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Backgrounder

LRC 28—Report on the Rule in *Bain v. Fothergill*

Date: June 1976

The decision of the English House of Lords in the nineteenth-century case of *Bain v. Fothergill* conclusively stated a common-law rule that limited the availability of damages for breach of contract in certain circumstances. The rule in *Bain v. Fothergill* holds that damages for breach of contract are not ordinarily available to a purchaser under a contract for the sale of land if the breach is due to a defect in title to the land. The rationale for this rule rests largely on the peculiarities of British land holding in the nineteenth century. In this system, the painstaking investigation of title deeds was necessary to establish whether a person had good title to the land. Given the vagaries of this investigation, it was felt that it was too difficult to demonstrate good title to a given piece of land and, in view of this difficulty, it was inappropriate to hold a vendor accountable in damages for failing to perform its obligations under a contract for the sale of land.

This project investigates the origins of the rule in *Bain v. Fothergill*, its practical effects, and its application in the courts of British Columbia and elsewhere. After analyzing the current law and noting its defects, the report concludes by presenting its recommendation for reform.

The report begins by examining the origins and rationale of the rule. It notes that the rule is closely aligned to the realities of English conveyancing in the nineteenth century. As a result, there are two aspects of the rule that serve to undercut its rationale when it is applied in British Columbia. First, unlike nineteenth-century England, British Columbia has a system of land title registration that away with the need to investigate title deeds, as good title is effectively guaranteed by the government. Second, the rule applies whether or not the vendor knows of the defect at the time of entering into the contract. It is difficult to maintain that the rule is needed because of the difficulties of ascertaining good title to a piece of land in the face of these two aspects. The introductory chapter goes on to discuss the practical effect of the rule and the four exceptions to it.

Next, the report analyzes the current state of the law with respect to the rule in *Bain v. Fothergill*. Close attention is paid to the difficulties in ascertaining good title. The inconsistency of application of the rule is also illustrated by a review of the case law.

The final chapter of the report sets out the commission's recommendation that the rule in *Bain v. Fothergill* be abrogated. In the commission's view, the rule is not in harmony with the land title system that is used in British Columbia. The various rationales for the rule do not have sufficient force in this province to sustain the rule's continued application.

Further Developments

See *Conveyancing and Law of Property Act*, S.B.C. 1978, c. 16, s. 33 (now *Property Law Act*, R.S.B.C. 1996, c. 377, s. 37).