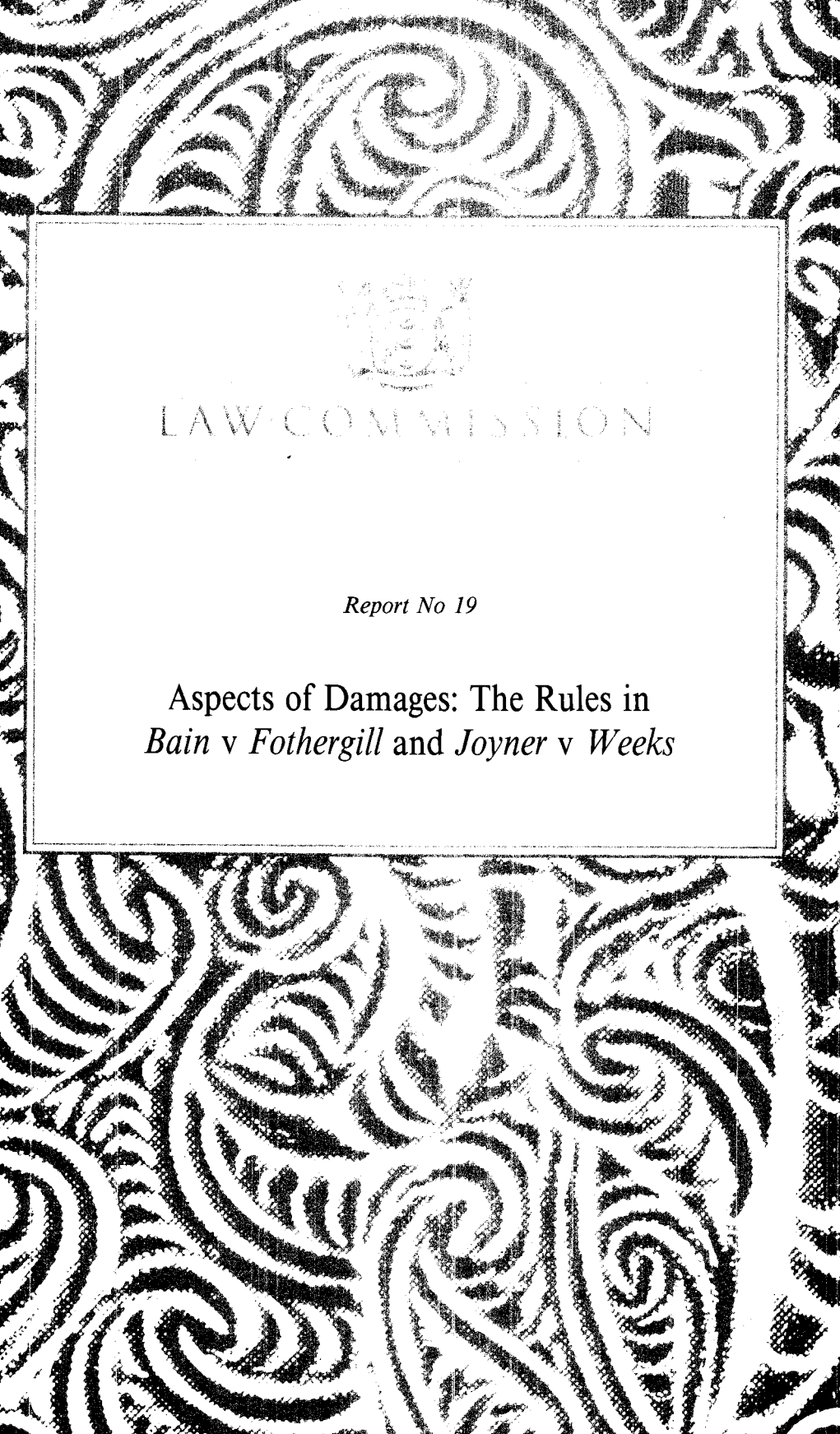

LAW COMMISSION

Report No 19

Aspects of Damages: The Rules in *Bain* v *Fothergill* and *Joyner* v *Weeks*

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LAW·COMMISSION

Report No 19

Aspects of Damages: The Rules in *Bain* v *Fothergill* and *Joyner* v *Weeks*

May 1991
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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13 May 1991

Dear Minister

I am pleased to submit to you Report No 19 of the Law Commission, *Aspects of Damages: The Rules in Bain* v *Fothergill* and *Joyner* v *Weeks.*

The Commission concludes that the rules established in the two cases are unjustified and contrary to principle. It proposes that they be abolished by amendments to the Property Law Act 1952.

You might consider that that can be most conveniently achieved by the inclusion of the proposed provisions in a Law Reform (Miscellaneous Provisions) Bill.

Yours sincerely

K J Keith
President

The Hon D A M Graham, MP
Minister of Justice
Parliament House
WELLINGTON

Summary and Recommendations

1 This Report examines two anomalous and much criticised rules about the damages payable in actions relating to land. The Report is part of the Commission's work on damages and follows Report No 18, *Aspects of Damages: Employment Contracts and the Rule in Addis* v *Gramophone Co.* It arises as well from the Commission's review of the Property Law Act 1952.

2 The rule in *Bain* v *Fothergill* (1874) LR 7 HL 158 limits the damages which an intending purchaser of land would normally recover for a breach by the vendor of a contract of sale (especially expectation damages) while, by contrast, the rule in *Joyner* v *Weeks* [1891] 2 QB 31 (concerned with a lessor's claim for the lessee's failure to deliver up premises in good repair) may allow the plaintiff a windfall substantially above the amount of any actual loss.

3 The rules are inconsistent with the general law relating to damages. The first is based on land transfer law and practice long since abandoned in New Zealand. Both have been the subject of much judicial and professional criticism. Both have been abolished by statute in the United Kingdom—where of course they were first established by the courts. The rule in *Bain* v *Fothergill* has been abolished by judicial decision in Canada and also by legislation in British Columbia and in a number of Australian states. In New Zealand the Property Law and Equity Reform Committee called for abolition of the rule in *Joyner* v *Weeks* and that action has been taken by the New South Wales and Queensland Parliaments. Our consultations have shown full support for the criticism of the two rules and for their abolition. Against that background of criticism and action here and elsewhere, the Law Commission has concluded that in this case it

need not follow its usual practice of first publishing a discussion paper.

4 The report recommends that the rules be abolished by way of amendments to the Property Law Act 1952. The proposed provisions are set out in paras 43 and 85. At this stage the Law Commission expects that its review of that Act will lead to a proposal for a new statute. Provisions abolishing rules of law could be omitted from such a new enactment as having achieved their objective, see the Acts Interpretation Act 1924 s 20(f) and draft Interpretation Act (NZLC R17) cl 6(2)(d).

I

The Rule in *Bain* v *Fothergill*

INTRODUCTION

5 In the course of its work on the Property Law Act 1952 and on aspects of damages, the Law Commission has reviewed the judge-made rule in *Bain* v *Fothergill* (1874) LR 7 HL 158. This rule, named after a decision of the House of Lords last century but of much earlier origin—dating from English land sale practices in the eighteenth century—imposes limits on the damages payable to a purchaser of real estate when the vendor is unable to provide good title and the contract is accordingly not performed. We have concluded that the rule is undesirable and should be abolished by legislation.

6 The rule is most conveniently explained by contrasting it with the ordinary rules about damages for breach or non-performance of contracts. If the vendor does not perform an ordinary contract of sale, the intending purchaser is entitled to damages for both

- expenses incurred in reliance on the contract proceeding: "reliance losses", and
- loss of a future bargain involving the subject of the aborted sale: "expectation losses".

(The entitlement is subject to the normal limit that the damages are not too remote.) The rule in *Bain* v *Fothergill* not only denies any damages for expectation losses but also limits recovery of reliance losses.

7 The scope of the rule is summarised in Williams *A Treatise on the Law of Vendor and Purchaser* (Vol 2, 3rd ed Sweet & Maxwell, London (1923) at 1027). Under the rule in *Bain* v *Fothergill*

> the purchaser's right to damages for the breach of 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, [the purchaser] 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.

8 Thus the rule in *Bain* v *Fothergill* refuses proper compensation for expectation loss: "loss of bargain". It also limits damages for reliance loss; only some of kinds of expenditure may be recovered. The purchaser can certainly recover any deposit paid with interest —by way of a restitutionary claim. But damages are not available for reliance loss except for expenses incurred in preparing the contract and the cost of arranging insurance (see *McGregor on Damages* (15th ed, Sweet & Maxwell, London (1988) paras 901-903). Often this will not come close to compensating the purchaser for the loss actually suffered.

9 Although, as will be seen below, the rule in *Bain* v *Fothergill* is very seldom allowed to apply in New Zealand, it does from time to time arise for consideration. Indeed it was considered in two judgments given in the High Court in 1990 which confirmed it is part of our law, although in neither case was the rule found to apply. Outside New Zealand the rule has been on the retreat. Apart from judicial criticism and limitation, the rule has been abolished by legislation in England (Law of Property (Miscellaneous Provisions) Act 1989 s 3), Queensland (Property Law Act 1974 s 68), and British Columbia (Property Law Act RSBC 1979 c 340 s 33), in each case after a law reform commission report recommending repeal. The Law Reform Commissions of New South Wales and Victoria have also recommended abolition in their respective States. The rule seems to have been abolished entirely in Canada by a decision of the Supreme Court. It has never been applied in Scotland, nor is it generally favoured in the United States (see Corbin, *Corbin on Contracts* (1st ed, West Publishing Co, St Paul, Mass (1950) para 1098).

10 This chapter of this Report

- outlines the origins and extent of the rule,

- summarises the current law in New Zealand,
- outlines developments elsewhere,
- canvasses the policy issues for and against retaining the rule, and
- concludes that the rule should be abolished in relation to future contracts.

ORIGINS OF THE RULE

11 The rule takes its name from the case in which it was considered and approved by the House of Lords. But it first appears in the law reports in the case of *Flureau* v *Thornhill* (1776) 2 Bl W 1078; 96 ER 635. There the plaintiff bought a an interest in a lease at auction (apparently at a good price), paying a deposit of 20 per cent. The vendor then discovered he did not have good title and gave the plaintiff the choice of taking the title with its faults, or receiving back the deposit with interest. But the plaintiff claimed as well further damages for loss of "so good a bargain" and (seemingly) loss of investment income since he had had to realise stocks to raise the purchase price. The jury awarded the purchaser £54 15s 6d for the deposit and interest and a further £20 for damages. The vendor's motion for a new trial was heard by the full bench of the Court of Common Pleas which held that the plaintiff was entitled only to the return of the deposit and interest:

> If the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think the purchaser can be entitled to any damages for the fancied goodness of bargain. (De Grey CJ at 1078; 635)

Blackstone J agreed, adding that such contracts were always upon the implied condition that the vendor had a good title. (That approach has been doubted since.) No previous authority was cited for the decision and the report is very brief.

12 *Flureau* v *Thornhill* was decided before the development of our present principles governing the award of damages. The amount of damages was then generally a matter for juries to decide, based on their view of the amount which was fair in the circumstances. Principled approaches were not developed and refined until the middle of the nineteenth century in cases such as *Hadley* v *Baxendale* (1854) 9 Ex 341; 156 ER 45.

13 The rule laid down in *Flureau* v *Thornhill* was approved as good law nearly 100 years later in *Bain* v *Fothergill* by the House of Lords after consideration of the advice of five summoned judges. In *Bain* the defendants had promised to sell a leasehold interest in some iron ore mines to the plaintiffs and received a £250 deposit. But the interest could not be transferred without the consent of the lessor and it transpired that this could not be obtained. The purchasers began an action in the Court of Exchequer claiming the deposit, interest and expenses, and also damages for loss of their bargain. At first instance it was held that the damages claim could not be sustained and that decision was affirmed on appeal. Arguments that *Flureau* v *Thornhill* should be overruled or distinguished were rejected by both the Law Lords who heard the views of the judges. It was held that because the defendants had acted without bad faith and made every effort to obtain the lessor's consent, the plaintiffs could recover only the expenses which they had actually incurred but not damages beyond.

14 Little doubt was expressed in *Bain* about the correctness in law or as a matter of policy of *Flureau v Thornhill* and the cases in which it had been followed. Adverse comment in respect of the rule was almost ignored. The existence of (and presumably reliance on) the rule for nearly 100 years weighed heavily with Lord Hatherley in favour of its retention:

> I certainly remember myself, now more than fifty years ago, when I was reading in Chambers, to have heard that it was considered as a settled rule that no damages could be recovered for a loss of the benefit of a bargain .... Therefore, my Lords, for ninety-nine years the rule has prevailed as settled by *Flureau* v *Thornhill*, and it has affected and governed, I may say, thousands and thousands of transactions annually, for undoubtedly the contracts for the sale of real estate may be reckoned by thousands annually, and nobody, I apprehend, has as yet contradicted it. (209)

15 However, the underlying reason given for retaining the rule was the difficulty which existed at that time in establishing good title to land. The plaintiffs had argued that different rules applied to a breach of contract to sell chattels and contended that these rules should apply as well to contracts to sell land. The argument failed. The judges drew clear distinctions between land and goods:

> First, no layman can be supposed to know what is the exact nature of his title to real property. ... Secondly, to enter into a

> contract for the purchase of land in order to immediately resell it before title is examined, is unusual and exceptional. (Pollock B at 173)

In 1874 there was no equivalent in England to the land registration systems with which we are now familiar. Title was established by examination of the deeds which documented dealings with the land. Tracing the transactions was apparently a time-consuming and unpleasant task: Megarry J in *Wroth* v *Tyler* [1974] Ch 30, 56 quotes a comment attributed to Lord Westbury to the effect that the title deeds were "difficult to read, disgusting to touch and impossible to understand". As a result, investigation of title was difficult and expensive and often failed to uncover a defect in an earlier conveyance.

EXCEPTIONS TO THE RULE

16 Over the years the judges have fashioned a number of exceptions to the (exceptional) rule in *Bain* v *Fothergill.* The most significant of these—the "conveyancing" exception—was established by *Engell* v *Fitch* (1869) LR 4 QB 659. Where the vendor is able as a matter of law to correct a defect but is unwilling or cannot afford to do so, the defect is said to be one of conveyance, not of title, and normal damages principles are applied. The contrast is exemplified by, on the one hand, a vendor who is legally unable to obtain surrender of a right of way enjoyed over the subject property by a neighbour and, on the other hand, a vendor who does not have from the sale or other sources sufficient funds to repay a mortgage over the property. *Engell* v *Fitch* itself concerned a sale by a mortgagee who refused to turn out the mortgagor in possession though ample power existed for him to do so. Similarly a vendor who promised vacant possession but refused (although having the right) to evict a tenant would be unable to take advantage of the rule. This exception to the rule was not affected by the decision in *Bain* v *Fothergill.*

17 Another important exception to the rule is found where the vendor acts in bad faith (*Day* v *Singleton* [1899] 2 Ch 320). The vendor cannot hide behind *Bain* v *Fothergill* if he or she has not used "best endeavours" to remedy the title defect. Often this will involve attempting to obtain the agreement of a third party to do some act. For example, in *Sharneyford Supplies Ltd* v *Edge* [1987] 1 Ch 305 the

purchaser had stipulated for vacant possession. The vendors, believing this could be obtained, agreed, but then found that the tenants refused to leave, claiming the protection of the Landlord and Tenant Act 1954. The English Court of Appeal refused to apply the rule in *Bain* v *Fothergill* on the ground that the vendors had not used their best endeavours because they had not served the tenants with notice to quit. This was in spite of the fact that any such attempt would probably have been futile:

> It matters not that the attempt to clear the title might have failed: it must at least have been tried. (Balcombe LJ at 322)

(But contrast *Staples* v *Lomas* [1944] NZLR 150, see para 20.)

18 Other more recent erosions of the rule are evident in *Wroth* v *Tyler* [1974] Ch 30 where Megarry J held that a wife's right of occupation under the Matrimonial Homes Act 1967 did not constitute a defect in title; and in New Zealand, the decision of Gallen J in *Slater Wilmshurst Ltd* v *Crown Group Custodian Ltd* [1991] 1 NZLR 344 that the vendor's failure to remember a third party's right of first refusal denied it the protection of the rule in *Bain* v *Fothergill* (see paras 23-25).

THE CURRENT STATUS OF THE RULE

New Zealand

19 The rule in *Bain* v *Fothergill* has been accepted as good law in New Zealand at least since *Fleming* v *Munro* (1908) 27 NZLR 796, although it has been said that it will seldom have application, given the certainty of title ensured by the system of land registration under the Land Transfer Act 1952: *Waring* v *S J Brentnall Ltd* [1975] 2 NZLR 401.

20 In fact, the rule has been applied in New Zealand to limit the purchaser's damages in only three reported first instance decisions:

- In *Conn* v *Bartlett* [1923] GLR 729 the vendor agreed to sell the lease of a shop which he represented as being a three-year lease with a right of renewal for a further three years. In fact the vendor had earlier failed to renew the lease and held only a periodic tenancy. Salmond J held that *Bain* v *Fothergill* was good law in New Zealand and applied unless the purchaser could show fraud or that the vendor had failed to take reasonable steps to remove the defect. The former was not proved and

as the purchaser had not pleaded the latter, the court would not consider it.

- In *Staples* v *Lomas* [1944] NZLR 150 the vendor promised to give vacant possession in the belief that the tenant would vacate. The tenant, unable to find alternative accommodation, relied on the Fair Rents Act 1936 and refused to leave. Myers CJ held that the statutory tenancy created a defect on the title, and that as the vendor had made reasonable efforts to find other accommodation for the tenant, everything possible had been done. Damages were restricted to the costs incurred in searching the title.

- In *Jacobs* v *Bills* [1967] NZLR 249 the vendor (elderly and depressed) agreed to sell her house for a sum much lower than its actual value. She held the house as a trustee under a family trust. Other beneficiaries intervened to prevent the sale. McGregor J refused damages for loss of bargain, relying on *Bain* v *Fothergill*, although it is evident that he was heavily influenced by the purchaser's conduct in taking advantage of the vendor. Developments in the law relating to unconscionable contracts since 1967 would probably assist the vendor if this case were brought again today.

21 More recently, in *Clasper* v *Lawrence* [1990] 3 NZLR 231 the plaintiff accidentally sold the same piece of land twice. The first purchaser took title and the second was left to an action for damages. Following the decision of the Supreme Court of Canada in *AVG Management Science Ltd* v *Barwell Developments Ltd* (1978) 92 DLR (3d) 289 (see para 31), Tipping J held that the rule in *Bain* v *Fothergill* did not apply: "It is a case of a vendor having good title at law but no title in equity as opposed to a vendor with a defective title." (240) Clasper (the second purchaser) was entitled to recover $15 000 for loss of bargain (the difference between the contract price to Clasper and the price which Clasper had to pay to acquire the land from the first purchaser some months later). The vendor was also ordered to pay interest on that amount and on the deposit already paid.

22 Tipping J explained the rule as follows:

> [I]t is my view in light of our land registration system and the cases to which I have referred that the vendor cannot take advantage of the rule unless he can show:

(a) that he neither knew nor ought to have known of the defect in title, or, if aware of it, he believed on reasonable grounds that the defect was curable by the time for settlement; and

(b) that he took all steps reasonably open to him to cure the defect.

It must always be recalled that the rule only protects against a defect in title not against problems of a conveyancing nature. (240)

23 In *Slater Wilmshurst Ltd* v *Crown Group Custodian Ltd* [1991] 1 NZLR 344, Crown had unconditionally agreed to sell a property to Slater, forgetful of a right of first refusal which Hallensteins enjoyed under an existing lease of the property. Slater concluded an agreement to onsell the property at a substantial profit before anyone recalled the right of refusal. Hallensteins, becoming aware of the sale, exercised its right and bought the property. It therefore became impossible for Crown to give title to Slater. Slater brought an action against Crown for its lost profit on the re-sale.

24 Gallen J held that the rule in *Bain* v *Fothergill* did not prevent recovery of that profit. Although, "if the defendant had believed that Hallensteins would not exercise that right, . . . the case would clearly come within the ambit of the decisions where the rule has been applied", that was not this case: since Crown had overlooked the very existence of the right, it could not be said to have acted in the belief that Hallensteins would not exercise it. That was Crown's own fault and the rule did not apply. Therefore Slater was entitled to damages for the profit lost on the re-sale contract.

25 Gallen J accepted the formulation of the rule by Tipping J in *Clasper* v *Lawrence*. He also commented on the rule in relation to a Torrens system, noting that although the rule is always discussed in terms of title, in *Bain* v *Fothergill* itself the difficulty was not in establishing title but in making it over. The New Zealand cases, he observed,

> all involve not an inability to establish title but rather an inability to transfer what the vendor contracted to transfer as the result of the intervention of some supervening factor for which the vendor was not responsible. (355)

England

26 *Sharneyford Supplies Ltd* v *Edge* [1987] 1 Ch 305 involved, rather exotically, the sale of a freehold maggot farm. The vendor had promised to give vacant possession, relying on the tenants' assurance that they would vacate. The tenants then changed their mind and claimed the protection of the Landlord and Tenant Act 1954. The sale was not completed and the purchaser sued for damages. It was held by the Court of Appeal that the rule in *Bain* v *Fothergill* did not apply. The vendor was found to have acted in bad faith by not using best endeavours to remedy the defect. The vendor had not served the tenants with notice to quit. He was obliged to do so in spite of the fact that this might well have been futile because the tenants were protected by statute. Balcombe, Parker and Kerr LJJ all expressed strong support for the proposals for the abolition of the rule in the working paper of the Law Commission in England (Working Paper No 98 *Transfer of Land: The Rule in Bain v Fothergill* (1986)).

27 *Sharneyford* may be compared with *Seven Seas Properties* v *Al-Essa* [1988] 1 WLR 1272 where Hoffman J, deciding preliminary issues of damages and security, considered and applied the rule. The decision is brief. There were contracts for the sale and subsale of a leasehold. When the primary sale fell through so did the subsale. The purchaser sued for specific performance and damages (including damages suffered in relation to the subsale) and sought security for damages in a preliminary hearing. Hoffman J held that the purchaser would be able to invoke the rule against the subpurchaser as a straight-forward case of a subseller who, despite his good faith and best endeavours, was unable to obtain a title to convey before the subpurchaser elected to rescind the contract. Therefore damages for any loss of profit on the part of the subpurchaser would not be available and no provision need be made for them.

28 Shortly after *Sharneyford* was decided, the Law Commission in England published a report on the rule (*Transfer of Land: The Rule in Bain* v *Fothergill* (Law Com No 166) Cm 192 1987) which cited the comments of the Court of Appeal and submissions received in response to the working paper, and formally recommended abolition. That was effected by the Law of Property (Miscellaneous Provisions) Act 1989, s 3 for all future contracts relating to any land, both registered and unregistered.

Australia

29 The rule is good law in Australia by a decision of that country's High Court (*Noske* v *McGinnis* (1932) 47 CLR 563), but, as elsewhere, it has been distinguished almost out of existence. The most recent reported case on the subject was *ASA Constructions Pty* v *Ivanow* [1975] 1 NSWLR 512 where the vendor sold the same land twice. As in *Clasper* v *Lawrence* the rule was held not to apply: "the vendor was the author of his own misfortunes".

30 The rule has been abolished in respect of registered land in Queensland by legislation (Property Law Act 1974, s 68), and abolition has been recommended by law reform commissions in New South Wales (Report No 64 in 1990) and Victoria (Report No 20 in 1989).

Canada

31 In Canada it is accepted that the rule was judicially repealed by the Supreme Court of Canada in *AVG Management Science Ltd* v *Barwell Developments Ltd* (1978) 92 DLR (3d) 289. In that case the parties had an agreement for the sale and purchase of land but the vendor, thinking that agreement had fallen through, then purported to sell to a third party. The first purchaser obtained specific performance and the second brought an action for damages. The Supreme Court was asked to consider whether the rule applied to the particular case or in Canada at all. The Supreme Court had no difficulty holding that the rule did not apply to the particular facts. Consideration of the second issue was therefore not necessary. But the judgment of the court delivered by Laskin CJC, while making that clear, went on to consider it anyway.

32 After noting the helpful report of the Law Reform Commission of British Columbia on the rule and the subsequent enactment of s 33 of the Conveyancing and Law of Property Act abolishing the rule in that province, Laskin CJC commented on the complexity of the rule, that the justifications for it were obsolete, the fact that it is generally not followed in the United States, and the incidence of systems of land registration, and said:

> It would be my opinion, if it was necessary, in order to decide this case, to come to a conclusion on the matter, that the rule in *Bain* v *Fothergill* should no longer be followed in respect of

land transactions in those Provinces which have a Torrens system of title registration or a near similar system. (301)

POLICY FACTORS

33 The arguments for abolishing the rule have been comprehensively addressed by the courts, by writers and by the law reform agencies and legislatures which have recommended or carried out reform. They include

- the lack of need for such a rule where there is a system of land registration and indefeasible title,
- the changes in ways of dealing with land since the rule was adopted in the late eighteenth century,
- the anomalous nature of the rule when compared with the general law of damages, and
- the inconsistencies created by the uncertain extent of the rule.

Reasons for retaining the rule include

- its antiquity: it has been part of conveyancing practice for over 200 years,
- reliance upon it by conveyancers, and
- the usefulness of the rule in allowing a fair result in difficult cases.

ARGUMENTS FOR ABOLITION

Impact of the Torrens system on the rule

34 The primary justification for the rule was the difficulty in establishing title under the then current English law. It was said that vendors could not be expected to know whether or not they had good title to their land. That was probably true in the United Kingdom in 1776 and even in 1874. But a similar rule has never existed in respect of the sale of goods, where title may be at least as difficult to establish. And with the existence of a comprehensive land registration system in New Zealand under the Land Transfer Act 1952 the uncertainties of the deeds system have been removed.

35 It is true that some land in New Zealand is not subject to the Land Transfer Act 1952, including Crown land, certain Maori titles held under Crown grant (where the permission of the Maori Land Court is required for any transfer), land which was overlooked in the

transfer from deeds to land registration and land the existence of which is only disclosed by the making of a new survey (Hinde McMorland & Sim *Land Law* Butterworths, Wellington (1978) para 2029). Although such land constitutes nearly half of New Zealand's total land area, the vast bulk of that is vested in the Crown. When ownership of land is to be transferred away from the Crown to private interests, the land is invariably registered and a certificate of title issued. For practical purposes, the transfer of an interest in land does not take place outside the registration system. As the High Court observed in *Waring* v *S J Brentnall Ltd* [1975] 2 NZLR 401 the rule will seldom have application to registered land. Uncertainty is now exceptional, and thus the primary justification for the rule no longer exists in New Zealand.

The anomalous nature of the rule

36 The rule in *Bain* v *Fothergill*, as we have seen, refuses compensation for loss of profits, a normal measure of damages for a breach of contract. Principles of remoteness or the special nature of land can no longer be used to justify this unique exception to contractual principles. At one time damages for loss of profit may have been thought to be too remote because the buying and selling of land for a profit was not then a common commercial enterprise. Contract law and commercial practice have long since developed to the stage where neither of these factors can now justify the rule. Nor can the rule properly be explained as arising from some implied term in the contract that damages are to be limited if the vendor is unable to convey title (see Blackstone J in *Flureau* v *Thornhill*). There is no suggestion that any such term was ever contemplated by the parties in any of the cases, or that such a term is or was necessary.

The uncertain extent of the rule

37 The decision in *Bain* v *Fothergill* has been consistently criticised and limited in the courts. The exceptions to it which have been created in an effort to avoid its effect have led to the situation where the precise ambit of the rule is not at all certain. It is suggested that they have also given rise to decisions which may not accord with principle. For example, the meaning of the phrase "best endeavours" has been extended over the years. Where the problem can be rectified, but only at great expense, it seems the vendor is obliged to do what is

necessary (even if that imposes a great burden) or lose the protection of the rule. Similarly, a "defect in title" has been differently construed over the years.

ARGUMENTS FOR RETENTION

Antiquity

38 A measure of the weakness of the case for the rule is that the main reason which can be put forward for retaining it is antiquity. Indeed this was the reason for the adoption of the rule in *Flureau* v *Thornhill* by the House of Lords in *Bain* v *Fothergill*. The rule formed part of English conveyancing practice for over 200 years. But in England antiquity has been outweighed by the arguments just canvassed.

Conveyancing practice

39 It has not been suggested to us that New Zealand conveyancers give any thought to the rule in *Bain* v *Fothergill* in conveyancing transactions except in the event that something goes wrong and the vendor wishes to limit the damages payable. The standard form of agreement for sale and purchase makes no mention of the rule. Special conditions dealing with it are rarely, if ever, found. We see no reason to disagree with the English Law Commission's views as expressed in its 1986 working paper (see para 26):

> We now consider whether abolition would have any deleterious impact upon conveyancing practice. If the rule is abolished, then it clearly behoves the vendor to ensure that he has a good title prior to entering the contract. This, however, is in accordance with long-established conveyancing practice. It is necessary for the vendor's legal adviser in drafting the contract to investigate his client's title to discover any defects in it, and they should then be dealt with by an appropriately drafted special condition of sale. The existence of the rule could be seen as an insurance policy in the event of this pre-contract investigation being performed inadequately. If the rule is abolished, this insurance will disappear. Should the legal adviser have failed to exercise proper care in drafting the contract, by not discovering and then dealing with discoverable defects in title, it seems that he would be liable to his client for the loss

> the latter has suffered in having to pay damages to the purchaser. We see no objection to this as it should help ensure that proper care is taken in the preparation of conveyancing contracts. (para 3.17)

Since there appears to be no present reliance on the rule, its abolition should have no effect on the insurance arrangements of the legal profession.

Is the rule useful in exceptional cases?

40 After canvassing the merits of the arguments for and against the retention of the rule in *Bain* v *Fothergill*, we have concluded that the rule is contrary to general principles for the assessment of damages and that the original justifications for the rule no longer exist. Even so, if the rule, limited as it now is, remained an efficient way of resolving difficult cases in accordance with reasonable expectations, it might possibly be worth retaining. If there are cases where it is appropriate that the purchaser rather than the vendor should bear the loss resulting from non-completion of the contract, the rule in *Bain* v *Fothergill* might be a means of ensuring this. However, we have found no evidence of any such need which is unable to be met by other means.

41 We have considered the position of a vendor of whom advantage has been taken by the purchaser. It seems to us that the result which was reached in *Jacobs* v *Bills* (para 20) (where the elderly and depressed vendor repudiated the contract but did not have to pay damages for expectation loss to the purchaser—only a much smaller sum for the return of the deposit and some compensation for expenses and delay) was fair. But the same result could be reached by applying the principles about "unfair" or "unconscionable" contracts which have been developed by the courts in the line of cases culminating in *Nichols* v *Jessup* [1986] 1 NZLR 226: the vendor was clearly disadvantaged, the house was sold at a substantial undervalue (of which the purchaser was aware) and the vendor did not have the benefit of independent advice. The contract would surely be set aside. If so, no damages would be payable and the vendor would thus be better off than if she relied on *Bain*. (The Law Commission has published a discussion paper on the general law relating to unfair contracts: see NZLC PP11 *"Unfair" Contracts* (discussion paper) (1989).)

CONCLUSION AND RECOMMENDATION

42 The Law Commission has concluded that the rule in *Bain* v *Fothergill* can no longer be justified and should be abolished by legislation. Since transfers of land do not take place outside the Land Transfer system or the Maori Land Court there is no need to retain the rule in any circumstances. However, our proposal would leave parties free to negotiate a contractual limitation on the liability of the vendor if they saw fit.

43 The Law Commission recommends that the rule in *Bain* v *Fothergill* be abolished and that damages for breach, by failure to give good title, of a contract to sell land should be governed by ordinary contractual principles. It further recommends that this be achieved by the enactment of a provision in the Property Law Act 1952 (which could be added after s 62) along the following lines:

> **62A Abolition of the rule in *Bain* v *Fothergill***
>
> (1) The rule known as the rule in *Bain* v *Fothergill* (which restricts the damages that may be recovered for a breach of contract caused by a defect in the title to land) is abolished.
>
> (2) This section applies only to contracts made after the commencement of this section.

II

The Rule in *Joyner* v *Weeks*

INTRODUCTION

44 We are also able to report quite briefly on the rule in *Joyner* v *Weeks* [1891] 2 QB 31. The Property Law and Equity Reform Committee in its Final Report on Legislation Relating to Landlord and Tenant (1986) paras 90-94 has previously studied the rule and recommended that it be abolished. This has already occurred for residential tenancies governed by the Residential Tenancies Act 1986 (see para 84).

45 The rule concerns the measure of a landlord's damages in circumstances where the lease has come to an end and the tenant is found to be in breach of a covenant to deliver up the premises in a specified standard of repair pursuant to an express or implied lease covenant. A customary formula, embodied in s 106(b) of the Property Law Act 1952, is that the premises must be yielded up "in good and tenantable repair, having regard to their condition at the commencement of the said lease ...". Under the rule in *Joyner* v *Weeks*, the applicable measure of damages in the case of breach is stated to be the cost of doing the necessary repairs, whether or not that sum represents the true loss to the landlord. For example, the landlord may have decided that the best use of the land is redevelopment, after demolition of the premises. Their condition in that case might be irrelevant. Nevertheless the rule permits a claim against the tenant for the cost of repair of the premises, though repair will never be done and no loss has been suffered. This rule conflicts with general principles governing the award of damages. Those general principles are

applied to measure damages for failure to repair when an action is brought during the continuance of the term of the lease. So different rules apply to situations which are in appearance very similar. We begin by outlining the position during the term.

Action brought during the term

46 No problem has arisen where an action for damages for breach of the repair covenant is brought during the term. In *Conquest* v *Ebbetts* [1896] AC 490, the House of Lords upheld a determination by the English Court of Appeal that in that circumstance the general principles laid down in *Hadley* v *Baxendale* (1854) 9 Ex 341; 156 ER 45 should be applied, namely that damages for the breach of contract should be such as might fairly and reasonably be considered either as arising naturally, ie according to the usual course of things, from the breach of contract itself, or be such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

47 The application given to those general principles in the case of the breach of the repair covenant during the continuance of the lease is that the landlord is entitled to damages measured by the amount (if any) by which the value of the landlord's reversion on the lease has been decreased because of the state of disrepair. How much has the market value of the reversionary interest been diminished by reason of the lessee's breach? Where the lease has a relatively short time to run and it is clear that the disrepair will have to be remedied by the lessor at the end of the term in order to avoid loss in value of the property, the appropriate measure will be the cost of the repairs to be done at the end of the lease, with a discount being allowed to reflect the fact that the damages are to be paid to the lessor at an earlier date than that on which the lessor will be incurring the expenditure on repairs.

48 But where the evidence shows that at the end of the term the lessor will not incur the cost of repair, as, for instance, when the premises will be pulled down for redevelopment or will be sold to a developer who will demolish them, there may be no loss at all to the lessor arising out of the disrepair. In such circumstances the lessor, if suing during the term, will be entitled to nominal damages only. In other cases it may be apparent that the carrying out of some repairs, but not the full repair required by a particular covenant, will be

sufficient at the end of the term to restore the landlord's position to what it should have been. In other words, partial repair will be all that is necessary to restore the value of the reversion when the lease ends. Then the measure of damages will be the cost of the partial repair, with the discount mentioned in para 47.

49 If the term of the lease has many years to run the lessor may be hard put to show that there is any diminution at all in the value of the reversion caused because the premises are not in the agreed standard of repair. The re-sale value of the reversion, and thus the amount of the damages, will depend upon the court's perception of whether a willing buyer would offer the landlord the same price for the property subject to the long term lease notwithstanding the disrepair. If the tenant's financial situation were strong a purchaser might pay little attention to the disrepair, being more interested in the income to be derived and conscious of the fact that the tenant would not, upon a rent review, be able to take advantage of breach as a means of obtaining a lower rent than if the premises were in a proper state of repair.

50 In summary, then, damages for breach of a repair covenant where the landlord sues during the continuance of the term are measured by the actual loss suffered or likely to be suffered by the landlord and will not necessarily equate the cost of carrying out the covenanted repairs. In reflecting actual loss the damages are consistent with the usual rules concerning assessment of damages.

THE RULE IN *JOYNER* v *WEEKS*

51 But, as has already been noted, the position is quite different if the landlord sues on a covenant in a lease which is no longer current. When the English Court of Appeal, consisting of two Appeal Judges, Lord Esher MR and Fry LJ, considered this question, it laid down (confirming a decision of Denman J in *Morgan* v *Hardy* (1886) 17 QBD 770) a strict rule which departed from the flexibility which normally marks the assessment of damages. The result is a rule which may give the lessor a windfall in the shape of damages which are unrelated to any loss the lessor actually suffers.

52 In *Joyner* v *Weeks* the plaintiff as lessor sued upon a covenant contained in a lease by which the defendant as lessee covenanted to leave the premises in repair. The lease had come to an end and it was not denied that the premises were left out of repair, so there was a

breach of the covenant as between the lessor and the lessee. The lessor had proved that to put the premises into the state of repair in which the defendant was bound to leave them would cost £70. But the defendant said that he was liable to pay nominal damages only to the plaintiff because the plaintiff had not suffered any real loss. The defendant sought to establish his case by the following argument.

While the term was running and he was in possession of the premises, the lessor entered into a further lease of the premises to a third party to commence from the determination of the current lease. The new lease was at a higher rental and contained a covenant that the new lessee should pull down and alter part of the premises and a covenant to repair. The defendant therefore said that under the circumstances the breach of his covenant did the lessor no harm, the lessor having relet the premises on terms that were not affected by the disrepair.

53 But the Court of Appeal held that the lessee must pay the full cost of such repairs as were contemplated by the repair covenant. It found that there was already

> an inveterate practice [amounting] ... to a rule of law ... that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. (Lord Esher MR at 43)

This is the so-called rule in *Joyner* v *Weeks*.

54 Lord Esher confessed that he was strongly inclined to think that it was an absolute rule applicable under all circumstances and suggested that it was a "highly convenient rule" because it "avoids all the subtle refinements ... and the extensive and costly enquiries which they would involve. It appears to me to be a simple and business like rule."(43) The rule in *Joyner* v *Weeks* is therefore the "ordinary rule, which must apply, unless there be something which affects the condition of the property in such a manner as to affect the relation between the lessor and the lessee in respect to it". (43-44)

55 In his judgment Fry LJ took a similar position, commenting that the rule being laid down by the court was much simpler than a measure of damages related to the diminution in value of the reversion and not exceeding the cost of the repairs. Such a rule, he said,

> involves the ascertainment of two amounts in order to take the smaller of the two. However exact such a measure of damages may be, there is, as it seems to me, a complexity about it which unfits it for determining affairs as between man and man in a court of law. (46-47)

It is curious that the same court was untroubled by this problem when *Conquest* v *Ebbetts* was before it only a few years later: [1895] 2 Ch 377 sub nom *Ebbetts* v *Conquest.*

56 Both judges quickly dismissed any suggestion that the defendant could rely on any arrangements made between the landlord and a third party "to which [the lessee] was no party and with which he had nothing to do". Therefore they could not be taken into account. They were said to be res inter alios acta. And furthermore, subsequent performance by the second lessee of the covenants which he had entered into could not abridge or take away the cause of action that had vested in the lessor before the second lease took effect. The damages, in the words of Fry LJ, "must be estimated with regard to the time when the cause of action comes into existence." (48) (But see further paras 74-75.)

REACTION TO THE RULE

England

57 It was not long before some reservation was expressed about the decision in *Joyner* v *Weeks.* In 1893 Wills J in *Henderson* v *Thorn* [1893] 2 QB 164, 167 expressed the view that

> the sum paid by the tenant [under the rule] is often a sum preposterous in relation to the real damage to the landlord: as, where he is going to pull down the premises and is, therefore, not the loser by a penny because they are returned on his hands out of repair. In such a case, the rule of law may amount to putting into the landlord's pocket money far beyond the damage which he has actually suffered.

Nevertheless he observed that

> it must be remembered that there are difficulties on the other side, and that, but for this rule of law, the tenant who has broken his contract might come off better than if he had kept it; a result not to be lightly encouraged. (167)

He therefore thought it not surprising that of these two principles the Court of Appeal had chosen that which they believed to be the workable one.

58 When the Court of Appeal and the House of Lords came to consider the principles to be applied in an action for damages brought during the continuance of the lease in *Ebbetts* v *Conquest* [1895] 2 Ch 377, on appeal sub nom *Conquest* v *Ebbetts* [1896] AC 490 (paras 46-50), *Joyner* v *Weeks*, though mentioned in argument before the House of Lords, was ignored in the judgments. Nevertheless, the court shied away from any

> arbitrary rules ... laid down upon grounds of convenience, that whether or not the lessor in fact loses by the want of repair, he should be paid the amount which would be necessary to place the premises in good repair. (Rigby LJ at 385-386)

59 By 1927 it had been decided legislatively to abandon the rule in England. Section 18(1) of the Landlord and Tenant Act 1927 states:

> Damages for a breach of a covenant or agreement to keep or put the premises in repair during the currency of the lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) of the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

60 When this section was enacted, an article in the *Law Quarterly Review* ("Damages for non-repair" (1928) 44 LQR 209) stated that it effected "a wholesome change in the law".

61 After the legislature in England had done away with the rule in *Joyner* v *Weeks* the Court of Appeal in *James* v *Hutton* [1950] 1 KB 9 declined to apply the rule in circumstances (outside the statute) in which the lessee had been given a licence to alter the premises and had covenanted to restore them to their original condition at the

expiry of the lease. It was held that the measure of damages at common law applicable to the breach was that of the general rule as to damages in breach of contract: the amount of the damage actually suffered and not necessarily the cost of the restoration. *Joyner* v *Weeks* was

> regarded as proceeding on the footing that the plaintiff must have suffered damage by the tenant yielding up the house out of repair. (16-17)

This seems an unlikely explanation. Nevertheless, the court's aversion to *Joyner* v *Weeks* is shown by the manner in which it dealt with that case.

62 The plaintiff in *James* v *Hutton* had given notice to the lessee requiring restoration of the premises in terms of the covenant. When this was not done she sought damages. There was no evidence that restoration would have made the premises suitable for any particular purpose or business or that they were in any way adversely affected or made less valuable by the alteration carried out by the lessee. The court therefore saw no ground for assuming that the plaintiff suffered any damage at all. There was no evidence that either she or her superior landlord would find the altered premises inappropriate and their former state suitable. If that had been the case, the court said, the lessor might well say that it was of value to her to have the premises back in their former condition and that she would suffer damage if the covenant to restore was not carried out. But in the circumstances she suffered no damage at all and was therefore entitled to no more than nominal damages. Thus, in a case very closely analogous to breach of a repair covenant but falling outside s 18 of the Landlord and Tenant Act 1927, the court declined to apply the rule in *Joyner* v *Weeks*.

63 In contrast, a judge at first instance in *Eyre* v *Rea* [1947] 1 KB 567 refused to extend s 18 to breach of a covenant forbidding the making of alterations to the leased premises. The defendant had converted a dwelling-house into flats and argued that the landlord had suffered no damage from this breach because the premises, as converted, were financially more valuable than they would be if restored as a single dwelling-house. The court allowed the plaintiff the cost of restoring the house. But on these facts the lessor may have had very good reason for wanting to have the house back as it was originally let. That would be a matter which could be looked into in

determining the reasonableness of the lessor's damages claim in accordance with ordinary principles.

Australia

64 Legislation in the same terms as that in England has been passed in New South Wales: s 133A Conveyancing Act 1919; and in Queensland: s 112 Property Law Act 1974.

New Zealand

65 In New Zealand the rule in *Joyner* v *Weeks* has, reluctantly, been accepted to be part of our law, though the possibility remains that the Court of Appeal might still refuse to follow it if persuaded of its anomalous nature. But in two of the only three reported cases—all at first instance—which consider the rule it has been criticised and distinguished.

66 In *Sleeman* v *Colonial Distributors* [1956] NZLR 188, F B Adams J remarked that the rule "produced some grave injustices and anomalies" and noted its modification in England by statute. He thought that adoption in New Zealand of the English enactment seemed to be "well worthy of consideration". (192)

67 The measure of damages under the rule in *Joyner* v *Weeks* was applied in *Lowe* v *Ellbogen* [1959] NZLR 103. There the tenant had failed to keep the leased farm in order, in breach of specific covenants in the lease. On the facts, the cost of repair was an entirely appropriate measure of the loss suffered by the landlord so the issue with which this part of this report is concerned did not arise.

68 But in *Maori Trustee* v *Bolton* [1971] NZLR 226, confronted with an argument that *Joyner* v *Weeks* should be applied in another claim by a lessor of farmland, Henry J thought that the action would "gravely and unjustly enrich the lessor if it succeeds on the basis on which it is put forward". At the time when the lease was terminated by reason of the lessee's breach it still had many years to run and there was a right of renewal. The lessor's expectation, if the lease had continued, was in the meantime to have "a minimal rental and freedom from the obligations imposed by law on owners or occupiers of land and assumed by the lessee under the lease". Furthermore, at the end of the term (or renewal) a substantial portion of the improvements was to be the subject matter of compensation to the lessee. The

lease had been forfeited because the lessee had failed to remedy breaches of covenants to clear and fence certain portions of the farm. Nevertheless His Honour thought that a claim based on *Joyner* v *Weeks* had no relationship to the value which the land would have had if the covenants had been observed and took no account of the substantial reimbursement to which the lessee would be entitled at the end of the term in relation to improvements. The claim was therefore "misconceived". *Joyner* v *Weeks* was side-stepped.

69 More recently in *Maori Trustee* v *Clark* [1984] 1 NZLR 578, 584 Woodhouse P speaking for the Court of Appeal in a decision concerning a rather similar lease (*Maori Trustee* v *Bolton* having been cited) said that in the view of the Court of Appeal "the immediate and important test is simply to enquire what has the lessor actually lost by reason of the absent improvements".

POLICY ARGUMENTS

70 The arguments of policy in favour of abolition of the rule in *Joyner* v *Weeks* have essentially been stated already. To summarise:

- The rule is out of line with basic principles in the assessment of damages.
- It is inconsistent with the rule applicable where the action is brought during the currency of a lease and there seems to be no good reason for the distinction.
- Most importantly, the inflexibility of the rule will sometimes produce a windfall for a lessor. A rule of law should not be used as a means of punishing a breach of contract far beyond any loss suffered by the plaintiff.

71 The arguments against:

- Tenants should not be allowed to ignore their covenants and yet escape damages.
- The rule in *Joyner* v *Weeks* is said to make assessment of damages relatively simple.

72 It certainly can be argued that it is unattractive to find a tenant in breach, perhaps deliberate breach, of the contractual obligation to repair, yet able to avoid the consequences of his or her acts or omissions because of fortuitous external circumstances. But on many occasions it may be those circumstances which convince the lessee that the carrying out of repairs to the standard required by the lease

has become uneconomic and unjustifiable. There would seem to be no good reason of policy why contracting parties should be held to the letter of their bargain in circumstances where a departure from the strict obligation does not deprive the other contracting party of the real benefit of that bargain. In *Joyner* v *Weeks*, and similar cases, there would be no possible advantage to the lessor in having the premises restored to their former glory only to be immediately destroyed by the demolition contractor's ball and chain. And to the extent that the landlord could show real disadvantage and real loss, damages would be claimable under ordinary rules. Proponents of economic efficiency arguments might also say that a tenant should be able to breach a repair covenant if this saves unnecessary expenditure.

73 The Court of Appeal in *Joyner* v *Weeks* stressed that the rule which it was laying down made assessment of damages very simple. This is undoubtedly true in some cases but in others it would be equally true were the rule abolished: often there would simply be no loss. In any event, the fact that measuring the real loss might sometimes give rise to delicate problems is not a good reason for imposing a simple rule if that rule is more likely to produce unfair and unprincipled results. Just as difficulty in assessment is not an excuse for denying damages to a plaintiff (eg *Chaplin* v *Hicks* [1911] 2 KB 786, 791), similarly it should not provide an excuse for over-compensation. It also seems strange that a landlord who has, in effect, mitigated the loss, is nevertheless to be entitled to pursue a damages claim as if that mitigation had not occurred.

74 Removal of the rule will not enable a lessee to take advantage of a fortuitous subsequent event any more than is the case under ordinary principles. Where an event which lessens the loss to a landlord would normally be regarded as res inter alios acta, it would still be so. As it was put by Denning LJ in *Smiley* v *Townshend* [1950] 2 KB 311, 320-321 (a case on s 18 of the Landlord and Tenant Act 1927):

> If the landlord is lucky enough to have some repairs done later by the local authority (or it may be in other cases by a fresh tenant under a reversionary lease), that does not itself affect the measure of damages as against [a lessee] who has broken his covenant. It is res inter alios acta. It is like the cases of the sale of goods where it has been held that a buyer of goods which are not up to contract is entitled to recover damages for the inferiority in quality even though he has made a profitable re-sale

> and has suffered no damage .... If a man's motor car is damaged by negligence and is out of repair, is the wrongdoer exempted because at some later date the car is destroyed by fire? The answer is clearly No, and we are all familiar with the rule that insurance money does not go in reduction of damages .... There are, therefore, many cases in which things that happen after a breach of contract or after a wrong done cannot be prayed in aid by the man who breaks his contract or by the tortfeasor in diminution of damages, because it is res inter alios acta.

75 Similarly, damages will, in the absence of the rule, still require assessment at the date of the breach. The question will be, in the usual case, whether the value of the reversion is diminished by the lessee's failure to deliver up the premises in proper condition. In examining that question, subsequent events will not be relevant except to the extent that they cast light on the question of whether there had been diminution in the value of the reversion at the point when the lease came to an end. Demolition may show that the premises, regardless of their state of repair, were more or equally valuable as a redevelopment proposition or, depending on the circumstances, it may show that pulling down the premises was the best means of mitigating loss caused by the tenant's breach. Equally, the fact that the premises could be relet at an undiminished rental may show that no harm was done by the tenant's breach, but it will not preclude the lessor showing that the reversion has lost value as a re-sale proposition even though it can still be successfully leased: *Jaquin* v *Holland* [1960] 1 WLR 258, 265, Devlin LJ.

THE ENGLISH LEGISLATION

76 Section 18(1) of the Landlord and Tenant Act 1927 has been quoted in para 59 above. It is not entirely straightforward in its drafting and has given rise to quite substantial case law. The position reached by the cases on the section is summarised in the following terms in Megarry and Wade *Law of Real Property* (5th ed, Stevens & Sons, London, (1984), 720):

> Damages for breach of a repairing covenant are not to exceed the diminution in the value of the reversion, ie the difference between the value of the reversion with the repairs done and its value without. In normal cases when the repairs are likely to be done the cost of doing them represents the diminution in the value of the reversion; and the landlord's claim is not reduced

merely because he has let the premises to a new tenant who has covenanted to repair them, or because his reversion is of very short duration. But no damages at all are recoverable if the premises are to be demolished, or structurally altered in such a way as to make the repairs valueless, at or soon after the end of the term. This is so even if in the event no demolition is carried out; but it is otherwise if the reason for demolition is merely the tenant's breach of his repairing obligations.

77 Section 18 expressly refers both to the obligation during the currency of the lease and at its termination, putting breaches of each on the same basis. Diminution in the value of the reversion is to be the maximum. The words "whether immediate or not" refer to the fact that the reversion may not be a reversion in possession (ie, it may not be immediate) because the lessor may already have granted a reversionary lease. In that case the reversionary lease is not to be taken into account in assessing the damages: *Jaquin* v *Holland* [1960] 1 WLR 258.

78 Section 18 does not merely abolish the rule in *Joyner* v *Weeks* but also attempts to state the measure of damages which is being substituted. This has required a relatively complicated means of expression, hence the body of case law around the section. And it also has brought with it a degree of rigidity which would be avoided if the rule in *Joyner* v *Weeks* were simply abolished so that damages could then be determined in accordance with general principles. The second part of the section requires that no damage be recovered for breach of a repairing covenant if it is shown that the premises would "at or shortly after the termination of the tenancy have been or be pulled down". Three cases have looked at these words. In *Salisbury (Marquess)* v *Gilmore* [1942] 2 QB 38 when the lease terminated the landlord intended to demolish the building but a little later, because of wartime conditions, abandoned that intention. Lord Greene MR took the view that the tenant was entitled to have his damages limited under s 18 if he could show that at the moment when the covenant failed to be performed the building was one which was going to be pulled down at or shortly after the termination of the tenancy. That was despite the fact that in the circumstances the landlord did suffer loss arising out of the disrepair. (On its facts the result may not have been a harsh one since the tenant had decided not to exercise a right of renewal because of assurances from the landlord that he would demolish the premises.)

79 In *Cunliffe* v *Goodman* [1950] 2 QB 237 it was said that a firm intention—a decision—on the part of the landlord must be proved by the tenant. It must be shown that the landlord's mind was made up and that the project had moved out of the zone of contemplation—the sphere of the tentative, the provisional and the exploratory—and had moved into the "valley of decision". Thus the court, finding that the landlord had not truly made a decision to demolish, was able to award the landlord damages in the amount of the cost of repairs which it appears she had actually carried out after at first exploring the possibility of redeveloping the site.

80 But in *Keats* v *Graham* [1960] 1 WLR 30 the English Court of Appeal applied *Salisbury* v *Gilmore* and denied the landlord damages. It appeared when the lease terminated that the local authority would require the relevant portion of the premises to be pulled down. The County Court Judge admitted evidence that, after the termination, the landlord had relet that portion of the premises and had been successful in obtaining permission for it to continue to exist for another five years. However, on appeal it was held that in the circumstances, the probabilities at the relevant time (when the tenants left the premises) were that there would shortly be demolition. Evidence as to events after the tenants left was found to be inadmissible. Here it appears that recovery of loss actually suffered by the landlord was denied by the wording of the section.

81 It is apparent that s 18, by laying down another inflexible rule, is itself the cause of some difficulty. The Commission is of the opinion that in this particular area it would be preferable to leave the courts to decide each case according to its own facts and general principles.

CONCLUSION AND RECOMMENDATION

82 The Law Commission has concluded that the rule in *Joyner* v *Weeks* should be abolished and that the assessment of damages for the tenant's failure to deliver up the premises in the agreed state of repair should be governed by the principles usually applicable to the measurement of damages for breach of contract, as is presently the case when the action for damages is brought during the currency of the lease.

83 The only other question is about the application in time of the new provision. We have concluded that the abolition of the rule in *Joyner* v *Weeks* should apply immediately in respect of all leases. We

recognise that this is to some extent retrospective legislation, since it will affect the rights of parties to leases which already exist to possible future awards of damages. However it is a remedial change rather than a change to existing substantive rights (see further NZLC R17 *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (1991), chapter V) and we consider that the removal of the possibility of a windfall will not give rise to any injustice to a lessor. And given the long terms of some leases, there would be two rules operating simultaneously for many years if the proposed reform applied only to new leases. This seems undesirable. We do, though, recommend in accordance with legislative practice that litigation already commenced should not be affected by the new provision.

84 The change in the law will not affect residential tenancies under the Residential Tenancies Act 1986. The repair obligation in such tenancies is thrown upon the landlord (s 45), with any inconsistent covenant being of no effect (s 11), so no question of damages to the landlord for non-repair can arise. See also s 142 which excludes the application to residential tenancies of Part VIII of the Property Law Act 1952. That Part does, however, continue to apply to certain long term leases of dwelling-houses and they would be affected.

85 The Law Commission recommends that a section along the following lines be added to Part VIII of the Property Law Act 1952 after s 115:

115A Abolition of the rule in *Joyner* v *Weeks*

(1) The rule known as the rule in *Joyner* v *Weeks* (that a lessee who is in breach of a covenant or agreement to maintain and leave premises in repair at the end of the term is liable to pay the lessor the cost of putting the premises into that state of repair although that sum exceeds the loss actually suffered by the lessor) is abolished.

(2) In this section, terms defined in section 117 of this Act have the meanings assigned to them by that section.

(3) This section applies to all covenants or agreements whether made before or after the commencement of this section, but does not affect legal proceedings for damages instituted before the commencement.

Addendum

After we had sent this report to the printer, a very recent case which considers the rule in *Joyner* v *Weeks* came to our attention: *The Maori Trustee* v *Rogross Farm Ltd* (High Court Palmerston North, CP 187/86, judgment of Greig J, 9 April 1991). The decision confirms our view that the rule should be formally abolished.

The case concerns a lease of farmland. The lessor, at the end of the term, alleged that the lessee had breached certain covenants in the lease and sought damages according to the measure in *Joyner* v *Weeks* for the cost of repair. Greig J refused to adopt this approach. He considered the rule and the New Zealand cases in which it has been discussed, and said

> That is a rule and the case mentioned is a leading case which is of that species that while it is acknowledged and said to state the law it is nonetheless distinguished, explained, restricted to its particular facts or factual situations, so that in the end, in my judgment, it is no longer the law. (19)

Instead the judge went back to first principles, and finding that there had been breaches of the terms of lease, but that no diminution in the value of the reversion had occurred, awarded nominal damages of $10.

The Commission's view is that it is desirable, in the interests of certainty, that the rule be abolished by Parliament in the manner recommended in para 85.

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