ARTICLES

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RESCISSION FOR DEFECT IN TITLE UNDER THE TORRENS SYSTEM

A. Introduction

This article, which will seem to many to state the obvious, is prompted by the fact that in New Zealand the view has surprisingly often been expressed that, because we have a Torrens system, the English law on rescission for defect in title has little or no application here. Many believe that, once a purchaser has signed a contract for the sale of land, he is bound to accept that title which would have been revealed had he searched the Land Register: in other words that he is fixed with knowledge of every aspect of the title as contained in the Register Book. The object of the article will be to demonstrate that this is not so: that the English rules have full application under a Torrens system.

The rule in England, where a deeds system of conveyancing has long been prevalent, is that a contract for the sale of land may be rescinded by the purchaser if, before completion, he discovers a defect in his vendor's title. Immediately after the contract is concluded the practice is for the vendor to deliver to the purchaser an abstract of his title, and the purchaser may rescind if on perusal he discovers a material defect. This will free him from the liability to complete, and he will be able to recover his deposit. A damages action will lie, too, although the rule in *Flureau* v. *Thornhill*[1] will often limit the damages to the expenses of investigating title[2].

The vendor's obligation under the contract is expressed in two alternative ways. The old courts of Equity preferred to say that the vendor was under an obligation to disclose any defects in his title, thus creating an exception to the rule that silence is no misrepresentation. The common law, however, preferred to base the purchaser's right to rescind on the view that a vendor of land implicitly promises in the absence of contrary stipulation that he can and will transfer a fee simple absolute in possession free from encumbrance. One still finds it put both ways[3], and normally it does not matter much which version one adopts. Yet in one way the common law phraseology is preferable, for the equitable version could lead one to believe that if a vendor does not know of a particular defect he cannot be expected to disclose it. In fact, the vendor's

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1. (1776) 2 Wm. Bl. 1078. The rule applies in New Zealand despite our system of registered title: *Fleming* v. *Munro* (1908) 27 N.Z.L.R. 796; *Conn* v. *Bartlett* [1923] G.L.R. 729; *Staples* v. *Lomas* [1944] N.Z.L.R. 150; *Jacobs* v. *Bills* [1967] N.Z.L.R. 249.
2. For accounts of the English practice, see Farrand, *Conveyancing Contracts* (1964), 57-68, 81-151 and Megarry and Wade, *The Law of Real Property* (3rd ed.), ch.10.
3. See Farrand, *op. cit.*, 57-58.

obligation is absolute, and attaches whether he is aware of the defect or not[4]. In another way there is something to be said for the equitable view, for it emphasizes that the vendor owes an active duty to inform the purchaser of defects[5].

The rule is thus an exception, perhaps an illogical one, to the maxim *caveat emptor*. It is based on the fact that under a deeds system a vendor is in a better position than his purchaser to know his title; indeed, the purchaser is often forced to rely on the vendor for his information. It follows from this that if a purchaser at the date of the contract knows of an irremovable defect in his vendor's title he cannot rescind, for he then knows that the vendor is not promising him a clear title. (Although apparently even knowledge will not debar the purchaser if the vendor gives an *express* promise to make clear title.) Similarly, if the defect is a patent one, i.e., one apparent on an examination of the physical property, the purchaser has no right to rescind.

For present purposes we may say that defects in title are of two kinds[6]. First, there are those which mean that the vendor cannot convey at all: that he does not own the estate in question, or is legally prohibited from transferring it. Second, there are those which consititute encumbrances on an otherwise good title: easements, restrictive covenants, land charges and the like.

On the face of it, the New Zealand Torrens or Land Transfer system, based as it is on the concept of the public register book, is very different from the deeds system. For one thing, the vendor's obligation to deliver an abstract of title is little short of nonsense in this country[7]: details of the vendor's title (at any rate most of them[8]) are summarised on the certificate of title which forms part of the Register Book. More, the existence of the Register Book means that the purchaser does not have to rely on the vendor for his information. He, and indeed anyone else, can go to the Land Registry and see from the certificate of title the state of the vendor's title[9]. It is in fact common practice for a purchaser to search the title before he signs a contract of purchase to find out exactly what he is buying[10], and there are even certain statements suggesting that it is negligence for him not to do so[11]. This being so, there is a superficial attraction in the argument that the basis for the rule

4. See, for example. *McDonald* v. *Wake* [1919] G.L.R. 106.
The common law view also makes it clear that damages will lie if the vendor is in breach of his obligation.

5. See the effect this can have when the contract contains exception clauses: *infra*, E.

6. Farrand, *op cit.*, 61, mentions a third type which relates exclusively to leasehold property. It has been omitted from the present discussion, which prefers to concentrate on sales of the fee simple estate.

7. *Hayes* v. *Ross (No. 2)* [1919] N.Z.L.R. 777 at 785 per Hosking J. See also *Schischka* v. *Peddle* [1927] N.Z.L.R. 132 at 136 per Skerrett C.J., and Adams, *Land Transfer Act 1952*, 146.

8. There are, unfortunately, more than a few sorts of interest which can bind land although not noted on the Register: see Hinde, "The Future of the Torrens System in N.Z.", *A. G. Davis Essays in Law*, 77, esp. at 79-98.

9. Land Transfer Act 1952 (N.Z.), s.46.

10. Stonham, *Vendor and Purchaser*, 123.

11. *Ryder* v. *Arkle* [1953] G.L.R. 725 at 726 per Callan J.; *Ostler* v. *Borough of Levin* (1912) 15 G.L.R. 254 at 255 per Cooper J.; *Miller* v. *Davy* (1889) 7 N.Z.L.R. 515 at 526 per Prendegast C.J. *Sed quaere*—might the judges in the last two not be talking of searches before completion rather than before contract?

about rescission for defect in title does not exist here, and therefore that the rule should not exist either, at least as regards matters which appear from a search of the title. In refuting this contention, the main emphasis will be placed on cases from New Zealand, the writer's home jurisdiction, but fortification will be obtained from Australian and Canadian authority as well.

B. Where there is an Express Promise to Make Good Title

If a vendor *expressly* agrees in his contract to transfer a certain estate in a certain piece of land, he commits a breach of contract if he is unable to do so, and the purchaser will be able to rescind despite the fact that a search of the register would have shown him that the vendor had no such estate as was promised. The purchaser is entitled to rely on the vendor's express promise as overriding any duty to search, and the vendor will not be heard to allege that the purchaser should not have taken him at his word. This is but an illustration of a principle which underlies other rules—for instance, the rule that a man may avoid a contract for misrepresentation even though he had available to him the means of discovering the falsity of the representation[12]. The cases fall into three groups.

1. First, there are cases where any other rule would be ludicrous: for example, where the vendor is totally unable to convey anything at all because he does not even own the property he is purporting to sell[13]; or because he is but a joint owner, and the other joint tenant refuses to join in the transfer[14]; or because the provisions of some statute forbid a transfer in the circumstances (as in *Bardebs* v. *Upham*[15], where a vendor was unable to transfer the piece of land the subject of the agreement because it had no frontage onto a public road)[16]. In such cases as these, the purchaser need not listen to the vendor if he tries to justify himself by promising to place himself in a position to transfer the required estate:

> "Where a person sells property which he is neither able to convey himself, *nor has the power to compel a conveyance of it* from any other person, the purchaser, as soon as he finds that to be the case may say 'I will have nothing to do with it'."[17]

In these cases, it appears reasonably well established in this country that a purchaser may rescind *brevi manu* the moment he learns of the lack of title, and it is even irrelevant that the vendor manages to get the required title before the date fixed for settlement. The argument that such a rescission protects the purchaser from an equitable action for specific performance but

12. *E.g. Redgrave* v. *Hurd* (1881) 20 Ch.D. 1.
13. *Cf. Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149.
14. This was alleged in *Murphy* v. *Rae* [1967] N.Z.L.R. 103.
15. [1927] N.Z.L.R. 722 (C.A.).
16. See also *Lilly* v. *Heaton Pike Ltd.* [1934] G.L.R. 483; *Hill* v. *Hastings Borough* [1917] N.Z.L.R. 737; *Goldring* v. *Federated Ironworkers Assn.* [1964] N.S.W.R. 832.
17. *Macdonald* v. *Marson* (1914) 33 N.Z.L.R. 248 at 253 per Edwards J. (my italics). See also *Pearce* v. *Stevens* (1904) 24 N.Z.L.R. 357 and *Chapman and Field* v. *Keys* (1908) 27 N.Z.L.R. 769. However, if the vendor can compel a transfer to himself, the purchaser cannot object to a transfer by direction: *Jonray (Sydney) Pty. Ltd.* v. *Partridge Bros. Pty. Ltd.* [1969] 1 N.S.W.R. 621.

not from a common law action in damages has not found favour here[18]. It would seem that a similar position holds if the purchaser discovers that although the vendor has a present power to transfer the land, there are in existence persons who have a power, which they are ready to exercise, to prevent the sale. The case where the vendor is a trustee who has contracted to sell in breach of trust would be an example[19].

A similar result would follow if, between contract and settlement, the vendor were to do some act putting it out of his power to transfer the property on due date: if, for instance, as a result of his making default under a mortgage, the mortgagee exercised his power of sale[19a]. It is, however, not sufficient to allow rescission merely that a mortgage on the property falls due between the date of contract and settlement, or even that the vendor makes default under such a mortgage. In such a case, even if the mortgagee has a right to sell, it is still open to the vendor to prevent this by paying the sum due and owing, and apparently the purchaser will not be heard to say that the vendor will not fulfil his obligations[19b].

2. Of rather more interest are the cases where the vendor is capable of transferring good title, but not to all the subject-matter he has promised: the cases, in other words, where the vendor owns some but not all of that which he has represented himself to own. These are virtually cases of misdescription of land and boundaries. It appears to be established beyond dispute that the purchaser can rescind the contract when he discovers the true position, provided that the deficiency is more than trivial. This is so even though the land is under the Torrens system and the purchaser could have discovered the true position on a search of the Register Book. The vendor is unable to fulfil the terms of his bargain. Thus, it has been held that a purchaser may rescind where the land as described in the contract contains a proportion of Crown land to which, of course, the vendor cannot make title[20]. It has even been held, interestingly enough, that a purchaser can rescind if the vendor has no right to fixtures on the land, for here again the vendor cannot transfer all the "land" he has promised[21].

This doctrine was taken to its furthest extent in the well-known case of *Moss* v. *Perpetual Trustees*[22]. Moss purchased land in a subdivision fronting on to a street less than 66 feet wide. Upon a search of the title, made after contract, he discovered that the land had not been exempted from s.117 of the Public Works Act 1908, and that he was due to lose 8 ft. 6 in. off his frontage for the purpose of road widening. He was held entitled to rescind and recover his deposit, on the ground that the vendor had effectively lost

18. This is expressly decided in *Macdonald* v. *Marson, supra* n.17. See Brookfield, (1967) N.Z.L.J. 227, at 229-230.

19. *E.g. Jacobs* v. *Bills* [1967] N.Z.L.R. 249.

19a. *Miller* v. *Kavanagh* [1932] V.L.R. 391, at 397 per Lowe J.

19b. *Miller* v. *Kavanagh, supra* n.19a, following *Mitchell* v. *Colgan* [1922] V.L.R. 372.

20. *Rodd* v. *Cronin* (1936) 2 D.L.R. 337; *Hardy* v. *Tennant* (1957) unrepd., but discussed in *Spooner* v. *Eustace* [1963] N.Z.L.R. 913; *Raven* v. *Keane* [1920] G.L.R. 168.

21. *Meehan* v. *N.Z. Agricultural Co. Ltd.* (1907) 26 N.Z.L.R. 766; *Vaile* v. *Cleland & McLaren* (1939) 1 M.C.D. 299.

22. [1923] N.Z.L.R. 264.

his beneficial interest in the frontage strip, and was thus unable to transfer to the purchaser all that he had promised. The case is a strong one, for it was argued that the plaintiff could have seen for himself on an inspection of the property that the street was narrow and should thus have been put on inquiry. But Hosking J. thought that the purchaser was entitled to assume unless the vendor told him otherwise that the street had, like many others, been specially exempted from s.117. *Moss's* case should be approached with some caution, for it is not expressly stated in the report that this was Torrens land, although Hosking J. implies that it was by his use of the word "transfer" rather than "conveyance". However the case has been cited several times as authority in Torrens cases, and has never been overruled or, indeed, disapproved[23].

3. The last of the "express promise" cases are ones where the vendor has title to, and can transfer, all the land in the contract, but where that land is subject to encumbrances. It appears that if the vendor expressly promises to transfer a "fee simple free from encumbrances" or "a good title" (which seems to mean the same thing), he is in breach of his contract if the property is in fact subject to irremovable encumbrances; the purchaser can rescind. Even if a purchaser has actual knowledge of the encumbrances at the time of the contract this still does not excuse the vendor from his express promise: to admit evidence of the purchaser's knowledge would be to vary a written contract by parol evidence[24]. In the words of a Canadian Judge[25], "[knowledge of encumbrances is irrelevant] where the agreement itself contains a specific stipulation requiring a vendor to give a good title. In such cases the matter is ruled exclusively by the terms of the contract."

If even actual knowledge does not override the vendor's express words, it follows *a fortiori* that the mere fact that the encumbrances are registered against the vendor's Torrens title cannot do so either. This has been stated by Stuart J. in the Supreme Court of Alberta in *Christie* v. *Taylor*, a case where the vendor had expressly promised to give a fee simple "free of all encumbrances"[26]:

> "The one argument to which I refer is, that the defect of the vendor's title would appear in the Land Titles office: that, therefore, the purchaser had notice of it from the beginning; and that, having such notice, he had yet gone on . . . I am of opinion, however, that this contention is not sound. So far as I am concerned, it is the first time I have heard it asserted that, as between vendor and his purchaser, the registry office gives the purchaser notice of defects in his vendor's title

23. See, for instance, *Jones* v. *Public Trustee* [1931] G.L.R. 475; *Savage* v. *N.Z. Properties Ltd.* [1964] N.Z.L.R. 319; *Bardebs* v. *Upham* [1927] N.Z.L.R. 273 (C.A.).

24. Farrand, *op. cit.*, 64.

25. *Ball* v. *Guttschenritter* (1925) 1 D.L.R. 901, at 906 per Duff J. See also *Hally* v. *McDuff* [1922] N.Z.L.R. 481. In the English case *Re Forsey & Hollebone's Contract* [1927] 2 Ch. 379 at 387, Eve J. stated that the Law of Property Act 1925, s.198, which provides that registration of a land charge is deemed to constitute actual notice to everyone, had the effect of overriding an express promise by the vendor to make good title. The case has been almost universally criticised (see Megarry & Wade, *op. cit.*, 590-591).

26. (1914) 15 D.L.R. 614 at 616.

> . . . I do not think that, as against his vendor, a purchaser is bound to search the registry. He is entitled to rely on his vendor's covenant, and to assume that the vendor is able to do that which he agrees to do."

This puts the matter as clearly as it can be put.

C. The Problem of Encumbrances Where a Post-Contract Search is Envisaged by the Contract

It is not uncommon in New Zealand for the parties to a contract of sale and purchase to provide in the contract itself that the purchaser has 14 or 28 days after contract to deliver requisitions and objections to title. In Australia, statutes provide that such a clause is implied unless the parties expressly exclude it[27]. Such a clause is a virtual admission by the vendor that the purchaser has not at the date of the contract carried out a full search, and amounts to a permission by him to carry out that search in the days immediately following the contract. It is clearly established that if the purchaser then on search discovers material encumbrances he may rescind. That position holds even if there is no express promise to deliver an unencumbered freehold, and even though the defects in question were apparent on the face of the register. The leading New Zealand case is *Nunn* v. *McGowan*[28], where a majority of a Full Court of the Supreme Court held that a purchaser under a contract containing such a clause could rescind if he discovered on a search that the Land Transfer title was subject to unexpired fencing covenants. The judgments on this point are admittedly obiter, for the covenants with which the case was concerned had expired and were of no effect; but the judges discussed the matter so fully that one can only regard their exposition as representing the law of this country. Myers C.J. and Smith and Kennedy JJ. all made the point that the normal fee simple gives the proprietor many rights, not the least of which is his right to claim a share of fencing costs from his neighbours. A title to a fee simple which does not give this last right is a defective title[29]. The members of the Court all took it for granted that the availability of a public register book which would have shown the purchaser what he was buying before he contracted was not to the point.

There are Australian cases in point too, holding that a purchaser can rescind an open contract of sale containing such a clause as that under discussion if on a later search he discovers that the title is subject to a drainage easement[30] or a restrictive covenant[31] not mentioned in the contract.

Another relatively common clause which envisages a post-contract search is one which states that the contract is "subject to the title being in order".

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27. *E.g.* Conveyancing Act 1919-1954 (N.S.W.) s.60, Schedule III; Transfer of Land Act 1928 (Vic.) Table A.
28. [1931] N.Z.L.R. 47.
29. Herdman J. is not explicit on the point. According to Blair J., an unexpired covenant is not a defect in title, it rather involves that the property is deficient in "pecuniary rights"; yet he believed that if the amount of money involved were substantial, rescission would be justified, for the purchaser would be getting less than he was entitled to expect.
30. *In re Ridgeway and Smith's Contract* [1930] V.L.R. 111.
31. *In re Roe and Eddy's Contract* [1933] V.L.R. 427; *Nirens* v. *McGinness* [1952] V.L.R. 13.

Here the purchaser is clearly reserving a right of search, and the agreement will be void if the search reveals a defective title[32]. In *Rayner* v. *R.*[33] a purchaser who had bought under such a conditional contract succeeded in having it declared unenforceable when he discovered that the land was subject to Part XIII of the Land Act 1924 and s.74 of the Native Lands Amendment Act 1913, which placed a limitation on the class of persons to whom the property could be sold.

D. Encumbrances and the Open Contract

The contract which demands most discussion, however, is the simplest. This is the contract where there is no express promise by the vendor to transfer an unencumbered fee simple, and where there is no time allowed for requisitions. This in other words is the simple case where the vendor promises to sell "12 Smith Street, Lot 1 D.P. 1999". In England, such a contract is held to amount to a promise to transfer an unencumbered fee simple[34], so that if a purchaser discovers on investigation that there are encumbrances of which he was not previously aware, he can rescind. Under a Torrens system, however, a strong case could be put and sometimes is put, to the effect that in such a contract the purchaser is agreeing to buy the land described in the Certificate of Title in the Land Registry, subject to all irremovable encumbrances there registered. It is usually easy for him to search the title or have it searched; indeed it is often easier for him to discover registered encumbrances than it is to detect latent defects of quality for which he has no remedy. If, therefore, he does not search before buying one could well cry *caveat emptor*, and say that while he can rescind for unregistered defects (as he indisputably can[35]) the remedy should not be available to him in respect of registered encumbrances.

Yet it would appear that this is not the law. The Torrens system cases uniformly assume that, just as in England, a vendor in the absence of contrary stipulation promises to give an unencumbered freehold, and that rescission will lie for all material defects in title, whether registered or not[36]. One of the clearest general statements was that of Macfarlan J. in the Victorian case *Re Roe & Eddy's Contract*:[37]

> "When a contract expressly provides that a vendor will make a good title there is no room for implication as to the title he is to make. If the land is subject to restrictive covenants, the general rule is that the purchaser is entitled to their removal or to rescind . . . When there

32. In this case, damages would not lie: the contract is subject to a resolutive condition.
33. [1930] N.Z.L.R. 441 (C.A.).
34. *Phillips* v. *Caldcleugh* (1868) L.R. 4 Q.B. 159; *Cato* v. *Thompson* (1882) 9 Q.B.D. 616.
35. *Meikle* v. *Gibbons* (1912) 32 N.Z.L.R. 698; *Schollum* v. *Francis* [1930] N.Z.L.R. 504.
36. See Fox, "Disclosure of Encumbrances" (1953) 26 A.L.J. 468.
37. [1933] V.L.R. 427, at 431. The contract in this case did contain a requisition clause, but the statement of Macfarlan J. is in the most general terms. See also *Manukau Beach Estates Ltd.* v. *Wathew* [1932] N.Z.L.R. 865 (C.A.) at 868 per Myers C.J.

is not express provision as to title, and the contract is an open contract, the implication is that a clear title should be made."

There are a number of New Zealand cases also which contain dicta of the broadest kind which assume that the English authority applies in New Zealand[38]. To attempt to read these dicta as applying only to unregistered encumbrances would be substantially to empty them of subject matter, for as a rule unregistered encumbrances do not bind a purchaser, and thus do not amount to defects in title[39].

There are specific decisions as well. In *McDonald* v. *Wake*[40], for instance, a purchaser under a very brief and bare contract of sale and purchase was held able to rescind when he discovered that the land was subject to Part III of the Land Act 1908, restricting the class of potential purchasers. The restriction appeared clearly on the certificate of title. Cooper J. said[41]:

> "These restrictions seriously limit the right of disposition of the land affected by them, and although the title is under the Land Transfer Act, the effect is that the proprietor has not the full right to dispose of the land which the proprietors of other Land Transfer land not affected with these restrictions possess. I think, therefore, that the defendant cannot be compelled to accept the plaintiff's title."

The case has been subsequently approved a number of times, once by the Court of Appeal[42].

In Canada, a group of cases on reservation of minerals and mining rights point clearly in the same direction. If a purchaser under an open contract buys Torrens land and then discovers on a search that the mines and minerals have been reserved to the Crown by the original grant, or by a subsequent dealing, he can rescind and recover his deposit.

The rule was stated in the following terms by Lamont J.A. in *Berenik* v. *Sheldon Farms Ltd.*[43]: "A purchaser of land—unless his rights are expressly or impliedly restricted—is entitled to the mines and minerals, and inability on the part of a vendor to make title to these is a defect in his title"[44].

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38. *E.g. Burfield* v. *Harris* (1960) Unrepd. A 203/58, Christchurch. Richmond J. said: "A vendor is under an obligation to disclose all defects of his title and if he fails to do so the contract is voidable by the purchaser." See also *Dell* v. *Beasley* [1959] N.Z.L.R. 89, at 95 per McCarthy J.
39. See however n.8 *supra.*
40. [1919] G.L.R. 106.
41. At 108.
42. *Schollum* v. *Francis* [1930] N.Z.L.R. 504; *Rayner* v. *R.* [1930] N.Z.L.R. 441 (C.A.); *Ferguson* v. *Hansen* [1931] N.Z.L.R. 1156.
43. (1926) 2 D.L.R. 977 at 981; approved in *Ferguson* v. *Saunders* (1958) 12 D.L.R. 2d 688 (Alta S.C. Appeal Divn.).
44. See also *Universal Land Security Co.* v. *Jackson* (1917) 33 D.L.R. 764 (Alta S.C. Appeal Divn.). The only exception to this was laid down by the case of *Ball* v. *Guttschenritter* (1925) 1 D.L.R. 901 in the Supreme Court of Canada (discussed in Thom, *The Canadian Torrens System* (2nd ed.), 211 *et seq.*). *If the purchaser expressly undertakes in the contract to accept his vendor's title,* the vendor need not make disclosure of a Crown reservation in the original grant. The reasoning is odd. The purchaser's acceptance of title debars him from objecting to defects in the title, unless they are defects which the vendor was under an obligation to disclose. The vendor need not disclose reservations of

The Canadian cases are Torrens cases and in only one case was the argument deemed worthy of mention that the purchaser could have seen the state of the title before the contract, and should be bound by it. In *Stankievich* v. *Armacost*, Harvey C.J.A. said[45]:

> "I would have thought that it might have been held that the duty to make disclosure might be different when the vendor alone knows the facts of title as in many cases under the state of English titles and failure to disclose would be little different from actual concealment, and the case under the Torrens system of title where it is open to anyone by a visit to the Land Titles Office to ascertain without difficulty and generally without legal assistance the exact state of the title. But the decision mentioned [*Ball* v. *Guttschenritter*[46]] seems to place the same duty on the vendor in each case."

In other words, despite the public nature of the Register Book, and the fact that a purchaser has an equal opportunity with his vendor to go to the Registry and inspect it, the courts seem to have opted in favour of adopting the English law *in toto*. One is at first inclined to wonder whether this may not be the result of an overzealous following of the English authorities. (It is notable that the New Zealand judges in particular have made frequent reference to English texts and cases.) But on reflection it is suggested that the present rule is both correct and satisfactory. In the first place, it is perfectly consonant with principle. No doubt, even though the New Zealand Torrens statute does not expressly so provide[47], the Register Book is notice of its contents for at least some purposes. Indeed it has been said judicially that it is negligence for a person dealing with registered land not to search the title before he does so, and he is thus affected by notice of what he would have discovered on a search[48]. But even in England the balance of authority

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minerals in the original Crown grant, because the Land Titles Act 1920 s.60 expressly provides that all titles are subject to any reservations in the original grant. One Alberta case has extended *Ball* to cover situations where the reservation of minerals took place after the original Crown grant, but only where the title was a typical "homestead entry" title, all of which contain such reservations, a fact which is known to everyone. (*Berenik* v. *Sheldon Farms Ltd.* (1926) 2 D.L.R. 977). Apart from this, the tendency has been to restrict *Ball* to its very particular facts. So, it has been held in Alberta that a purchaser can even rescind because of a reservation in the Crown grant if the contract does not contain an express acceptance by the purchaser of the vendor's title. (See *Chekaluck* v. *Sallenback* (1948) 2 D.L.R. 452 (Alta S.C.), following a long line of previous authority, and the words of Beck J.A. in *Stankievich* v. *Armacost* (1926) 2 D.L.R. 401 at 407 (Alta S.C. Appeal Divn.)). A decision to the contrary in Saskatchewan was expressly based on the Land Titles Act, s.60, mentioned above: *Jaegle* v. *Feuerborn* (1926) 1 D.L.R. 230). It has also been held several times that a contract does not preclude rescission on the ground of a reservation which took place later than the original grant: *Innis* v. *Costello* (1917) 33 D.L.R. 602 (Alta S.C.); *Stankievich* v. *Armacost, supra; Armstrong* v. *Sparling* (1925) 1 D.L.R. 914 (Sask. S.C.).

45. (1926) 2 D.L.R. 401, at 401-402 (Alta S.C. Appeal Divn.).

46. (1925) D.L.R. 901.

47. Compare the Law of Property Act 1925 (U.K.) s.198(1): "Registration is deemed to constitute actual notice of such instrument or matter . . . to all persons and for all purposes connected with the land affected."

48. See for instance *Ostler* v. *Levin Borough* (1912) 15 G.L.R. 254, at 255 per Cooper J.: "[T]he omission to search the register before dealing with land under the Land Transfer Act is negligence, and . . . the register is notice to all persons

favours the view that *notice* is not enough to exclude the warranty of unencumbered freehold: only actual *knowledge* will do[49]. In *Wisely* v. *McGruer*, a New Zealand deeds system case, Williams J. said[50]: "The question is not one of notice . . . but of knowledge, and it must be made plain that the purchaser had that knowledge and so must have contracted with reference to it . . ."

Secondly, the rule normally does justice, and, even if it were out of line with principle, it could be justified on this ground alone. In the smaller towns of New Zealand a purchaser cannot be expected to search the title before signing his contract, for the simple reason that the District Land Registry may be in a city a hundred miles away; it is notable that those who support the contrary view tend to be the city dwellers. Nor is it realistic to assert that a novice at the business of purchasing, who is being pressed by a land agent and afraid of losing a bargain if he does not sign immediately, "ought to have searched" before signing. It is not reasonable, either, to expect a lay purchaser to have enough know-how to stipulate in a contract that his liability is "subject to search". There are too many ways already in which the unskilled can find themselves landed with a bad bargain without the protection of the law[51].

E. Contracting Out

Very often a vendor will attempt to contract out of his liability to disclose defects and to transfer an unencumbered fee simple. There is surprisingly little authority bearing on the efficacy of these efforts at contracting out, but it must be remembered that basically they consist of clauses exempting a vendor from a liability to which he would otherwise be subject. One might therefore expect the device of construction *contra proferentem*, so familiar in the context of exemption clauses in commercial contracts, to be used when the occasion demands. It seems also that, because of equity's concern with conveyancing contracts, a rather blunter approach based simply on good conscience may sometimes be available. Such authority as there is may be summarised as follows:

(a) *Clauses limiting the time for requisitions.*

By and large, if the contract specifically provides for a time limit for requisitions, the purchaser will normally be debarred from rescinding for defects notified after its expiry[52]. The only certain cases when he will be allowed to object out of time are those where the vendor cannot make any title at all,

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dealing with the land of that which would be discovered upon a search." His Honour purports to follow Prendegast C.J. in *Miller* v. *Davy* (1889) 7 N.Z.L.R. 515. See n.11 *supra*.

49. See the discussion in Stonham, *supra* n.10, 127.

50. (1909) 28 N.Z.L.R. 481, at 486. See also *Re Roe and Eddy's Contract* [1933] V.L.R. 427, at 431; *South Suburban Land & Finance Co. Ltd.* v. *Hughes* (1884) 15 V.L.R. 751, at 759.

51. See Farrand, *op. cit.* 65-66, for further objections.

52. *Murphy* v. *Rae* [1967] N.Z.L.R. 103; *Ferguson* v. *Hansen* [1931] N.Z.L.R. 1156; *Nirens* v. *McGinness, supra* n.31. This is apparently so even if the clause contains the addendum that the right to rescind on requisition is the vendor's rather than the purchaser's: *Murphy* v. *Rae*. On this point see Brookfield (1967) N.Z.L.J. 227, at 231-232.

or where the property with the defect would be substantially different from that which the purchaser thought he was buying; in these cases the purchaser would effectively be receiving no consideration for his money[53]. Nevertheless there are tentative dicta which go further and suggest, generously to the purchaser, that the time limit may be exceeded if the defect was one of which the vendor knew but which he did not disclose[54], and also if the defect was one not discoverable by an "ordinary" search—whatever that may mean[55].

(b) *Clauses binding a purchaser to "accept" his vendor's title.*

These clauses also are ineffective if the title is non-existent, or totally different from that contracted for[56]. Nor are they effective to bind the purchaser to a removable encumbrance, for he is entitled to assume that it will be removed[57]. Authority in England and Canada goes further, but is of doubtful extent: it has been held that an "acceptance of title" clause does not relieve a vendor of the burden of disclosing defects of which he actually knew at the time of the contract[58]: an excellent example of equity overriding express words.

(c) *The common land agent's clauses.*

Of great interest, however, are those clauses, commonly found in land agents' contracts in New Zealand, which purport to make the purchaser accept a title subject to everything which appears in the certificate of title in the Land Registry. The most common states that the purchaser will accept the land "subject to all registered easements, fencing covenants, and conditions as to building line (if any)". Another provides that the purchaser will take a transfer "free of all conditions except any now registered against the title". It is commonly believed in New Zealand that these clauses accomplish their object, i.e., that they force a purchaser to accept a title subject to the encumbrances noted in the Register Book. The most recent authority is *Savage* v. *New Zealand Properties Ltd.*[59], where both Haslam J. and the Court of Appeal said that the effect of the second clause outlined above was to

> "relieve the vendor of the obligation to clear from the title such registered encumbrances, liens or interests as would be discoverable by a purchaser on searching at the Lands Registry Office. . . . This passage [could fairly be read] as discarding the conventional obligation on the vendor to convey an unencumbered fee simple, and imposing the more qualified duty to clear off all such charges as were not at that date registered on the titles"[60].

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53. *Zsadony* v. *Pizer* [1955] V.L.R. 496; *Ferguson* v. *Hansen* [1931] N.Z.L.R. 1156, at 1165-1166.
54. *Ibid.*
55. Stonham, *supra* n.10.
56. See (1969) N.Z.L.J. 59.
57. *Parer* v. *Carlton* (1959) 101 C.L.R. 515.
58. *Re Haedicke & Lipski's Contract* [1901] 2 Ch. 666. There was admittedly something approaching active concealment in this case: see *Ferguson* v. *Hansen* [1931] N.Z.L.R. 1156, at 1168. See also *Western Canada Investment Co.* v. *McDiarmid* (1922) 66 D.L.R. 457, at 460 per Lamont J.A. (Sask. C.A.); and *Bousfield* v. *Hodges* (1863) 33 Beav. 90.
59. [1964] N.Z.L.R. 319; [1965] N.Z.L.R. 341 (C.A.).
60. [1964] N.Z.L.R. at 323 per Haslam J.

If this is the effect of the second clause, it would seem that the first must also be effective as far as it extends. However, it only extends to registered easements, fencing covenants and building line restrictions; other encumbrances, for instance restrictive covenants, are not included, and a purchaser would be entitled to rescind on the ground that they had not been disclosed.

Yet the statements in *Savage's* case are obiter dicta, and it is fairly clear that in other jurisdictions clauses of this kind have not received such kindly treatment. In England, for instance, it has been held that a clause to the effect that the purchaser buys "subject to any existing rights and easements of whatever nature" does not absolve the vendor from disclosing an easement of which he knows[61]; another example of equity overriding express words on the grounds of convenience alone. A Victorian court has taken a further step, and said that even a clause making the purchase subject to "all *registered* appurtenant easements and covenants (if any)" does not compel the purchaser to take title subject to a registered covenant which was not disclosed at the time of sale, at least if the vendor was aware of it at that time[62]. This case must be approached with some care, for it did involve a fourteen-day requisition clause; but the words of Coppel A.J. are perfectly general. Indeed Mr. P. Moerlin Fox, writing in the Australian Law Journal, has suggested that the safest way for a vendor to bar the purchaser's right of rescission is to set out the encumbrances fully and in detail in the contract itself; even a reference to their registered numbers may not be enough[63].

Suffice it to say that the view which seems to have been accepted in New Zealand is not by any means the last word on the subject. One awaits further decisions with interest.

F. What is a Defect in Title?

One has left till last the awkward question of what, precisely, constitutes a defect in title. One need not speak of the obvious cases where a vendor is totally unable to convey the whole, or a substantial part, of the physical property he promised, except to say that if there is a real doubt as to the vendor's title to part of the land, a doubt which could lead to litigation, this counts as a ground for rescission. A purchaser will not be forced to buy a lawsuit with his land. Thus, in *Brodie* v. *Grindrod*[64], where the District Land Registrar had refused to bring the vendor's land under the Land Transfer Act because of a dispute as to whether part of it was or was not a public road, the purchaser was freed from his contract[65].

Of more concern is the question of what encumbrances amount to defects in title, and here we find the law in a state of unfortunate complexity. A useful starting point—but no more—is the judgment of Kennedy J. in *Nunn* v.

61. *Heywood* v. *Mallalieu* (1883) 25 Ch. D. 357. See also *Simpson* v. *Gilley* (1922) 92 L.J. Ch. 194.

62. *Nirens* v. *McGinness* [1952] V.L.R. 13, at 19.

63. (1953) 26 A.L.J. 468-469. *Cf. Harper* v. *Joblin* [1916] N.Z.L.R. 895. (It is not clear from the report how specifically the encumbrances were described in the contract.)

64. [1917] G.L.R. 498.

65. See also *Re Pigott and Keen* (1913) 12 D.L.R. 838.

McGowan[66]: "The list of defects in title is not limited or closed. In particular I think that a title which confers less than those rights . . . which the ownership of land of the tenure agreed to be sold, without any derogation on the part of the owner or his predecessors generally does, is a defective title."

Thus it has been held that fencing covenants[67], restrictive covenants[68], easements[69], leases[70], restrictions in the class of persons to whom one can sell[71] and (semble) building line restrictions[72] are defects in title; they will ground rescission if they are more than trivial[73]. So no doubt would a statutory licence under an act like the Mining Act[74]. Furthermore, on the *Brodie* v. *Grindrod*[75] principle, it would seem that if there is genuine doubt as to whether an encumbrance is valid, the purchaser will not be compelled to take[76].

Other things may also be confidently stated at the outset. An encumbrance which does not run with the land so as to bind purchasers will not constitute a defect in title[77]; for even though it may fall well within Kennedy J.'s definition while the property is still in the vendor's hands it will vanish completely when the transfer to the purchaser is registered[78]. Nor is an encumbrance a defect in title if the vendor has the right to remove it, for the purchaser can then compel him to; it is then a matter of conveyance, not of title. (A mortgage is the best example[79]). For this reason, it is submitted that a caveat will sometimes be a defect in title, sometimes not; it will depend on whether or not the caveat protects a removable interest[80].

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66. [1931] N.Z.L.R. 47, at 80.
67. *Nunn* v. *McGowan, supra* n.28; *Meikle* v. *Gibbons* (1912) 32 N.Z.L.R. 698.
68. *Nunn* v. *McGowan, supra* n.28, at 80 per Kennedy J.; *Dell* v. *Beasley* [1959] N.Z.L.R. 89, at 95 per McCarthy J.; *In re Roe and Eddy* [1933] V.L.R. 427.
69. *In re Ridgeway and Smith's Contract* [1930] V.L.R. 111; *Torr* v. *Harpur* (1940) 40 S.R. (N.S.W.) 385.
70. *Re Englefield Holdings Ltd. and Sinclair's Contract* [1962] 1 W.L.R. 1119. In *Staples* v. *Lomas* [1944] N.Z.L.R. 150 a statutory tenancy under the Tenancy Act was denominated a defect in title; but in *Hensley* v. *Reschke* (1914) 18 C.L.R. 452 the High Court of Australia preferred to treat a similar situation as a breach of the obligation to give vacant possession.
71. *McDonald* v. *Wake* [1919] G.L.R. 106; *Schollum* v. *Francis* [1930] *N.Z.L.R.* 504; *Rayner* v. *R.* [1930] N.Z.L.R. 441.
72. See the judgment of Haslam J. in *Savage* v. *N.Z. Properties Ltd.* [1964] N.Z.L.R. 319, esp. at 324.
73. There are indications in some of the cases that trivial defects will not ground rescission: *e.g. Nunn* v. *McGowan* [1931] N.Z.L.R. 47, at 52 per Myers C.J.; *Moss* v. *Perpetual Trustees* [1923] N.Z.L.R. 264, at 269 per Hosking J.; *Cook* v. *Griffiths* (1913) 32 N.Z.L.R. 1109, at 1110 per Stout C.J.; *Armstrong* v. *Sparling* (1925) 1 D.L.R. 914, at 924 per Martin J.A.; *Re Hughes and Macaulay, Nicholls Maitland & Co.* (1970) 10 D.L.R. 3d 86. They probably ground damages or compensation, however: Farrand, *op. cit.*, 58.
74. And the other statutory interests not requiring registration: see Hinde, "The Future of the Torrens System in N.Z.", *A. G. Davis Essays in Law*, 77.
75. *Supra*, n.64.
76. *In re Ridgeway and Smith's Contract* [1930] V.L.R. 111.
77. See *Toohey* v. *Gunther* (1928) 41 C.L.R. 181.
78. *Savage* v. *N.Z. Properties Ltd.* [1965] N.Z.L.R. 341, at 349 per Turner J.
79. There are many cases. The best known are *Daveney* v. *Carey* (1913) 33 N.Z.L.R. 598 and *Crump* v. *Reynell* (1909) 29 N.Z.L.R. 366. Note also s.54 Property Law Act 1952 (N.Z.).
80. *Cf. Western Canada Investment Co.* v. *McDiarmid* (1922) 66 D.L.R. 457 (Sask. C.A.); *Thomson* v. *Richardson* (1928) 29 S.R. (N.S.W.) 221.

Here, however, the certainty stops, for some matters which appear at first sight to fall squarely within the definition of Kennedy J. in that they subtract from that cluster of rights that we call the incidents of ownership are apparently not defects in title. There are some fine, and perhaps not very logical, lines to be drawn.

In the first place, a defect in title must be carefully marked off from a defect in quality, for the latter grounds no remedy at all in the absence of an express contractual promise. Some defects are obviously within the category of quality: the fact that the land is too soft for building[81], or that a house is badly constructed[82], for instance[83]. But others are not very easy to distinguish from a defect in title. Apparently the encroachment by a building onto the adjoining property is a mere defect of quality giving the purchaser no right to resile from his contract[84], despite the fact that an encroachment carries a prospective law suit[85] with it just as much as did the doubtful road in *Brodie* v. *Grindrod*[86]. Such fine distinctions do not do the law credit, especially where the differences in consequence are so great. More than that, it must be remembered that sometimes the factual inconvenience caused by something that is admittedly a defect of quality—a jerry-built house, for instance—may be far greater than that of a defect in title such as an easement. It seems peculiar that rescission lies only for the latter.

In the second place, one has apparently to draw a distinction between a defect in title and a general restriction imposed by the law. The paradigm example of the latter is *Manukau Beach Estates Ltd.* v. *Wathew*[87], a New Zealand Court of Appeal case, where it was held that a purchaser could not rescind his contract when he found that, because the land in question was situated outside a town or borough, it was subject to the restriction on subdivision imposed by ss.16 and 17 of the Land Act 1924. This was a general restriction applying to all land of the type that the purchaser had bought, and the case went off on the simple ground that a purchaser, like anyone else, is deemed to know the law. Although simple, that ground is a little unfortunate, for, theory apart, it is the fact that under the Torrens system a purchaser normally has a much better chance of knowing his vendor's title than he does of knowing the general law, which can often only be gleaned from a large number of statutes and cases.

The *Wathew* case is apparently to be distinguished from *McDonald* v. *Wake*[88] on the ground that in the latter case, although the restrictions were created by statute, they attached only to certain types of property, and it was not apparent by mere physical inspection of any particular property whether it fell within the scope of the Act or not; a search of the title was needed to find that out.

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81. *Burfield* v. *Harris, supra* n.38.
82. *Hoskins* v. *Woodham* [1938] 1 All E.R. 692.
83. For other examples see Stonham, *supra,* n.10, 223.
84. *Spooner* v. *Eustace* [1963] N.Z.L.R. 913.
85. Under s.129, Property Law Act 1952 (N.Z.).
86. *Supra,* n.64.
87. [1932] N.Z.L.R. 865 (C.A.).
88. *Supra,* n.40.

What then, of Town Planning schemes, when it is recalled that they sometimes impose restrictions on the user of particular properties? Town Planning restrictions are usually accepted as not being defects of title[89]. The reason is not entirely clear. Two justifications have been given. First, it has been said that planning schemes are imposed by the law, just as the restriction in the *Wathew* case was[90]. A little more than this is necessary, however, to distinguish the case from *McDonald* v. *Wake*, and it is presumably found in the fact that planning schemes are not just imposed by the law, they are actually part of the law themselves, so that one can legitimately say that the law itself (which everyone is deemed to know) specifies the user to which even particular properties are to be put. Second (and this is the more usual explanation) it is said that planning schemes are not matters of title in that they do not detract from ownership; they affect the user of the property by all and sundry, whether they be owners, occupiers or even mere trespassers[91]. The same justification has been given for holding that a restrictive building permit, requiring that any building erected be in permanent materials, and giving the local authority the right to enter and demolish any building not complying with this requirement, was not a defect in title[92]. Such a permit affects user rather than ownership[93]. Yet surely we could equally say that an covenant affects user rather than ownership, and one cannot escape from the fact that the principal difference between a restrictive covenant and a planning restriction or a local authority permit is the fact that the last two have a governmental origin. (Apparently, however, if a demolition order has actually been made at the time of the contract, this does amount to a defect in title[94], presumably for the same reason as in *Moss* v. *Perpetual Trustee Co.*[95] that the vendor is not in a position to transfer the beneficial interest in a substantial part of what he promised to transfer, namely land and buildings).

Some of these distinctions are too fine, and because of them the law appears artificial. Yet it does appear that, when in doubt, the Courts are today leaning against finding a defect in title[96].

Indeed defects in title may, despite the words of Kennedy J. in *Nunn* v. *McGowan*, be, like interests in land, a class which does not readily admit of expansion. This suggests that if ever Parliament comes to iron out the inconsistencies and problems in this branch of the law, it may have to take into account the fact that judicial feeling seems to favour *caveat emptor*. To which, no doubt, the detractors may retort: why, then, were the common law rules about rescission for defect in title accepted here in the first place?

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89. *Dell* v. *Beasley* [1959] N.Z.L.R. 89; *Yammouni* v. *Condidorio* [1959] V.R. 479 (although this case was decided on rather special grounds); *Royal Sydney Golf Club* v. *Federal Commissioner of Tax* (1955) 91 C.L.R. 610; *Re Pongratz and Zubyk* (1955) 1 D.L.R. 143 (Ont. H.C.); *Trafalgar Township* v. *Hamilton* (1954) 1 D.L.R. 740 (Ont. C.A.). However, consider the implications of the decision of Wilson J. in *Paparua Country* v. *D.L.R.* [1968] N.Z.L.R. 1017.
90. *Dell* v. *Beasley, supra*, n.89 at 95.
91. *Royal Sydney Golf Club* v. *Federal Commissioner of Tax, supra*, n.89, at 624.
92. *Savage v. N.Z. Properties Ltd.* [1964] N.Z.L.R. 319, affd. [1965] N.Z.LR. 341.
93. [1964] N.Z.L.R. at 324 per Haslam J.
94. *Zsadony* v. *Pizer* [1955] V.L.R. 496.
95. [1923] N.Z.L.R. 264.
96. *E.g. Spooner* v. *Eustace* [1963] N.Z.L.R. 913; *Savage* v. *N.Z. Properties Ltd.* [1965] N.Z.L.R. 341.