain* v. *Fothergill* has been applied in several Canadian provinces, including British Columbia, but we share McGregor's difficulty in perceiving the reason for the differences in a purchaser's position before and after conveyance.

CHAPTER II ANALYSIS OF THE PRESENT LAW

A. Introduction

In setting out the present law in British Columbia with respect to the rule in *Bain* v. *Fothergill*, we noted that the limitation on damages enunciated in that case was premised on the fact that the land transfer system in force in England in 1874 was inadequate in many respects.

The rule has been the subject of judicial criticism in some provinces of Canada, in Australia, and in New Zealand, and we believe this to be significant in view of the fact that those jurisdictions, together with British Columbia, have adopted a land transfer system very different from the English system of 1874.

Our research has also revealed that many American courts deny the existence of the rule, and that those which do recognize it justify it on a ground which has no application in the Province.

We noted, too, in the previous chapter that the rule is inconsistently applied, giving protection to individuals where the basis for the rule would suggest that it ought not to apply where the vendor knows of the defect and resulting in liability in circumstances where the rationale for the rule would suggest that it ought to provide protection after the conveyance and transfer of title.

In this chapter we explore those matters in some detail, and set out our conclusions with respect to the value of the rule in British Columbia.

B. Difficulties in Ascertaining Title to Land

When *Bain* v. *Fothergill* was decided, the land transfer system in force in England was one involving deeds. Under that system, the ascertaining of title to a specific piece of real property entailed a physical search of all instruments which pertained to that land, and which were filed in the land registry office. The fact that a search for a "good root of title" often involved a search for instruments which were executed some forty or sixty

years prior to the actual search; the fact that the possibility was very real that an instrument might be misinterpreted, or omitted from the vendor's abstract of title; the fact that a search for a "good root of title" was necessary each time the land was dealt with; the fact that certain equitable claims, even *if unregistered*, could be valid against the interest of a subsequent purchaser of the property; and the fact that certain claims, *even if registered against a different piece of property,* could be valid against the interest of a purchaser, suggested to the House of Lords in 1874, that the fairest resolution of a dispute involving title matters would be to place the parties to the agreement in the position in which they would have found themselves if the agreement had never existed.

We believe that it is important to examine in some detail that line of reasoning, in order to determine whether the changes which have since taken place in land transfer systems justify the statutory repeal qf the rule.

1. ___Implied Liquidated Damages Clause

One of the more common explanations of the rule in *Bain* v. *Fothergill* is that, in the light of the difficulties in ascertaining title to land (a matter of which both the vendor and purchaser must be cognizant), contracts concerning interests in land:

> *... are, therefore, made with the understanding that, upon failure to make out a satisfactory title, the rule as to damages enunciated in that case* [] *will be applied*. [emphasis added]

The most authoritative statement of the "implied liquidated damages" theory, is found in the judgment of Lord Hatherley in *Bain* v. *Fothergill* itself, where he held that:

> *... he [the purchaser] is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed ...* [emphasis added]

This analysis is supported by the fact that, where the parties expressly provide for an amount as liquidated damages, the rule will not apply.

The issue, then, is simple. A court, in the absence of express evidence of a contrary intention, and having regard to the inadequacies of the land transfer system in force in England in 1874, will imply an intention on the part of both the vendor and purchaser that the vendor's liability to the purchaser will not exceed the return of the purchaser's deposit, interest on the deposit, and minimal expenses incurred in investigating title.

We suspect, however, that the intention of the parties to a contract concerning land might be quite different from that supposed in *Bain* v. *Fothergill,* and we agree that:

If the test is truly that of the intention of the parties, then the courts should conduct a proper inquiry in every case to see whether such was indeed their intention. This they manifestly neglect to do. If the test is not that of the intention of the parties, then to try to justify the rule by reference to it is plainly fruitless.

In many cases, the judicial implication of a contractual term is a device employed to achieve some other end, and we have concluded that the implication of a term limiting a vendor's liability in damages is, in this instance, a technique that obscures the true rationale for the rule.

Thus we come to the crucial issue what is or was the policy sought to be furthered by the creation of the rule in *Bain* v. *Fothergill*, and by its continued application since 1874? We have perceived two possible policies which might be served by the rule. The first is "increased commercial activity in land," the second is "no contractual liability without fault."

2. Increased Commercial And Private Sale of Land

In 1861, in the case of *Sikes* v. *Wild,* Cockburn C.J., reflecting on the true basis of the rule in *Flureau* v. *Thornhill*, made the following remarks:

> That immunity is in itself an anomaly. It probably had its origin in the difficulty in which, in the complicated and highly artificial state of our law relating to real property, an owner of real estate having contracted to sell is too frequently placed from not being able to make out a title as a purchaser would be bound or willing to take ... *the difficulty which might be thrown in the way of bringing real property into the market if the full liability attached in such a case has probably, by an understanding and usage among those engaged in the transfer of estates, led to this exception tothe general law*. [emphasis added]

It is not unreasonable to suppose that the inadequacies and complexity of the land transfer system in force in England in the eighteenth and nineteenth centuries required the creation of some technique designed to enhance the commercial and private sale of land. One technique, was a new, fundamentally different, more reliable, and more expeditious land transfer system recommended in the Report of the Commission on Registration and Conveyancing in 1850.

This system first appeared in England as a result of the *Transfer of Land Act, 1862* known as *Lord Westbury's Act*. The system, however, was not successful, and was replaced by another by virtue of the *Land Transfer Act, 1875*, known as *Lord Cairns's Act*. This too failed, and was replaced by the *Land Transfer Act, 1897* which has since been amended extensively by the *Land Registration Acts* of 1925 and 1936.

Although the new system was in force when *Bain* v. *Fothergill* was decided, registration was voluntary and the system was not well received:

> It is unnecessary to notice further the provisions of the Act, since [for reasons which have never been very fully or satisfactorily explained] it was not a practical success? In 1866 the number of titles registered was one hundred and five, and this was the best year. In 1870 the number had fallen to twenty-nine, and in 1875 it was four. In 1866 a Royal Commission was appointed to inquire into the causes of failure, and in 1870 a report was issued repeating the recommendation of 1857 ... Upon the lines of this report *Lord Cairns's Act*, the *Land Transfer Act, 1875*, 38 & 39 Vict. c. 87, was passed. It put an end to applications for registration under Uie Act of 1862 (s. 125), though the earlier system is still in force for the purpose of dealings with land which remains registered under it ...
>
> The Act of 1875 failed equally with its predecessor to obtain any considerable amount of general support. Down to December 1885 only one hundred and thirteen titles had been registered under it, of which seventeen were leasehold ...

Another technique was the rule in *Bain* v. *Fothergill* itself, which, while it did not eliminate, reduce or even affect the unreliability of the land transfer system, reduced significantly its adverse consequences.

The land transfer system now in force in British Columbia is a modification of the system first set out by Sir Robert Torrens, and is a direct result of the *Torrens Registry Act* enacted in 1899. It seems reasonable to us to suppose that the modern system of conveyancing in this Province, with its increased reliability of title, reduction in cost, and increased efficiency,

favours the proposition that the rule in *Bain* v. *Fothergill* is no longer necessary as an incentive to the commercial and private sale of land.

Contractual Liability Based on "Fault"

Baron Pollock, in his judgment in *Bain* v. *Fothergill*, made the following remarks:

> First, *no layman* can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not. [emphasis added]

In *Sikes* v. *Wild*, Cockburn C.J. noted that:

> That immunity is in itself an anomaly. It probably had its origin in the difficulty in which, in the complicated and highly artificial state of our law relating to real property, an owner of real estate contracted to sell is too frequently placed from not being able to make out a title such as a purchaser would be bound of willing to take. *The hardship which would be imposed on a bona fide vendor if, upon some legal flaw appearing in his title, he were held liable in all the consequences which would attach upon a breach of contract relating to personality*, [has] probably, by an understanding and usage among those engaged in the transfer of estates, led to this exception to the general law. [emphasis added]

We believe that those propositions the absence of "fault," and the consequent hardship which would be imposed on bona fide vendors of real estate if the rule in *Bain* v. *Fothergill* was not applied have played a critical role in the creation and continued application of the rule since 1874. That belief is strengthened in the light of the remarks of Stuart J., speaking for the majority of the appellate division of the Alberta Supreme Court in the case of *Maitland* v. *Matthews*. In that case, the defendant vendor had agreed to sell the land in issue to the plaintiff, in the belief that the party from whom he (the defendant) was buying, had good title. In fact, the defendants were unable to complete their agreement to buy the property because their vendor had failed to register his statutory transfer within the time allotted under the *Land Titles Act* in force in Alberta.

An action brought by the plaintiffs to recover damages against the defendant was unsuccessful, and Stuart J. pointed out that:

> Now, if we assume that the expression without any fault, which is applied to a vendor throughout *Bain* v. *Fothergill, supra,* applies not merely to some default occurring after the agreement is made in the way of omission to do all he can in the way of positive refusal or creation of difficulties, but also to a default, prior, or at a time of entering into the agreement in the way of failure to be certain that he can convey before he agreed to do so, *it seems to me that the defendants in Bain* v. *Fothergill were, to say the least, as much at fault as were the defendants in this case. Indeed, I think they were more at fault than the present defendants, because the present defendants honestly relied on their own vendor having in his possession a transfer which they supposed he would be able to register. And even if we attach blame to them for not having, first, before they made a covenant to convey satisfied themselves that they would be able to do so, I cannot see that their fault was any greater than Fothergill's omission* to make certain

> that the lessors would consent to the assignment of the lease to him before he entered into an agreement to assign it himself. [emphasis added)

The remarks of a leading Canadian commentator also reveal that the existence of "fault" on the part of the vendor is critical:

> It has been argued from time to time but with little apparent success that, as the Torrens system of title registration provides security of title and simplicity of transfer, the application of the doctrine of *Bain* v. *Fothergill*, *supra*, to such a system is anomalous.
>
> Support for this view appears to be predicated upon the assumption that the exclusive *ratio decidendi* in *Bain* v. *Fothergill, supra*, was the uncertainty attendant upon the investigation of title in England.
>
> While this fact undoubtedly weighed heavily in the deliberations of their Lordships, it is submitted that the complexity of real property law, and in particular visavis the layman, was the golden thread which permeated the fabric of uncertainty of title and established that the bona fide vendor, who, either with or without knowledge that at the date of the contract his title was defective, but with subjective optimism, oversimplified his problem, would be granted substantial absolution when he knelt at the confessional of *Bain* v. *Fothergill*.
>
> *Thus, while a statutory title registration system may make uncertain titles certain, it does not necessarily follow that such a system makes simple the complex law of real property,* although this latter result in varying degrees may be a correlative legislative *desiredatum*. [emphasis added]

If the rule in *Bain* v. *Fothergill* is a manifestation of the principle of "no contractual liability without fault," and if the law surrounding the transfer of land, be the system ancient or modern, is so complex that a representation by the vendor that he has good title when he does not, cannot be said to be the "fault" of the vendor, the rule has a certain internal consistency. However, for good or ill, under the general law fault does not appear to have more than tangential relevance in apportioning contractual liability.

> A contract is a promise or set of promises which the law will enforce. The main justification for the legal enforcement of promises is an economic one: trade and commerce would be impossible if the law permitted a promisor to break his promise without, at least, placing him under an obligation to pay compensation for the loss occasioned by his default ... A concomitant of the doctrine of freedom of contract is that of the sanctity of contracts; and this is still a cardinal principle of English law because it suits the needs of a commercial community ... English law is consistently reluctant to admit excuses for nonperformance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement. The courts are also reluctant to interfere with the literal words and scope of an agreement ...

It is not, perhaps, surprising to discover that judicial ingenuity and creativity had resulted in the creation of a number of exceptions to the principle of strict contractual liability, but even in the case of the most important exceptions, "the Courts are reluctant to interfere with the contractual obligations of the parties," and the principle that if one party

fails to perform that which he promised, he will be liable to compensate the other party for the other's losses, remains a fundamental principle of the law of contract.

It is incumbent upon us, in considering the rule in *Bain* v. *Fothergill*, to form an opinion on whether British Columbia's land transfer system is so complex that it justifies a retention of the rule as an exception to the principle of strict contractual liability.

C. _Inconsistency of Application

In the first chapter of this Report we noted that the rule in *Bain* v. *Fothergill* does not apply to the situation where a defect in title results in a breach of a covenant contained in a deed of conveyance.

The reason for this exception to the rule in *Bain* v. *Fothergill* is obscure, but logic would suggest that the rule is equally as appropriate to a breach of a covenant in a conveyance as it is to a breach of a contractual term in an agreement for sale.

This anomaly has been noted by others, and we have failed to discover any reason for the distinction. In the United States the rule, although nonexistent in most jurisdictions, has been held to cover both situations. Thus,

> ... in most states he [the purchaser] is allowed to recover for total loss of the property only the consideration which he paid foreit, with interest.

Another aspect of the rule that has puzzled us is its applicability notwithstanding the fact that the vendor may know of the defect in title when he agrees to sell the land. If it is accepted that an important reason for creating the rule was a desire to absolve a vendor from contractual liability resulting from the inadequacies of the land transfer system, then logic would suggest that the absolution should not be available where the vendor knows of the title defect beforehand.

Finally, it is difficult to reconcile decisions holding the rule to be inapplicable where a contract falls through because of a difficulty in conveyancing (for example, where a vendor, because of a preexisting lien, is unable to convey the property), with decisions in which the rule has been applied to breaches of contract due to defects in title. If the basis of the rule is, in fact, the absence of blameworthiness, then surely a vendor who discovers, after entering into an agreement for sale, that a lien exists on his property, is no more at "fault" than a vendor who discovers a preexisting easement. To be sure, the disability, if a matter of conveyancing, may be remedied by the vendor as a matter of right, but as a practical matter this is often impossible. The complexity of real property law plays as great a role with respect to defects arising as a matter of conveyancing, as it does where defects in title are involved. Even more importantly, persons unacquainted with real estate law, for whose benefit and protection the rule was initially created, are scarcely likely to appreciate the distinction.

CHAPTER III CONCLUSION

A. Recommendation for Change

In the preceding chapters we set out the present law in British Columbia, as we perceive it, with respect to the rule in *Bain* v. *Fothergill*, and then attempted to ascertain the precise reason for its emergence and continued application since 1874.

Our research revealed that the rule is inconsistently applied, and it deems to us that the difficulties in the land transfer system which brought about its creation, have been considerably reduced.

Reforms in the land registration system in other jurisdictions (that is, the adoption of a Torrens system of certification of title) have led numerous judges to conclude that, in the light of the rationale for the rule, the limitation on the availability of damagesshould no longer apply. We have noted that these judicial conclusions have gone unanswered by legislatures, but they do, in our opinion, represent the better position in the resolution of a contractual dispute between two parties to a contract concerning land. We agree with Chief Justice Sir Charles Fitzpatrick of the Supreme Court of Canada, who, in 1917, argued unsuccessfully for the abolition of the rule. In his decision he cited *Sedgewick on Damages*, a leading authority on the law of damages:

> If a defendant fails to convey because he has not a good title, he is always liable in substantial damages. This is commonly called the United States Supreme Court Rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle.

We have already voiced our suspicion that the implied liquidated damages clause is a legal fiction employed to achieve some other policy, and we have concluded that neither of the possible policies originally underlying the rule continues to justify denying full compensation to a purchaser who, through no fault on his part, suffers loss as a result of a vendor's breach of contract.

The fear that the abolition of the rule will impose a threat of liability in damages on vendors, and thus operate as a disincentive to the commercial and private sale of land is, in the opinion of the Commission, unwarranted. The experience in those American states which have chosen not to adopt the rule is, we believe, conclusive evidence that the repeal of the rule will not have this effect. Even if we were to concede that there might be an adverse effect on sales, which we do not, the abrogation of the rule in *Bain* v. *Fothergill* will not affect the vendor's right to bargain for reduced liability.

We have also concluded that, in principle, "fault" ought not be considered an inherent part of contractual liability in this context. The introduction of the concept of blameworthiness was anomalous to begin with, and we suspect that it may have the effect of encouraging a certain lack of responsibility on the part of vendors, who, knowing that their liability in damages

will be relatively small, may fail to take adequate precautions before entering into agreements to sell "their' property.

Even if we were to accept the proposition that there ought to be no contractual liability without "fault" our position would still be 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 depision 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.

It is also our view that Professor Corbin's analysis of the rule as it applies to real estate transactions in the United States is equally applicable in British Columbia:

> A reason sometimes given for the English rule is that land in England is not subject to rapid fluctuation, that contracts are nearly always quickly closed, and that the contract price is usually substantially the same as the market value at the time of breach. This reason is certainly one that is not to be accepted in the United States. If the market value and the contract price are the same, it makes no difference which rule is adopted. But in the United States there are innumerable longterm contracts for a future conveyance, and land often rapidly fluctuates in price. The English rule, therefore, would discriminate against the purchaser when it is not useless.

It is unquestionable that the rule in *Bain* v. *Fothergill* may have its most severe effect on agreements for sale. There, the length of time which elapses between the agreement and closing may be quite substantial, and may result in a significant increase in the cost to the purchaser if he is forced to purchase comparable property when his vendor defaults.

The provisions of the Land *Registry* Act recognize this possibility, and section 28, which first appeared in the *Land Registry Amendment Act* of 1914, now provides that:

> 28. It is the duty of any person selling or conveying land, or who enters into an agreement, or assignment of an agreement for the sale of land, whereby the purchase price is payable by instalments or at a future time, to register his own title, in order that any person to whom the land or any part thereof is conveyed, and any person claiming under the agreement, subagreement, or assignment, may be able to register his title; and so long as the failure of any person to comply with this section continues, no action shall be brought by the person so failing to register upon any covenant in such agreement or subagreement.

A judicial explanation of this provision was set out by Martin J.A., of the British Columbia Court of Appeal, in *Cox* v. *Whieldon:*

> It is a matter of common knowledge that the object of the original section was to remedy the many notorious frauds and injustices that had been perpetrated upon innocent purchasers of land by dishonest or inpecunious vendors selling on time by agreement for sale whereby the purchase price was payable by instalments, the result frequently being that the purchaser after duly paying the instalments and interest found that the vendor could not give a clear or any title to the property and so the new and salutary

> .statutory duty was imposed upon the vendor, for the present and future protection of the purchaser, of registering his title, which under our present land registry system means that the vendor must and can only acquire an indefeasible title which fully safeguards all concerned.
>
> It is to be remembered, as already noted, that the duty to register the title was alone originally declared, and from it the purchaser acquired the right of repudiation and recission only, which he could exercise at his option, but by the addition of the final clause in 1921 he was afforded another and distinct protection in that the vendor was prohibited from bringing any action while in default of his duty to register.

We believe, however, that section 28 of the *Land Registry Act*, which imposes a statutory responsibility on a vendor to register his title under the Act, and in fact, prohibits a vendor suing on an agreement for sale unless he has done so, does not go far enough.

The abolition of the rule in *Bain* v. *Fothergill* would go one step further and provide a purchaser with a significant remedy in damages which is now denied him at common law, and which is not affect by section 28 of the *Land Registry Act*.

Finally, it is significant that recent legislation in England has resulted in the abrogation of the rule in *Bain* v. *Fothergill* where a vendor makes an express representation to a purchaser that he has title to the property which is the subject of the contract. Section 2 (1) of the *Misrepresentation Act, 1967* provides that:

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

In *Watts* v. *Spence*, Graham J. held that a purchaser could recover damages for lost profits where a vendor had made a representation that he (the vendor) had title to the house he was selling. The nature of the award in that case has been criticized, but the legislation, which was intended to include all contracts, gives colour to the view that the rule in *Bain* v. *Fothergill* is an anomalous exception to the principle of law than an individual who suffers a loss by reason of another's breach of contract will be able io recover an award of damages that will put him in the position in which he would have found himself had the contract been completed.

The Commission therefore recommends that:

The rule of law known as the rule in Bain *v*. Fothergill *should be abrogated*.

B. Acknowledgments

We would like to express our appreciation to Mr. Nicholas Blom, who is the Chairman of the Real Property Subsection of the Canadian Bar Associationi Mr. Victor DiCastri, the author of a leading treatise on property law, and the Director of Legal Services with the Department of the AttorneyGeneral, and Dean A.J. McClean, of the Faculty of Law at the University of British Columbia, for having taken the time to review a draft of this Report, and making suggestions for its improvement.

We also wish to acknowledge here and express oup appreciation for the contribution of David Cohen, Legal Research Officer to the Commission. Mr. Cohen did all the research involved in preparing this Report, and most of the writing of it, and the Commission owes much to his energy and thoughtfulness.

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June 28, 1976.